DUALE, OVIA & ALEX-ADEDIPE

Restrictive Agreements Under the Federal Competition and Consumer Protection Act: Part 1

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INTRODUCTION

No quote or expression succinctly explains the theme of this Competition Series better than the timeless words of Adam Smith when he said

> *"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices"*[1].

Section 59(1) of the Federal Competition and Consumer Protection Act No. 1 2018 ("the Act") provides as follows:

> *"Any agreement among undertakings or a decision of an association of undertakings that has the purpose of actual or likely effect of preventing, restricting or distorting competition in any market is unlawful and, subject to section 61 of this Act, void and of no legal effect"*

Section 59(1) of the Act applies when the conduct under examination:

- is an agreement or a decision; and
- the agreement is between undertakings or a decision made by an association of undertakings;
- The purpose or effect of such agreement or decision must be the prevention, distortion or restriction of competition in a market.

In this article *"restriction of competition"* shall be used as short-hand for the expression "preventing, restricting or distorting competition" and the term "restricting competition" shall be construed accordingly[2].

Assessing anti-competitive or restrictive agreements is a two-step process. The first step is an assessment whether the agreement or decision under examination has the purpose or effect of restricting competition. Where the agreement is found not to have the purpose or effect of restricting competition, the analysis stops there. Where however, the finding is in the affirmative, the analysis moves to the second step, assessing whether the relevant agreement or decision can be redeemed by any pro-competitive benefits and whether these pro-competitive benefits outweigh the anti-competitive effect of the agreement according to Section 60 of the Act provided that consumers derive a fair share of the pro-competitive benefits[3].

This Part 1 of our Competition Law Series discusses preliminary concepts before discussing the substantive provisions of Section 59 by answering the following questions: what is an Agreement? who are Undertakings ? what is a decision? and who are associations of undertakings?

[1] Adam Smith "The Wealth of Nations" (Metheun, 1776), BK 1, ch.10, pt 2.
[2] Restrictive Agreement and Trade Practices Regulations, 2022 (the Regulations), Reg. 3(2)
[3] Regulations, Reg. 4

SECTION A: AGREEMENTS

1. What is an Agreement?

The Act defines the word "agreement" to include a contract, arrangement, understanding, written or oral and a concerted practice[4]. The Court of Appeal in the case of *Zakhem Const. (Nig) Ltd v. Nneji*[5], held that an agreement is a consensus of two or more minds with respect to anything done or to be done. Therefore, the term "agreement" in its widest sense occurs where two or more persons concur in expressing a common intention with the view of altering their rights and duties. From the above statutory and judicial interpretation of the word "agreement", the following deductions can be made:

- The agreement need not be in writing, hence, oral discussions between undertakings, telephone conversations and exchange of correspondence via letters, electronic mails can be characterised as an agreement. Provided that there is evidence of concurrence of will or meeting of minds, the form of the agreement is of no moment and it is immaterial that breach of the agreement will not attract any sanctions or whether the parties to the agreement intend to implement the agreement. For example, Regulation 19(4) of the Regulations expressly stipulate that the mere fact that a price fixing, market sharing, output limitation agreements and collusive tendering (discussed in Part B of our Competition Law Series) is in writing or not or is constituted by covert rather than overt acts shall not be a defence to the application of sections 69, 107, 108 or 109 of the Act.

- Consensus ad idem reached by the participating undertakings need not be formal, a consensus reached informally will qualify as an agreement. Pursuant to Regulation 19(2) of the Restrictive Agreement and Trade Practices Regulations, 2022 ("Regulations"), in determining whether an agreement exists, the Federal Competition and Consumer Protection Commission ("Commission") shall consider whether the parties alleged agreement or decision reached a "meeting of minds" either explicitly or tacitly, to engage in the prohibited conduct.

- The agreement need not be binding, thus, gentlemen's agreements such as memoranda of understanding will be regarded as an agreement for the purpose of Section 59 of the Act.

