

01: Introduction

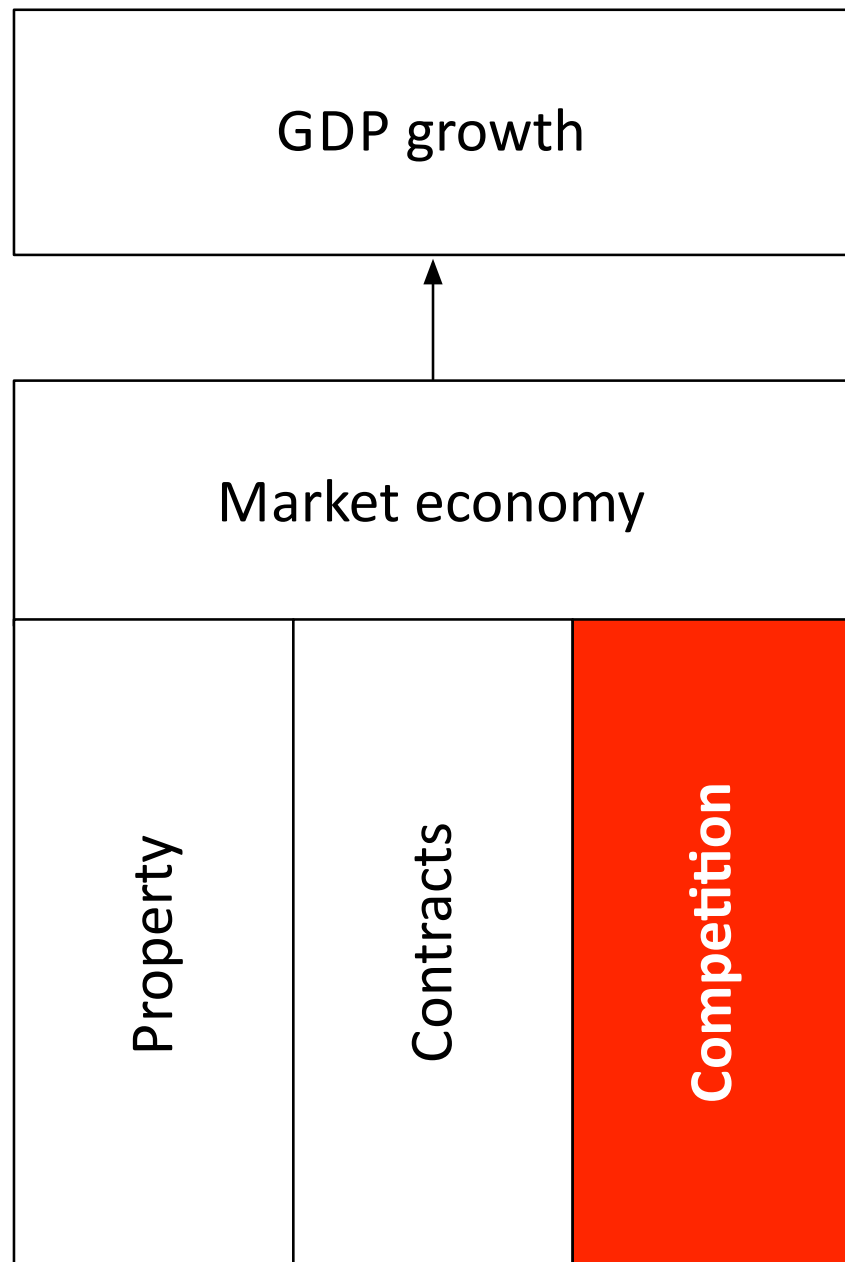
U.C. Berkeley, Boalt Hall School of Law, Silicon Valley Antitrust, Fall 2013

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Antitrust laws enforce the competition mandate



