Kluwer Competition Law Blog

Microsoft/Inflection: Direct Hiring as a New Challenge for Merger Control

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Acqui-hiring—a fusion of the words *acquisition* and *hiring*—refers to the practice of larger companies acquiring start-ups with the primary goal of integrating the employees of the startup to their own workforce. While this phenomenon is becoming increasingly common in the tech sector, it is not limited to it.

From a merger control perspective, a particularly challenging variation of this practice is **direct hiring**. Instead of acquiring an entire company through a traditional asset or share purchase, the acquiring firm can directly recruit key employees from the target company (see Bar-Isaac et al., *Acquihiring for Monopsony Power*, *Management Science*; for numerous real-life examples, see Becker, in: ibid. (ed.), *Wettbewerb auf digitalen Märkten*, Nomos 2025, p. 115 et seq.).

Until recently, the German Federal Cartel Office did not consider itself in a position to address such cases under merger control (see Bien/Becker, *Wirtschaft und Wettbewerb – WuW* 2024, p. 81 et seq.). This attitude has changed with Microsoft's hiring of key developers from AI start-up Inflection. The headline of the press release of the Bundeskartellamt issued on November 29, 2024, leaves no room for doubt: *"Taking over employees may be subject to merger control in Germany"*. Just two months earlier, both the European Commission and the UK Competition and Markets Authority (CMA) had found the deal to be a merger for the purposes of merger control. Meanwhile, the outcome of the US Federal Trade Commission's (FTC) review, which has been ongoing since June 2024, remains pending.

Formal and substantive merger control

1. The acquisition of employees from a third company can, in certain cases, constitute a merger. Employees, along with the know-how they bring (as seen in the Microsoft/Inflection case) or their business relationships (as in the German case CTS Eventim / Four Artists, where the artists represented by the agents that had been poached from Four Artists became the customers of the acquiring competitor, CTS Eventim), can be among the most critical assets of a company. When the acquired group of employees can be attributed a distinct and transferable market position forming a relevant part of the target company under merger control law, such acquisitions may become subject to merger notification requirements as a transfer of control and/or assets (see

Bien/Becker, *WuW* 2024, p. 81, 82 et seq.; for a different view see *v. Wallenberg*, Neue Zeitschrift für Kartellrecht – NZKart 2023, p. 473, 475).

2. A major obstacle to scrutinizing such acquisitions under the merger regulations has been the high threshold requirements which are rarely exceeded as these acquisitions often involve only a handful of employees from small start-ups. In the Microsoft/Inflection case, the European Commission asserted its jurisdiction only after receiving seven referral requests under Article 22 of the Merger Regulation. Following the ECJ ruling in the *Illumina/Grail* case, the Commission ultimately decided not to issue a decision in the proceedings. Although the Bundeskartellamt found that it was theoretically possible to initiate a merger investigation using a transaction value threshold—Microsoft has paid a high price for the takeover—the review ultimately failed due to the requirement set out in Section 35 (1a) No. 4 ARC: the number of users of Inflection's chatbot *Pi* in Germany was not (yet) deemed high enough by the authority. Within the outgoing German Federal Ministry for Economic Affairs and Climate Action (BMWK), there have already been discussions about adjusting the transaction value threshold to *expected* increases in domestic user numbers with a high degree of probability (see *Käseberg*, NZKart 2025, p. 1). This worthy proposal should also be taken into consideration by the next government.

With its Towercast decision, ECJ reaffirmed that one can use the Continental Can case law, which allows authorities to use the prohibition of the abuse of a dominant position, in cases where threshold requirements may not be met and hence merger control is not applicable. Therefore, this approach has the potential to become an important tool in addressing issues that may arise due to acqui-hiring or direct hiring (see Becker, in: ibid., loc. cit., p. 129 et seq.).

3. The **substantive assessment** of mergers that primarily involve the acquisition of key employees from a third company should not be limited to evaluating the risk of reduced competition in the affected product markets (as seen in the *Microsoft/Inflection* case, where the CMA dismissed concerns about a substantial lessening of competition). Rather, the transfer of employees to a new employer should prompt competition authorities to also examine the potential consequences in labor markets—an area that has largely been overlooked in merger control so far (see Bien/Doganoglu, NZKart 2019, p. 185).

From the perspective of the recruited employees, direct hiring may initially seem beneficial—particularly due to the associated salary increases. However, the goal, or at least the effect, of **acqui-hiring** and direct hiring can be the elimination of a key competitor in the labor market. This, in turn, may give the acquiring firm a **monopsony-like** position over specialized workers (cf. Bar-Isaac et al., *loc. cit.*), reducing the incentive to offer improved working conditions in the future (Becker, in: ibid., loc. cit., p. 125 et seq.).

Remedies

In cases which involve direct hiring, the prohibition of the merger would mean that the employees concerned would not be allowed (at least in the short term) to accept a lucrative offer from a new employer. When the labor market is concentrated and the number of alternative employers is small, such a prohibition may imply a serious interference with the constitutionally protected freedom to search for a job. In finding the right balance between protecting the rights of individuals to freely search for employment and keeping the markets competitive, one must use the principle of

proportionality. In the following we will discuss a few possible remedies which try to strike this balance.