- It is also inconsequential that a party to the agreement was coerced into the agreement or never intended to adhere and/or carry out the terms of the agreement. It is a sufficient that the undertaking was a party to the agreement except the undertaking can dissociate itself from the agreement in accordance with the provisions of the Act as discussed below

2. Where an Agreement is found to Breach the Act, will the entire Agreement or the Offending Provisions of Agreement be rendered void

Where the agreement under investigation is irredeemable by the provisions of Section 60 of the Act, the agreement is deemed null and void under Section 59(1) of the Act, however, the nullity shall only apply to those parts of the Agreement that breach the Act, provided that such breaching clauses of the agreement are severable from the agreement as a whole[6]. That is, the Commission will apply the blue pencil rule to severe the provisions of the Agreement that are in contravention of the Act from the other provisions of the Agreement that are legitimate[7].

[4] Section 167 of the Act
[5] *Daspan v Mangu Local Government Council (2002)* 5 NWLR (Pt 759) 55
[6] Reg.12(5) of the Regulations
[7] Attorney General of Ondo State v. Attorney General of the Federation (2002) 9 NWLR

3. What is Concerted Practice?

Concerted practice is defined in the Act as any practice involving direct or indirect contacts between competitors falling short of an actual agreement. The insertion of the term concerted practice in the definition caters to the possibility of undertakings averting the application of Section 59 of the Act by engaging in collusive practices that fall short of an agreement in the strict sense of the word. Concerted practices customarily take the form of coordinative and collusive behaviour of the participating undertakings whereby they coordinate their market conducts without necessarily entering into an agreement. Putting it differently, there is a practical cooperation of the participating undertakings such that they replace competition with collusive coordination of their market conduct.

Through direct and indirect contact, the undertakings involved reveal to each other their present or intended market conducts. The direct and indirect contacts between the competing undertakings have the purpose or effect of either influencing market conduct of competitors or to disclose to competitors the market conducts which the undertaking have implemented or intend to implement. By engaging in direct or indirect contact, coordinating undertakings remove strategic uncertainties with respect to their respective conducts. It is however pertinent to note that "concerted practice" does not preclude undertaking from adapting intelligently to the present and anticipated conduct of their competitors as illustrated in Box 1 below.

A. Direct Contract

Undertakings may be in the position to coordinate their market conduct by exchanging strategic information such as their pricing, output, quality etc. The ability of undertakings to exchange commercially strategic and sensitive information distorts and restrict competition by eliminating or reducing the risk that any participating undertaking will spring a spontaneous competitive reactions contrary to the terms of the coordination. The exchange of information between the coordinating undertaking may occur during meetings between representatives of the undertakings. For example, in an ongoing price fixing investigation by the Commission on Airline Operators of Nigeria which allegedly resulted in a 66% increase in the fees charged by the airlines in question, the investigation revealed that the airlines had been in meetings for a period of 3 weeks. The Commission stated that it had credible information that while attendees at the meeting may not have arrived at a consensus, the meeting ended in a resolution that encouraged, permitted or consented to coordinated conducts amongst the airlines in question[8].

- Must the Direct Contact always be in the Form of Meetings

  No. The term "concerted practice" will also accommodate disclosure and exchange of strategic information between undertakings via correspondence such as letters, emails, fax, telephone calls etc. The problem however is that participating undertakings will take all necessary measures to destroy all incriminating correspondence which will make it difficult for the Commission to establish concerted practice by direct contact

B. Indirect Contract

Indirect contact encapsulates situations where there are no direct disclosure or exchange of information between the participating undertakings, nevertheless such information is divulged and received indirectly. For example, commercial and strategic information may be divulged in circumstances where such information is published publicly by the undertakings (for example

[6] Reg.12(5) of the Regulations
[7] Attorney General of Ondo State v. Attorney General of the Federation (2002) 9 NWLR (Part 772) 222
[8] Row over price-fixing as FCCPC moves to sanction airlines | The Guardian Nigeria News - Nigeria and World News — Business — The Guardian Nigeria News – Nigeria and World News accessed on 8th May 2022

where the undertakings operate in regulated industries that make certain commercial information public knowledge) or where such information are disclosed through intermediaries such as newspapers, trade journals, trade association information documents or through dealers and distributors that operate along the value chain.

C. Between Concerted Practice and Conscious Parallelism

Concerted practices are not necessarily deduced from parallel conduct of competing undertakings since undertakings may act in a similar manner because each individual undertaking appreciates the conduct of its competitors and the market structure is such that failure to adapt the conduct of the competing undertakings may inflict injury on the undertakings.

