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Hire And Higher? Employee Recruitment And German Merger Control

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Merger control has long been a cornerstone of competition enforcement in Germany, with the Federal Cartel Office ("**FCO**") known for wielding its mandate decisively and not shying away from blocking notifiable deals if they are perceived to cause competitive harm. One example was the prohibition of CTS Eventim's acquisition of the booking agency Four Artists (FCO press release). In response, the former established a new entity and swiftly hired most of Four Artists' staff – with the FCO finding that those moves did in fact *not* trigger German merger control, as FCO president Mundt stated to German media.

Recently, however, the FCO caused a stir with a press release in an AI-related case, declaring: "*Taking over employees may be subject to merger control in Germany*". This "**AI Case**" caused some legal scholars to argue that key employee recruitment can indeed trigger German merger control as a general rule. They posit that **direct hiring**, that is, offering employment to (a group of) employees that move away from their former employer, can have the same effect on the market structure as "**acqui-hiring**" (meaning the act of buying an entire company primarily for its talent) or indeed mergers in general. On this basis they conclude that direct hiring generally amounts to the acquisition of "control" over a business.

But can recruitment – however "aggressive" or disruptive – truly fall within the boundaries of German merger control? Or should one emphasise the word "may" in the FCO's formulation, suggesting that only specific situations are covered, and that pure direct hiring may not be one of them?

For German merger control, this article argues the latter. Analysing the legal definition of "concentration" under German law shows that only in very specific cases – such as when hiring is accompanied by an agreement to transfer intangible assets or business-critical infrastructure – might a personnel-related transaction qualify as a concentration. Absent such additional elements, direct hiring remains outside the statutory remit.

Past Practice, Present Puzzles: The FCO and Talent Transfers

The FCO has previously dealt with employee hiring in its cases, suggesting that this is hardly a novel issue. Historically, its approach has been marked by restraint – some would say comforting predictability – when assessing whether recruiting talent falls within the ambit of merger control.

A notable early example is *WAZ/Ostthüringer Nachrichten*, a regional newspaper merger. The FCO prohibited WAZ's acquisition of a 40% share in the publisher of the *Ostthüringer Nachrichten*. Following this, WAZ launched a rival paper, the *Ostthüringer Zeitung*, and extended job offers to most of the editorial and other staff from its erstwhile target. These employees joined WAZ, prompting the *Ostthüringer Nachrichten* to shut down operations. The FCO did not intervene again, apparently seeing no merger control issue. A second, more recent example is the *CTS Eventim/Four Artists* case mentioned above which resulted in a prohibition regarding the merger attempts. Notably, CTS formed its "All Artists" company while litigating the prohibition decision and soon after hired a significant number of Four Artists' employees, following which Four Artists ceased operations. Again, however, the FCO declined to step in, reinforcing the precedent that employee recruitment alone does not amount to a "concentration" within the meaning of German merger control.

Despite this established line, the AI Case has sparked a debate whether the FCO is now deviating from its previous practice. In its press release, the FCO states that the hiring of certain employees together with agreements regarding the hiring and the use of key intellectual property could amount to a notifiable concentration under Section 37 of the German Act against Restraints of Competition ("**ARC**"). Crucially, the FCO did not clarify whether it regarded the arrangement as an "asset acquisition" (Section 37(1) No. 1 ARC) or a "control acquisition" (Section 37(1) No. 2 ARC), nor did it elaborate on the reasons why either route applied. Frustratingly for practitioners, this leaves vital questions unanswered. Were the employees considered "assets"? Or was this about acquiring control? And regardless of the basis: what precisely distinguished this case from prior ones? The authority's press release offered little guidance.

Time, then, to explore these questions more closely.

Only Mergers in the Building? The relevant "Concentrations" under German Law

Pure direct hiring scenarios do not involve any transfer of share capital or other corporate links between the former and the new employer. As a result, Section 37(1) Nos. 3 and 4 ARC – which concern share acquisitions and structural combinations allowing for material competitive influence – do not apply. This leaves two possible avenues:

- Section 37(1) No. 1 ARC (acquisition of assets), and
- Section 37(1) No. 2 ARC (acquisition of control).

We begin with asset acquisitions – and whether employees can sensibly fall within that definition.

"They're our best Assets!" But are they?