1. Structural remedies are preferable regarding the objective of effective protection of competition and simple monitoring.

a) When the hiring of a group of employees has led to competition concerns competition in the marketplace, and immediate ex-post remedy that comes to mind would be the spinning off the unit to which these employees belong. However, using such a remedy ex ante would make the original motivation for the merger obsolete. Given that the firm is interested in the services of these employees which it has hired, it is reasonable to expect that they would not attempt to recruit these employees expecting to see them in the hands of a competing third-party firm as part of an additional transaction.

b) Selling another part of the company or other structurally effective measures on another market appear more realistic. Such measures include, for example, opening up an important infrastructure to competitors, granting licenses for a key technology that has already been developed or granting special termination rights for the benefit of long-term customers. The prerequisite in each case is that the improvements in the third-party market outweigh the restriction of competition resulting from the merger. the harms that may arise due to lessening of competition in the market due to the transaction/merger in question. The possibility of such balancing is opened up under both European and German law, based on what we consider to be the correct interpretation of Article 2(1)(a) of the Merger Regulation and Section 36(1) sentence 2 no. 1 ARC (“consideration of the structure of all affected markets”). However, this interpretation is not undisputed.

c) The suggestion to limit the duration of the employment contracts of the newly recruited employees is motivated by the well-known ancillary provisions used in dealing, for example, with vertical mergers where long term supply contracts are required to have a limited duration. We think, however, that the effect of such a measure in combatting a reduction in the competitiveness of the market to be only modest. One concern arises because after the departure of the key employees, the original employer of these individuals—typically a competitor of the recruiting firm — may reduce or halt altogether its R&D activities. This may even result in the original firm leaving the market and reducing alternative employment options for the employees in question. Another complication arises due to the reaction of acquired employees to an ex-ante limited employment contract with their prospective new employer because of the competitive implications of the change of their employer. It is quite likely that they may choose to remain in their existing (usually, permanent) positions. However, this might be different in dynamic tech labor markets, where changing of employers is commonplace, so this scenario is not unrealistic from the outset. Another concern arises when the original employer, compensated well otherwise—as was the case with the Microsoft/Inflection transaction, may exert pressure on its employees to take limited duration contracts offered by the acquiring firm for example by threatening to discontinue to business unit these employers belong to.

d) A more acceptable remedy may assign the employees in question to a potential competitor —including possibly their original employer—for a period to be defined in advance. Such a practice will have the goal of establishing a viable competitor in the market before the employees in question return to the acquiring firm. These employees may be assigned to other companies on a project basis and alternate their work activities between the acquiring firm and others. It is also possible to imagine situations where these employees are completely assigned to another firm for

the specified duration. We believe such a policy may have a larger pro-competitive effect. One can avoid making commitments on the duration of such a remedy, and instead, make the removal of such obligations subject to a review clause with clearly defined conditions.

As an example, consider the Microsoft/Inflection case. A possible remedy could have been designed as follows. Microsoft would be obliged to assign some of the new employees acquired from Inflection to a competitor in return for a reasonable fee that is commensurate with the market conditions. This obligation may initially have a predefined duration. If, however, it can be established that the competitor has established itself as a viable rival to Microsoft within, say, three years, the authority can eliminate the obligations of Microsoft to assign the employees in question to a competitor.

2. Competition authorities tend to consider behavioral remedies less desirable. German law even explicitly excludes conditions and obligations that "subject the undertakings concerned to ongoing behavioral control […]" (Section 40 (3) sentence 2 ARC). Nevertheless, the boundary between structural and behavioral remedies with structural implications is rather fluid. Thus, we believe authorities should keep an open mind regarding behavioral remedies as they may be more appropriate to deal with the implications of direct hiring practices. The criterion should primarily be the effective protection of competition, but also the principle of proportionality. We should highlight once again, in such cases, the authorities should not only be concerned with protecting the competitive environment but should also seek not to restrict the freedom of employees to change employer. A generous approach to the prohibition of ongoing behavioral control seems particularly appropriate in the constellations of direct hiring discussed here. At stake is not only the entrepreneurial freedom of the acquirer, but also the professional freedom of the employees willing to change jobs.

a) An example of a behavioral remedy that could be effective and much easier to implement than structural remedies discussed above would be to require the acquiring undertaking to license on FRAND terms those technologies that would be developed in the future by the new employees. Such a policy could stimulate development efforts in other firms and ensure a higher level of competitiveness in the markets. Of course, such a policy would make sense only when these technologies can be used by third-party developers in a meaningful way.

b) Another behavioral remedy that could be useful would require the acquiring firm to waive non-compete clauses in employment contracts. In dynamic product and labor markets, such a condition could ensure that recruited employees can seek employment elsewhere without friction. In the long run, such a policy can also create a more competitive environment in product markets through a more dynamic labor market and the resulting diffusion of talent across a large number of firms. One can even imagine coupling such a ban of non-compete clauses with FRAND licensing requirements. Of course, it would only be sensible to impose such behavioral remedies as long as concerns remain regarding the competitiveness in the marketplace. One can then eliminate these requirements conditional on a sufficient number of the employees moving on to other firms and the emergence of sufficient competition in the market.

Conclusion

With advance of investigations surrounding the Microsoft/Inflection case, it has now become

conventional wisdom that direct hiring of certain key employees can be considered as a merger. This case may very well mark the beginning of a more proactive era for the competition authorities scrutinizing direct-hiring practices. However, high notification thresholds still largely keep such direct hiring cases outside the scope of existing merger control rules.

Once these thresholds are met, as recently was the case in the investigation of the CMA of the Microsoft/Inflection case, one must explore competitive implications of such direct-hiring practices. In the Microsoft/Inflection case, the CMA found no competitive concerns and has allowed the transaction to go through. In cases where it can be objectively established that there is a risk of anti-competitive effects in product and/or labor markets, the conditions under which such a transaction can be allowed remain as open questions. An important question to be discussed is what kind of remedies may be useful and effective in such cases. We have discussed above some remedies that we find useful. This debate, however, is far from over and there is a need for future research in this area. In this discussion, an important principle that we have identified is that one must not only think of ensuring the competitiveness of markets but also design policies which protect the interests of employees seeking new opportunities.

** This blog post provides the English-language version of the editorial originally authored in German by the contributors for NZKart 2025 (pp. 41–43).*

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