Box 1

Until 2019, the carbonated drinks market was dominated by Nigerian Bottling Company ("NBC") and Seven Up Bottling Company Limited ("Seven-Up") the sellers of the Coca Cola and Pepsi brands respectively. On or about 2016, the market witnessed two new entries, Bigi Cola and RC Cola. Rite Foods Limited, the manufacturers of Bigi Cola introduced 60 CL bottle drinks in PET bottle at the price N100 which compelled NBC and Seven-Up to increase the content of their PET bottles to 60Cl at the price of N150 per bottle, with marketing campaigns tagged "Big Bobo" and "Long Throat" for Coca Cola and Pepsi respectively. Subsequently, NBC was compelled to reduce price to N100 for its 35CL PET drink while its 50CL went for about N150 in a bid to regain market share. The entrance and conduct of Rite Foods Limited saw a shift by consumers from Coca Cola and Pepsi Cola brands to the cheaper and larger Bigi-Cola.. Earlier in 2019, Coca Cola HBC, disclosed in their 2018 full financial year result that though they had witnessed volume growth in all countries at 4.3% same cannot be said of Nigeria where NBC witnessed decline in sales volume due to intense competitive pressure from suppliers like Rite Foods Limited.

See Seye Ayinla "Nigerian Merger Control: Principles and Practice" Chap. 5. See also "Coca-Cola Nigeria Sales Volume Drops Amid Intense Competitive Pressure" Business Day Newspaper, 18th February 2019: "Coca Cola's Desperate Moves to Regain Market Dominance Could Hurt Margins", Business Day Newspaper 10th October 2019

Furthermore, the parallelism in conduct could be attributed to exogenous shocks which compels the competitors to act in a similar way. For example, an increase in the costs of raw materials, inputs, foreign exchange volatilities may compel all undertakings competing in a market to act in a similar way by increasing price. Consequently, analysis of concerted practices requires examining the structure of the market, that is the number of the undertakings involved and the volume of market output, the nature of good and services offered.

Conclusively on the relationship between conscious parallelism and concerted practice and from the illustrations in Box 1 above, the Act does not preclude undertakings competing in a market from adapting their trade practices intelligently to existing or anticipated conduct of their competitors. Nonetheless, while undertaking can legitimately and intelligently recalibrate their market conduct to adapt to the present and anticipated conduct of their competitors, undertakings are prohibited from (i) engaging in direct and/or indirect contact which enables the undertakings to influence independent market conducts of competitors; and (ii) disclosure of internal commercial and sensitive decisions and strategies to competing undertaking as such disclosure help create markets conducive for market coordination.

[6] Reg.12(5) of the Regulations
[7] Attorney General of Ondo State v. Attorney General of the Federation (2002) 9 NWLR (Part 772) 222

SECTION B: UNDERTAKINGS

An agreement that contravenes Section 59 of the Act must be between undertakings. In this Section we shall be discussing the legal ramifications of the term "undertaking".

1. What is an undertaking?

The Act adopts a functional definition of the term "undertaking" by defining the word to include any person involved in the production of or trade in goods and services. The Act defines the term "trade" to include any business, industry, occupation, activity of commerce or undertaking relating to the supply of goods or services[9] or to the disposition or acquisition of any interest in land.

The Act further defines a "person" to include any natural or legal person, incorporated or otherwise and such a person must be engaged in the production or provision of goods and services. Hence, the term "undertaking" accommodates natural human beings, partnerships (whether limited partnerships or limited liability partnerships under the Companies and Allied Matters Act No. 3 2020 (CAMA)), companies incorporated under the CAMA. And as we discussed below, the term "undertaking" accommodates public and government entities that engage in commercial and economic activities.

2. Must the Undertaking be Profit Motivated?

It is not necessary that the undertaking engages in trade for the purpose of making profit. Hence, the definition will accommodate non-profit organizations such as companies limited by guarantee provided that such organization is engaged in the trade of goods and provision of services. Since, the Act adopts a functional approach in defining "undertaking" by focusing on the activity of the undertaking, that is, the production or trade in goods or the provision of services, profit is not essential ingredient for characterising a person as an undertaking or otherwise. Hence, except as otherwise provided in the Act, the Act applies to all undertakings and commercial activities within or having effect within Nigeria. Section 2(2)(c) further states that the Act shall "also" apply to and is binding on all commercial activities aimed at making profit and geared towards the satisfaction of demand from the public. The use of the word "also" means the Act applies to both profit and non-profit oriented commercial activities of an organization. This position is however subject to a qualification in the case of government entities that supply goods and services in the exercise of their public function and not necessarily to make profit, as discussed below.