- Goal: Economic growth (GDP)
 - GDP growth is far and away the most significant contributor to a higher standard of living
- Means: Property, contract, competition
 - Greater efficiency
 - Lower prices
 - Higher rate of technological innovation
 - Normal rate of profit (long run)
- Problem: Mismatched incentives
 - Society = maximize output
 - Firm = maximize profits
 - It may well be more profitable to steal, breach contracts, and avoid competition
- Solution: Legal protection of property, contract, competition
 - Antitrust laws enforce the competition mandate



The all-important concept of market power

Power level	Conduct
Low	–
Medium	Baseline prohibitions
High	Baseline and special obligations

- Market power is a measure of how important a market participant is to its trading partners
 - What is a “market”?
 - Who are the “market participants?”
- As a practical matter, firms are likely to have market power if their products are
 - indispensable
 - essential
 - otherwise hard to replace.
- There are three levels of market power: low, medium, and high
 - High market power firms may have the incentive and ability to subvert the competitive process

The complete picture: Market power-based offenses and *per se* offenses

Power level	Conduct	Per se prohibitions
Low	–	yes
Medium	Baseline prohibitions	
High	Baseline and special obligations	

- In addition to the market power-based offenses, there are certain “hardcore” violations that are *per se* illegal (and may be criminally prosecuted)
 - Price fixing among competitors
 - Market allocation (territory, customer, time)
 - Group boycotts
- The main baseline prohibitions apply to net-anticompetitive *agreements*
 - Tying and bundling
 - Exclusive dealing
 - Mergers & acquisitions & joint ventures
- Special additional *unilateral conduct* obligations imposed on monopolists
 - E.g., refusals to deal with competitors
 - Also hair-trigger standard for tying, exclusive dealing, and mergers

The complete picture: Market power-based offenses and *per se* offenses

Power level	Conduct	Per se prohibitions
Low	–	§1 SA (per se) Art. 101 (hardcore)
Medium	§1 SA §7 CA Art. 101 ECMR	
High	+ §2 SA + Art. 102	

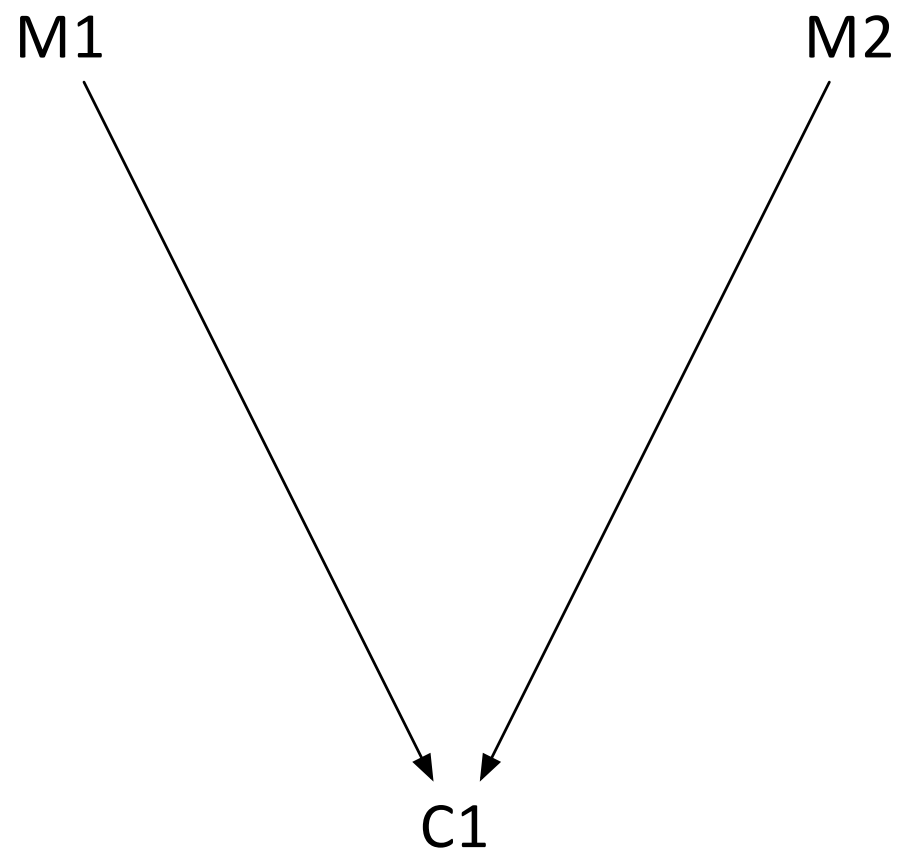
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Key legal provisions