Under Section 37(1) No. 1 ARC, a concentration exists if "all or a substantial part of the assets of another undertaking" is acquired. In the context of employee recruitment, two questions arise:

1. Can employees be considered "assets"?

2. If so, does hiring them qualify as an “acquisition” sufficient to trigger merger control – that is, do they represent at least a substantial part of the current employers’ assets in which full ownership is transferred?

(a) The Concept of “Asset”

By its plain meaning an “asset” is something that can be bought or sold independently, enabling the acquirer to obtain ongoing control over that asset. It must have identifiable market value and be alienable in a manner that permits an acquirer to assume it, i.e., it must be capable of transfer and of conferring ownership.

Employees, by contrast, are not “transferred” like factories or trademarks. Their movement is governed by individual autonomy and fundamental rights. In a direct hiring scenario, employees are not being alienated from one firm and handed over to another in a transactional sense. The situation therefore differs from acqui-hiring, where the current employer transfers existing employment contracts – which may indeed be considered assets – to the new employer. In fact, equating employees with assets would effectively reduce them to tradeable objects, ignoring that the employer does not acquire ownership over them. It follows that, under the commonly accepted interpretation of Section 37(1) No. 1 ARC, employees themselves do *not* constitute “assets”.

But what about the intangibles they bring? Could know-how or customer relationships embedded in certain individuals qualify as “assets”?

Clearly, know-how and business relationships in these cases are intrinsically tied to individual employees. Unlike, for instance, machinery, they are not standalone, self-sustaining economic resources. Nor are they comparable to proprietary intangible assets such as patents or software licences, which remain separate and identifiable irrespective of the personnel involved.

Nonetheless, German courts and legal scholars have traditionally treated know-how and customer relationships as assets. But these views have generally arisen in the context of conventional transactions – that is, they were based on formal purchase agreements between a seller and buyer and involved transferring *additional* tangible or documented intangible assets. These might include recorded procedural know-how, operational manuals, client lists, or even complete production facilities – assets capable of independent transfer separate from any particular employee. Yet, in the digital age, an increasing number of businesses rely heavily on knowledge workers and maintain minimal physical infrastructure, such as brokerage firms or recruitment agencies whose employees operate remotely. Here, employees’ expertise and client networks effectively become the company’s core assets. Arguably, although inherently personal, these assets remain accessible to the employer through its contractual authority to direct and instruct employees, allowing it to leverage their knowledge and relationships to the company’s advantage.

So, can know-how and customer relationships alone, without the concurrent transfer of other tangible assets, legitimately be considered standalone assets under merger control law? Ultimately, the answer hinges on how closely one views modern employment practices as comparable to past scenarios explicitly involving asset transfers. To date, no clear case law exists addressing whether assets that exist solely within the knowledge and relationships of individual employees – who independently switch employers without the previous employer’s involvement – constitute a stand-alone asset transfer.

(b) Full Transfer of Ownership

The same goes for the question whether this could at all constitute a "transfer" under the law. The legal requirement in this case is a 'full transfer of ownership'. Under this concept, referred to in German as *Vollrechtserwerb*, an asset acquisition must result in the permanent vesting of substantive ownership rights in the acquirer, enabling them to fully and comprehensively assume the position held by the previous owner.

As previously noted, know-how and customer relationships are intrinsically bound to individual employees. An employer cannot "own" these intangible assets in the same sense it owns machinery or intellectual property rights. Employees retain autonomy over their skills, knowledge, and business relationships beyond the employment period, typically unaffected by employer constraints. However, it's important to note that "full ownership" doesn't necessarily demand absolute or exclusive control over the asset. While simply acquiring a licence from a patent owner doesn't qualify as a transfer of ownership, transferring an *existing* licence can indeed constitute such a transfer if it allows the acquirer to fully assume the licensee's prior legal and economic position.

One could argue similarly that a new employer indirectly accesses an employee's know-how through the contractual right to instruct that employee. However, a significant counterargument arises: employees remain free to terminate their employment, either after a fixed term or at their discretion following an agreed notice period. This inherent flexibility raises questions about whether the new employer genuinely obtains a secure and transferable legal interest in the know-how and customer contacts brought by employees.

Ultimately, this issue remains unresolved by existing case law. Nevertheless, a definitive answer is unnecessary if direct hiring already fails to meet the final criterion outlined in Section 37(1) No. 1 ARC.