3. Does the definition of "undertaking" accommodate Government Entities?

Yes. The functional approach to the definition of "undertaking" and the use of the word "any"[10] in the definition of undertaking means government and public bodies are accommodated in the definition of "undertaking" provided that the government entities are engaged in commercial and economic activities of supplying, trading and provision of goods and services.

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[9] Section 167 of the Act defines "goods" when used with respect to particular goods, includes any other goods that are reasonably capable of being substituted for them, taking into account ordinary commercial practice and geographical, technical and temporal constraints. It also includes, ship, aircraft, vehicles, minerals, trees and crops, gas and electricity. The Act defines "services" to mean a service of any description, whether industrial, trade, professional or any other service; and the sale of goods where the goods are sold in conjunction with rendering of a service. And the Act defines "product" to include goods or services.

[10] The word "any" is not restrictive or limited in its application. It includes all things to which it relates or of things mentioned. Texaco Panama Inc. v. Shell P.D.C.N NWLR (Pt 759) at 230-231 (Par D-E)

4. To what extent are government entities caught in the definition of Undertaking?

Pursuant to Section 2(2) of the Act, the Act is applicable to:

a. all body corporate or agency of the Federal Government or agency of the subdivision of Federation if the body corporate or agency engages in commercial activities;

b. a body corporate in which the Federal Government of state government or in which the federal government, state government or local government holds controlling interests and where such a body corporate engages in economic activities; and

c. all commercial activities aimed at making profit and geared towards the satisfaction of demand from the public.

From the above provisions of Section 2(2) of the Act, Section 59 of the Act will apply to:

a. a corporate entity or a ministry, department or agency ("MDA") of the Federal Government or State Government if the corporate entity or MDA carries on commercial activities. Section 59 will apply to body corporates incorporated by the government under the CAMA or entities which have been vested with status of body corporate by the enabling statute that establishes the government entities[11];

b. anybody corporate in which the Federal, State or Local Government have controlling interest either by virtue of shareholding in the case of companies or commercial interests in the case of joint ventures, partnerships or limited liability partnerships under the CAMA. Provided that the body corporate in which the government has controlling interests in engaged in economic activities.

c. all profit oriented commercial activities of the government related entity which is geared towards the satisfaction of demand from the public.

5. When is a Government Entity engaged in commercial activities?

The court has defined the term commerce to mean the exchange of goods and services and the buying and selling of articles[12]. Hence, a government entity will be held to be engaged in commercial activities where it is engaged in the exchange of goods and services and/or the buying and selling of articles for the purpose of making a profit.

6. When is a Government Entity engaged in Economic Activities?

Economic activities refer to offering of goods and/or provision of services in a market and under market conditions. It is worthy of note that other than offering of goods and services, the government entity may carrying out other public functions. The fact that a government entity is carrying out a purely public function in respect of some of its activities does not preclude its characterization as an undertaking as regards its other activities and a government entity will be characterised as an undertaking if it is engaged in economic activities when one or more of its activities can be described as economic in nature.

[11] Abubakar v. Ya'radua (2008) 19 NWLR (Pt 1120)1, Anozia v. A-G Lagos State (2010) 15 NWLR (Pt 1216) 207, Uwazuruonye v. Gov. Imo State (2013) 8 NWLR (Pt 1355) 28

[12] *C.A.C v Gov. Council, I.T.F (2015) 1 NWLR (Pt 1439) 114 @ 141*

7. When is a Government Entity Engaged in Public Services and not in a Commercial or Economic Activity?

Differentiating between public functions of government entities and their economic activities is not always straight forward. Generally, government entity may not be treated as engaging in commercial or economic activity when the activity is connected with the exercise of sovereign power as a public authority or where the activities relates to tasks performed in the public interest or to the essential functions of a state. That is, a government entity will not be characterised as an "undertaking" for the purpose of Section 59, when the government entity is exercising its official authority in furtherance of a task that is in public interest and which forms part of the essential functions of the government. For example, the functions of the Nigerian Ports Authority, relating to or connected with the (i) development, ownership, and operation of ports and harbours (ii) provision of safe and navigable channels (iii) offering of cargo handling and storage services (iv) maintenance of port facilities and equipment (v) ensuring safety and security. The fact that the NPA provides these public functions in consideration for fees or remuneration does not characterize such activities as a commercial or economic activity as they are provided in furtherance of the their public function and not necessarily for profit. Similarly, the Court of Appeal has held that the CAC in furtherance of its powers and functions under the CAMA cannot be characterised as a commercial activity[13].

