Inequality

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Public policy and labour market competition

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Introduction

The last decade has witnessed a number of remarkable developments in public policy, laws and law enforcement that have been associated with failures of competition in US labour markets. These include: (1) enforcement actions and antitrust law suits regarding explicit conspiracies to suppress competition in labour markets; (2) the documentation and forced abolition of franchise contracts that include worker 'no-poaching' clauses; (3) explicit discussion of the regulation of mergers that affect labour market competition; and (4) legislation and regulation affecting 'non-compete' and 'non-solicit' clauses in employment contracts.

It is difficult to pinpoint the reasons for this rebirth of interest in competition in labour markets. No doubt one factor at work is the stagnation of real wage rates. Wage rate growth has a natural benchmark: productivity growth. In the three decades following World War II, productivity growth and real wage growth were similar. But in the four decades since that time, productivity growth has been four to five times as high as wage growth. The gap between wage growth and productivity growth implies that the share of aggregate real income paid to workers has declined. Despite elaborate explanations for this gap that rely on assumptions about technology, a decline in labour market competition is one obvious explanation for this development.

In addition, there have been some very visible examples of explicit collusion in labour markets, and these have raised questions about just how much competition has been damaged. With the decline in the strength and size of the trade union movement, it is also understandable that few natural checks on competitive failures exist outside of government actions.

In the following, I review the recent developments in public policy. I begin with a deconstruction of a particularly high-level conspiracy to reduce labour market competition in the High-Tech world.

High-Tech Silicon Valley no-poaching agreements

Although there have been several antitrust enforcement actions and class action antitrust law suits alleging anticompetitive behaviour in labour markets, the most influential and largest is associated with the 'no-poaching' and 'no-solicitation' agreements reached by Silicon Valley executives, which affect software engineers and animation coders. Universally described as the 'High-Tech Employee Antitrust Litigation', the litigation was initiated by the Department of Justice (DoJ) in 2010 against Adobe, Apple, Google, Intel, Intuit and Pixar (and subsequently against Lucasfilm) under Section 1 of the Sherman Act. The complaint alleged that these companies engaged in a series of bilateral 'no cold call' agreements. The parties agreed to a settlement that ended these practices, but without any monetary compensation. The settlement was announced on the same day that the very short DoJ complaint was filed, and no further details of the alleged illegal behaviour were made public. It has been speculated that the DoJ learned of the allegedly

[1] The author thanks David Card, Henry Farber and Michael Ransom for many helpful discussions.

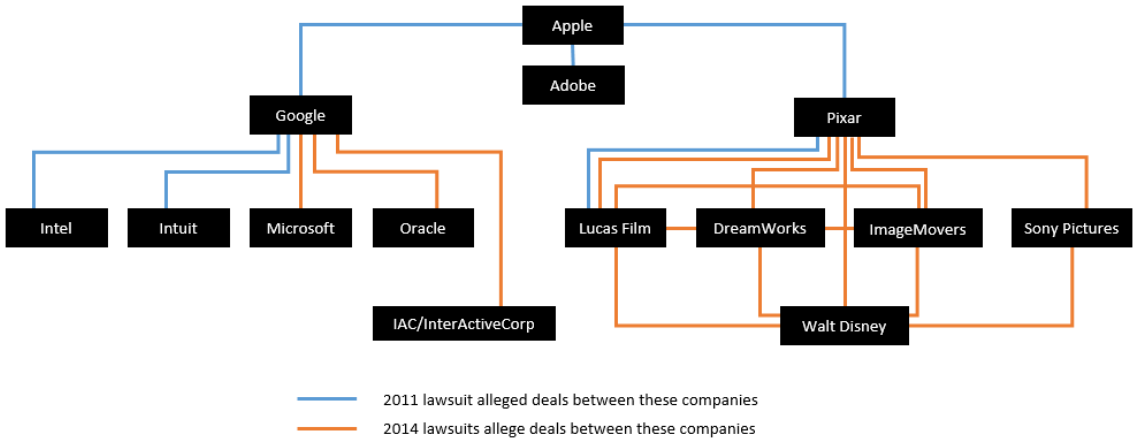
illegal agreements through informal contacts from competitive firms in the high-tech industry, but this has never been confirmed.