(c) "All or a Substantial Part"

Section 37(1) No. 1 ARC also requires that the acquiring party takes over "all" or "a substantial part" of the target's assets. A "substantial part" in this sense can be assumed if the assets form the foundation of the seller's market presence – allowing the buyer to effectively assume the seller's market position and continue its economic activities seamlessly.

This requirement notably underscores the key distinction between direct hiring and transactions typically subject to merger control. In conventional asset transfers, buyer and seller agree explicitly on transferring assets collectively. By contrast, pure direct hiring involves employees independently and individually choosing to move to a new employer. When viewed separately, each employee hire usually does not constitute a "substantial part" of the former employer's assets. Even if (very) exceptional circumstances should raise doubts, merger control thresholds under Section 35 ARC, which consider turnover or transaction value, will in practice never be met through a single employee hiring. Consequently, and assuming theoretically that the other questions raised so far are answered in the affirmative, direct hiring might only trigger German merger control if the law allowed multiple independent hires to be combined into a single transaction.

The statutory method for combining transactions appears in Section 38(5), sentence 3 ARC (modelled after Article 5(2), subparagraph 2 EUMR), which covers asset acquisitions from the same seller to the same buyer occurring within two years. Pure direct hiring clearly does not fit this provision: the previous employer, not participating in the employees' decisions, cannot be considered a seller. Employees themselves also cannot be classified as "sellers" because they do not "sell" or "transfer" themselves as assets. Instead, each employee autonomously decides on their employment situation, often without the previous employer's involvement or consent. Thus, this legal provision provides no basis for consolidating individual hiring decisions into a single merger transaction.

Besides Section 38(5) sentence 3 ARC, German case law offers another pathway to combining individual asset acquisitions into one transaction, provided that, from an economic point of view, they are brought about by a single event that is likely to influence the market structure (BGH, KVR 95/10; OLG Düsseldorf, VI-Kart 5/16 (V)). While EU case law mostly requires that the individual events be contractually conditioned upon each other, German case law does not regard this as a mandatory requirement. However, what is the "single event" supposed to be in cases of direct hiring?

When deciding on employment, individuals exercise their constitutionally protected freedom of occupation as private citizens. While an employee might consider whether former colleagues have joined or will join the new company, decisions usually hinge on highly personal factors – such as salary, career advancement, commuting convenience, and work-life balance. Such individualized and personal choices cannot reasonably be viewed as a unified or coordinated event. This point becomes even clearer when the employer's hiring decisions are staggered or opportunistic rather than systematically coordinated.

As employment contracts in these cases are not conditional upon on each other, will often neither be concluded nor executed simultaneously and do not involve any coordinated actions between former and new employers, the only potential "single event" could be the new employers unilateral decision to hire (*en masse*) with the intent of creating or expanding specific economic activities. However, considering such a decision alone as sufficient for merger control would contradict existing case law and fail to acknowledge the particular nature of the involved stakeholders, their interactions, and the contractual specifics.

Artificially grouping independently acting employees into a hypothetical unified transaction would misrepresent reality. Employees decide individually about their own employment situation, not collectively about other colleagues or the future of an enterprise as a whole. Furthermore, the abovementioned court decisions concerned cases where there were a single buyer *and* seller who agreed on the acquisition of legally distinct businesses based on a "uniform entrepreneurial decision". This context underscores that an entrepreneurial decision alone is insufficient; specific transactional interactions between the companies involved must occur. Direct hiring starkly contrasts with this scenario, as it involves independent, individual decisions made by private individuals rather than structured negotiations between undertakings.

Additionally, assuming a single transaction in these cases would dangerously blur distinctions between transactions requiring merger control notifications and those not requiring them. If merely deciding to hire employees could amalgamate independent contracts into a single, hypothetical transaction, every subsequent opportunistic hire after such a decision would also need to be considered part of that transaction. This approach would significantly complicate predicting when merger notification thresholds are triggered. It would also create an inconsistency with the established (and correct) view that a strategic rationale behind acquisition patterns by serial acquirers, such as private equity firms or strategic investors, does not itself justify bundling separate acquisitions into one notifiable event.