[13] C.A.C v Gov. Council, I.T.F Supra

SECTION C: DECISIONS BY ASSOCIATION OF UNDERTAKINGS

Section 59 of the Act is not restricted to agreements by undertakings but also applies to decisions by association of undertakings. By extending the provisions of Section 59 of the Act to decisions of association of undertakings, the Act applies to institutionalized coordination amongst firms through the collective structure of a common body to which the undertakings are members, for example trade associations.

1. What is an Association of Undertakings?

An association of undertakings comprise of undertakings of the same general type and the associations takes up the task of representing and/or defending the common interests of its member vis a vis other stakeholders in the market such as the government and the public in general.

2. Trade Association as an Association of Undertakings

Trade associations are very good examples of an associations of undertakings. While trade associations provide the forum for competitors in a particular industry to get together and discuss matters of mutual legitimate and beneficial interest, trade associations may also serve as the vehicle through which undertakings in that industry can engage in collusive practices. While trade associations are set up and carry out many legitimate functions that promote competitiveness, the existence and structure of the trade association and the market may provide the undertaking members of the association with the vehicle to engage in collusive and other anti-competitive practices.

3. What is a Decision?

The term "decision" should be given a broad interpretation to accommodate any conduct of an association that has the purpose or effect of coordinating the market conducts of its member undertakings including:

Recommendations

A recommendation by an association to its members, which has no binding effect will constitute a decision, if in reality it is intended to determine or is likely to have the effect of determining the conduct of its members.

Box 2

In the Nigerian flour milling markets, significant number of flour millers belonged to the Association of Flour Millers of Nigeria ("Association"). The Association was vested with the power of fixing price in the flour mills market. While, the membership of the Association makes the possibility of concerted practice and market coordination very rife, industry sources allege that the large flour millers in the market habitually and constantly set their prices higher than that stated by the Association.

See. C. Chris Ofonyelu "Strategic Capacity Utilization and Competion: An Analysis of Competitions in Nigerian Flour Industry" ("Ofonyelu 2014A"); C Chris Ofonyelu "Strategic Capacity Utilization and Zero Conjectural Variation in Output: Experience from the Nigerian Flour Industry" ("Ofonyelu 2014B")

Constitution and Bye Laws

The constitution, rules and bye-laws of the association can also be characterised as a decision under Section 59 of the Act.

Association as Medium of Exchange

Rather than making recommendation or express stipulations in the constitution of the association, the association may subtly enhance collusive practices where the association is the medium through which member undertakings facilitate the collection and dissemination of commercially sensitive information (such as price and output).

Certification Schemes

While associations serve a lot of legitimate purposes such as the setting of standards and certification of the quality of products offered by member undertakings. However, this certification and standardization schemes may be a subtle way of foreclosing non-members from a particular industry or market.

Agreements by Associations

An agreement entered into by an association may also be characterised as a decision.

4. Must the Decision of the Association be Binding?

No. the decisions need not be binding on the members for the provisions of Section 59 to apply. As stated in the illustration contained in Box 2, the Association of Flour Millers of Nigeria stipulated prices but majority of the largest flour millers regularly flouted the prices stipulated by the association.

5. Must Every Undertaking Member of the Association Consent to the Decision to be in breach of Section 59

It is not necessary that the decision be a unanimous one for it to be caught under Section 59. Section 167(9) of the Act expressly states that any contract or arrangement entered into by an association or body is deemed to have been entered into by all the persons or undertakings who are members of the association or body unless the undertakings dissociate itself from the decision of the Association of Undertakings.

6. How Does an Undertaking Dissociates itself from the Decision of the Association of Undertakings

An Undertaking can dissociate itself from the Decision of an Association of Undertakings by:

- expressly notifying the association or body in writing that the undertaking dissociates itself from the contract, or arrangement or any provision thereof;
- establishing that it had no knowledge and could not reasonably have been expected to have had knowledge the contract, arrangement or understanding.