What is known about the High-Tech case is a result of a private antitrust law suit of the same name that was filed in 2011 and settled for $415 million in 2015. Judge Lucy Koh of the Northern District of California wrote a detailed summary of the case when she certified a class of 65,000 employees in 2013. Her detailed, slightly redacted decision is the basis for what is known about the details of the conspiracy. Although there are many documents associated with this case (filed in the Northern District of California, Case5:11-cv-02509-LHK, and available online) the judge's order granting, in part, class certification (Document 531)[2] provides a detailed summary of the facts.

Judge Koh writes (p. 25) 'Plaintiffs' evidence indicates that the roots of Defendants' conspiracy appear to reach back to the mid-1980s, shortly after George Lucas (former Lucasfilm Chairman of the Board and CEO) sold Lucasfilm's "computer division" [...] to Steve Jobs (Co-Founder, Former Chairman, Former CEO of Apple), who then renamed the division "Pixar".' To avoid, as George Lucas described it, 'a bidding war with other companies', Lucasfilm and Pixar agreed (1) not to 'cold call' each other's employees, (2) to notify the other company should they receive an application for employment, and (3) that all offers to employees at the other company would be 'final', with no further bidding.

It was not long before this agreement was extended by Steve Jobs to Apple and its labour competitors. Judge Koh quotes the Head of Apple Human Resources, stating, 'add Google to your "hand-off" list. We recently agreed not to recruit from one another so if you hear of any recruiting they are doing against us, please be sure to let me know.'

The figure below shows a diagram of the ultimate group colluding to suppress competition. As the diagram shows, there are overlapping spokes to the conspiracy. One involves the animation business while the other includes a broad list of Silicon Valley firms that employed software engineers.



Sources: Lawsuits filed in federal court in San Jose, California;
Bloomberg Graphics.

Enforcement of the conspiratorial agreements was also evident. Judge Koh cites one instance when Steve Jobs informed Eric Schmidt (then CEO of Google) that a Google recruiter had contacted an Apple employee. Jobs wrote 'I would be very pleased if your recruiting department

[2] Available at https://ia800700.us.archive.org/4/items/gov.uscourts.cand.243796/gov.uscourts.cand.243796.531.0.pdf.

would stop doing this.' Judge Koh continues, 'Google responded by making a "public example" out of the recruiter and terminating the recruiter within the hour.'

Although not all the firms that were approached joined the conspiracy (Palm, Inc is a notable example), many did. Moreover, it is apparent that at least some of the participating executives were aware of the potential illegality of the agreements. In 2005, a Google executive created a draft formal list of 'do not cold call' companies. Judge Koh writes (p. 27): 'The draft was presented to Google's Executive Management Group, a committee consisting of Google senior executives Eric Schmidt, Larry Page (Google Co-Founder), Sergey Brin (Google Co-Founder), and Shona Brown (former Google Senior Vice President, Business Operations). [...] Eric Schmidt approved the list. [...] When Shona Brown asked Eric Schmidt whether he had any concerns with sharing information regarding the "Do Not Call" list with Google's competitors, Eric Schmidt responded that he preferred that it be shared "verbally[,] since I don't want to create a paper trail over which we can be sued later."'

It is not entirely clear what ended the Silicon Valley conspiracy. By March 2008, 20 years after the origin of the conspiracies, Facebook was ramping up and Google (p. 76) 'discovered that non-party Facebook had been cold calling into Google's Site Reliability Engineering ("SRE") team.' The executive who discovered this poaching behaviour suggested 'contacting Sheryl Sandberg (Chief Operating Officer for non-party Facebook) in an effort [...] "to consider establishing a mutual 'Do Not Call' agreement".'

Judge Koh writes that, despite this, in August 2008, 'Facebook continued to poach Google's employees. [...] Accordingly, in October 2010, Google began studying Facebook's solicitation strategy. A month later (and two months after the DOJ made public its investigation of the Defendants), Google announced its "Big Bang", which involved an increase in the base salary of *all* [emphasis in the original] of its salaried employees by 10% and provided an immediate cash bonus of $1,000 to all employees.'

It is apparent that the competition from Facebook and the DoJ investigation coincided as the conspiracy unravelled. Determining their separate effects, if indeed they are separate, is therefore impossible.