What then led the FCO to assume a concentration in the AI Case? While the authority's rationale remains unclear, the crucial factor may have been alignment between the former and new employers. Reports suggest that the previous employer contractually waived its rights to challenge the new employer's recruitment, arguably signifying consent to the transfer of the employees. Additionally, the two companies entered into agreements on the financing of the new employer's future business operations and licencing of IP. Contrary to some commentary, this scenario differs significantly from pure direct hiring – with that difference likely marking the reason the FCO assumed a "concentration" in this case.

"Control" – or Ctrl/Alt/Del?

The second – and final – avenue to consider under German merger law is the "acquisition of control" pursuant to Section 37(1) No. 2 ARC. This concerns the acquisition of direct or indirect control by one or several undertakings of the whole *or parts* of one or several other undertakings. The latter term aligns closely with the interpretation of 'substantial part of the assets' in Section 37(1) No. 1 ARC. Central to both concepts is whether the object of acquisition represents a market presence transferable to the acquiring entity. Crucially, German law – consistent with EU merger control rules – requires that such a transaction confer market presence *on a lasting basis*.

In conventional M&A transactions, the lasting nature of transferred control typically emerges from a shared intention of buyer and seller regarding the future of the acquired asset. Forecasting the duration of this control inherently relies on evaluating forward-looking scenarios and indicators present at the time of transaction completion. Absent express contractual terms indicating a temporary arrangement, such as a predetermined shift from joint to sole control, control may generally be presumed permanent. Similar logic may be found to apply to direct hiring of employees: unless concrete indications suggest an imminent termination, the default assumption is that employment contracts are intended to endure beyond just the short term.

At the same time, direct hiring differs markedly from traditional asset acquisitions because it lacks an explicit counterpart ("seller") who jointly defines the asset's destiny – and is different from the asset (as a means of control). Instead, employees themselves, serving as the purported asset, exercise substantial autonomy by deciding independently how long they wish to remain employed. This autonomy introduces an inherent uncertainty: employees can terminate their employment unilaterally without employer consent, disrupting the anticipated permanence of the market presence conveyed. On the other hand, licensing, leasing, or supply agreements – assets frequently acquired in conventional M&A transactions – often permit unilateral termination by the contractual partner without the acquirer's agreement, posing comparable risks to the enduring nature of control. If direct hiring indeed proved capable of transferring control over part of a business, such control might well be regarded then as conferred on a lasting basis. Ultimately, this depends on whether this scenario is treated as sufficiently analogous – or fundamentally distinct – from other contractual arrangements granting control. The distinguishing factor remains the unique position of the "asset" itself, which here retains the agency to independently determine the continuity of its status.

Notwithstanding this assessment, however, the principles outlined regarding asset acquisitions remain equally relevant: the concept of a single transaction, suitable to bundle, the individual decisions of various employees, does not apply here. While advocates of broader merger control interpretations might find some support for categorizing employees' know-how and business contacts as assets, a sufficient legal basis is lacking to justify aggregating individual, independently concluded employment contracts – even if executed concurrently – into a coherent (part of a) business over which control could be acquired. As there are no grounds in the law or decisional practice to aggregate these independent contractual relationships in a manner that fulfils the turnover or transaction value thresholds set forth in Section 35 ARC, the assessment would not even change if each employee were viewed as individually constituting a distinct business unit within the former employer's organization; individual employees will not meet the thresholds.

It follows that without supplementary agreements between the previous and new employer – such as coordinated hiring efforts or additional asset transfers – the mere recruitment of employees, irrespective of their strategic value, fails to meet the requisite legal standard for acquiring control as stipulated in Section 37(1) No. 2 ARC. From a merger control perspective, direct hiring is not about acquiring control over an existing business – but (re-)starting one's own.

Where do we stand? Enforcement Gap vs. Enforcement Stretch

While some have suggested that applying German merger control rules to direct hiring has become "conventional wisdom", the analysis above shows this is far from true. Mere recruitment of employees – no matter how skilled or senior – does not constitute a notifiable "concentration" under German merger control law. Regardless of ongoing debates about the interpretation of "assets," "full transfer of ownership," or the "lasting" nature of control, the only conceivable "assets" to be "acquired" here are the employees' know-how and customer relationships – which by their nature are inherently personal to the employee as an *individual* human being – rendering the legal tests for assuming a single transaction particularly crucial here. However, direct hiring fails these tests. The simple act of entering into independently negotiated and maintained employment contracts lacks the necessary "bracket" to treat these hires as a transfer of "a substantial part" of the former employer's assets or part of its business. Direct hiring is not a case for merger control.