SECTION D: EXEMPTED AGREEMENTS

Section 68 of the Act provides a safe harbour for a category of agreements which are exempted from the prohibitions of Section 59 or any other provisions of the Act provided that the exemptions granted to the agreements and/or decisions are consistent with the provisions of the Act. The categories of agreements and decisions exempted include:

1. Employees

Combination or activities of employees which are for the reasonable protection of the employees are exempted from the prohibitions of the Act. It is however imperative to note that the combinations or activities must be for the benefit of the employees.

2. Collective Bargaining

Arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing minimum terms and conditions of employment are exempt from prohibitions under the Act. This is because collective bargaining and collective agreements are made in furtherance of social policies for the protection of the labour market and interests of employers and/or employees. However, for the collective agreement to be exempted from the application of the Act, the purpose and terms of the agreement must be protection of the interests of the employers and/or employees by fixing the terms and conditions of employment. Anything outside this scope will bring the collective agreement or the relevant provisions of same agreement within the girth of the Act.

3. Professional Associations

Professional associations are exempt from the prohibitions of the Act because the activities professional associations are customarily for the purpose of developing and enforcing the standards of professional qualifications. The purpose of the association's activities must be setting the quality and technical requirements for qualification to practice that profession. In the EU case of *Wouters v. Algemene Raad van de Nederlandsche Orde Van Advocates*, the plaintiff had challenged the regulations of the Dutch Bar Association which prohibited lawyers in the Netherlands from entering into partnership with non-lawyers because he intended to practice as a lawyer in a firm of accountants. The Court of Justice held that account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the needs to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience.

However, the Commission reserves the right to issue guidelines for the application of certain provisions of the Act to the supply of services or conduct of business by members of such professional associations. An indicative list of professional associations in respect of which the Commission may issue guidelines are stated in the First Schedule of the Act.

4. Partnerships

Partnership contracts or arrangements are exempted from the provisions of the Act if the following conditions are satisfied:

- all the partners are natural persons and none of the partners must be a body corporate;
- the provisions of the partnership contract or arrangement must relate to:
  - the terms of the partnership or the conduct of the partnership business; or
  - competition between the partnership as a whole and an individual partner for the period that partner remains in the partnership or after the partner ceases to be a member of the partnership.

The rationale for exempting a partnership is simple, the partners are treated as one economic unit tied together with the common purpose of pursuing profit. As such, the agreement or arrangement is not between separate economic unit but one economic entity.

5. Employments

Combination or activities of employees which are for the reasonable protection of the employees are exempted from the prohibitions of the Act. It is however imperative to note that the combinations or activities must be for the benefit of the employees.

- is in respect of natural persons and not bodies corporate;
- the restriction must be for the duration of the employment and the post termination engagement restriction on the employee or independent contractor must not exceed 2 years.

6. Sale of Business and Shares

The Act does not proscribe any transaction for sale of a business or shares in the capital of an undertaking to the extent that it contains provisions that is solely for the protection of the goodwill relative to the purchased shares and assets. Thus, it is typical that share, business and asset sale and purchase agreement contain non-compete covenants necessary for the implementation of the transaction and post-transaction integration, at least for a transitional period.[14] These restrictions are of considerable practical importance for the preservation of goodwill in the acquired business and for successfully reaping the fruits of the merger. It is however important that the restrictions must relate to and are necessary for implementation of the share and/or asset acquisition. That is, the restrictive covenants must be necessary for protecting the value transferred as part of the transaction and to ensure continued supply of input after a break up of a former economic entity for the purpose of generally making the post-transaction transition smooth.[15] In the case of Remia and Nutricia, the EU court of justice held that the seller of an undertaking with his particularly detailed knowledge of the transferred undertaking, would still be in a position to win back his former customers immediately after the transfer of the undertaking and thereby driving the acquired undertaking out of business. Against that background, non-competition clauses incorporated in the agreement for the sale of the undertaking in principle have merit of ensuring that the acquisition have the effect intended. However, in order for such non-compete clauses to have a benign effect on competition, they must be necessary to the transfer of the undertaking concerned and their duration and scope must be strictly restricted for that purpose[16].

[14] Kokkoris and Shelanski 151-152
[15] Ibid.
[16] Remia and Nutricia, Case. 42/84[1985] ECR 2545

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