Mergers and labour market concentration

Subsequent to the Silicon Valley High-Tech Employee litigation, litigation surrounding the conspiracy amongst animation studios (included in the figure above) commenced.[3] The case was ultimately settled in 2018 for $170 million, much of the settlement being paid by Walt Disney Co. There is an irony to this litigation because in the intervening years Disney purchased both Pixar and Lucasfilm, who were also defendants in the litigation. Ironically, once these firms were consolidated, the practices that were the basis for the litigation would no longer be illegal, as they would take place within the single, larger entity.

There are several papers that have considered the effect of the role of concentration in labour markets on wages. Although these papers do not measure the effects of mergers of firms on labour market concentration and do not directly address the effect of mergers on wages, they do suggest the possible importance of merger policy for labour market competition.

[3] Full disclosure: I was an expert witness for the plaintiffs in this litigation.

The US competition authorities, the DoJ and the Federal Trade Commission (FTC), have begun investigating these issues. A 'Public Workshop on Competition in Labor Markets' summarized many of the key issues.[4] It is unclear whether public policy toward mergers and their effect on labour market competition, which is governed by the regulatory authority enabled by the Hart–Scott–Rodino Act, will change.

Franchise no-poaching agreements

In a paper I wrote with Alan Krueger (Krueger and Ashenfelter, 2018), we examined explicit contractual no-poaching clauses that have existed in many franchise agreements until recently. These agreements typically prohibit a franchisee from hiring another franchisee's employees for some pre-specified period of time after an employee's departure. Since employees typically apply on line, the application form simply asks if the applicant has worked for another franchisee. Not knowing that an affirmative answer disqualifies the applicant, the applicant has a clear incentive to answer truthfully, and thus is disqualified from the position. As we showed, these clauses existed in about half of franchise agreements in the US, but were not universal.

Subsequent to the circulation of the Krueger–Ashenfelter paper, and as a direct result of it, enforcement actions to eliminate these clauses were initiated by the Attorney General of the State of Washington. At this time, despite litigation that continues over past behaviour, franchise contracts no longer contain these no-poaching clauses. There remains the legal question of whether these clauses are per se illegal, but this is perhaps a moot issue at this point.

Non-compete and non-solicitation contracts

A few academic papers have dealt with the role of non-compete employment contracts in the labour market. Such contracts typically forbid an employee from taking employment with a competitor for some pre-specified period after leaving an employer. Historically, public policy regarding such contracts is highly fragmented, as state laws are the primary regulation. Some states (California, Oklahoma, North Dakota) do not permit enforcement of these contracts. Other states permit their enforcement but with restrictions, and still others permit unfettered enforcement.

There are many puzzles regarding these contracts, which are estimated to cover 20% of US workers. For one thing, these contracts often seem to appear in states where they are not enforceable. For another, they are often used in employment relations of low wage, relatively unskilled workers without unique skill sets.

A recent Executive Order from the President in July 2021 ('Promoting Competition in the American Economy') directs the FTC to consider enforcing limitations on non-compete contracts using statutes already available. Some have interpreted the order to also suggest possible restrictions on non-solicit clauses (which prohibit an employee who has departed a company from soliciting employees from the company the employee departed). The Executive Order also instructs the FTC and DoJ to reconsider their guidance to human resource professional regarding the sharing of wage and benefit information. It remains to be seen what these agencies will propose in the future.

[4] https://www.justice.gov/atr/events/public-workshop-competition-labor-markets.

Concluding comments

This brief survey provides some perspectives on US employment law and the role of competition in labour markets. Adam Smith, in a famous passage in *The Wealth of Nations*, asserted that employer collusion to suppress wages was an endemic characteristic of the labour markets of his time. It is difficult to know the extent of labour market anticompetitive behaviour today and how it has changed over time. As a result, it is difficult to provide any reckoning of its role in wage stagnation or increased inequality.

What is clear is that the tools needed to investigate labour market competition do not exist in many countries. More transparency in employment contracts is a sensible starting point for studying these issues.

References

Krueger, A. B., and Ashenfelter, O. (2018), 'Theory and Evidence on Employer Collusion in the Franchise Sector', National Bureau of Economic Research (NBER) Working Paper No. 24831.