For the sake of legal certainty – and in light of the fines attached to violations of merger notification rules – the FCO should reaffirm this interpretation. This would not only be consistent with established case law, but also in keeping with the principle that legal provisions carrying sanctions must not be expanded by analogy or creative interpretation beyond their statutory wording and purpose.

One might argue that this doctrinal restraint permits a "loophole" – allowing firms to sidestep merger control by hiring talent instead of acquiring businesses. But this objection is not compelling. Harm to competitors does not automatically signal a regulatory gap, as such "harm" will not only be found as a result of anti-competitive behaviour but also (and often) as the consequence of lawful conduct and working competition – including competition for scarce input factors such as labour. Furthermore, the AI Case shows that the “loophole argument” is grossly overstated to begin with. The more any dealings involving the recruitment of personnel resemble a traditional concentration, namely, showing active involvement of the previous employer and including the transfer of additional assets (with the previous employer effectively acting as a “seller”), the more likely it is a notifiable concentration may exist.

Finally, there are other legal avenues to combat hiring practices that undermine competitors’ positions and run the risk of anti-competitively excluding them from a market. If a company with a certain market strength aggressively poaches employees from another company against the latter’s will, such case may be examined against the yardstick of Article 102 TFEU and Sections 19 and 20 ARC. And in addition, unfair competition law (*Lauterkeitsrecht*, *UWG*) sets limits on aggressive poaching practices.

Where do we go from here? Recruitment and the Limits of Merger Control

If policymakers nevertheless wish to limit certain hiring strategies through merger control, such a change would require legislative action – not administrative improvisation. That step would also necessitate a careful balancing of interests, as it would amount to creating a new category of “concentration” alongside the current text of Section 37 ARC. Such a move would have to grapple with a range of open questions, both legal and practical, including:

- How can the new category of concentration be defined with sufficient legal certainty? Would merger review be triggered only for experienced, pre-trained staff? Only for hires from the same sector? Would it apply to high-potential graduates? Interns? And how many employees would suffice – one? A group? A group of how many?
- What is required in order to consider the individual hiring act a single concentration? Do the employment contracts have to be conditioned upon each other? Does a general interest of a company to opportunistically hire another company’s employees suffice?
- How can the new legislation be reconciled with fundamental rights, particularly freedom of occupation and employee mobility? This will also need to sufficiently take into account the constitutional principle of proportionality – especially in light of the heavy restrictions such a rule might impose on all employees, in order to capture a handful of sensitive cases per year.
- How does the new legislation relate to the ongoing enforcement campaign against no-poach agreements, which aims to promote, not restrict, employee fluidity?
- How should the turnover or transaction value be attributed to the employees for the purposes of the notification thresholds? This is particularly difficult if only part of the workforce is hired, and this part was not assigned to a specific business area at the previous employer. The salary of the employees is unsuitable as a benchmark, as it relates to the internal relationship between the employee and the employer, but not to the external market position that is supposedly being transferred.

Despite the considerations set out above, the FCO’s recent case – cited at the outset – demonstrates that, in practice, the picture remains muddled. In transactions involving more than simple hiring, companies must assume that the authority may seek to apply merger control rules. The more a transaction approximates a classic asset or control acquisition – in other words, combining talent recruitment with essential IP rights, critical infrastructure, or identifiable business operations – the more likely merger thresholds are to be met.

This position was recently echoed by DG COMP officials in the EU context (where this question is also relevant in relation to gatekeepers' information obligations under Article 14 DMA). According to their interpretation, a transfer of employees will constitute an acquisition of control, if it involves a transfer of key personnel *together with* other important tangible or intangible assets, such as IP rights or critical know-how. Pure hiring, without accompanying asset transfers, generally fails this test.

This reasoning from Brussels further underscores both the cross-border implications of large-scale hires and the friction between labour mobility and the structural focus of merger rules. By remaining attuned to these nuances – and any future legislative developments – companies can position themselves to avoid falling within the scope of merger control. And while they are entitled to compete for talent until the legislature should redraw the lines, it will be wise to watch the FCO's evolving stance as closely as any headline deal.

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