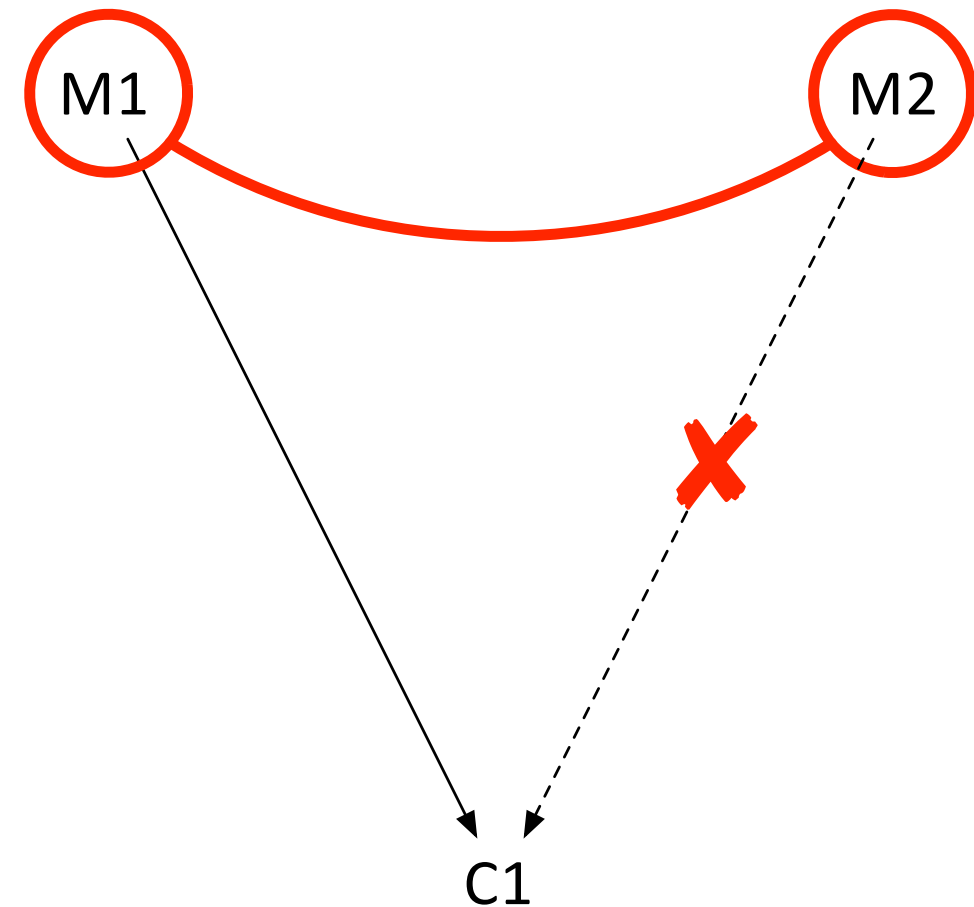
- §1 of the Sherman Act (Art. 101 TFEU)
 - Agreement
 - In restraint of trade (= anticompetitive effect)
 - Per se (for hardcore offenses); market-power independent (more complex in the EU)
 - Rule of reason (for everything else); mid- to high market power only
- §2 of the Sherman Act (Art. 102 TFEU)
 - Monopoly power (~ 40% in the EU)
 - Unilateral exclusionary conduct (harms rivals and doesn't benefit consumers)
- §7 of the Clayton Act (ECMR)
 - Acquisition of shares or assets
 - Likely resulting in a “substantial lessening of competition”
 - HSR and Clayton Act are independent of each other (unlike ECMR)

Strategy 1: Coordination

Competition
= M1 and M2 bid against each other

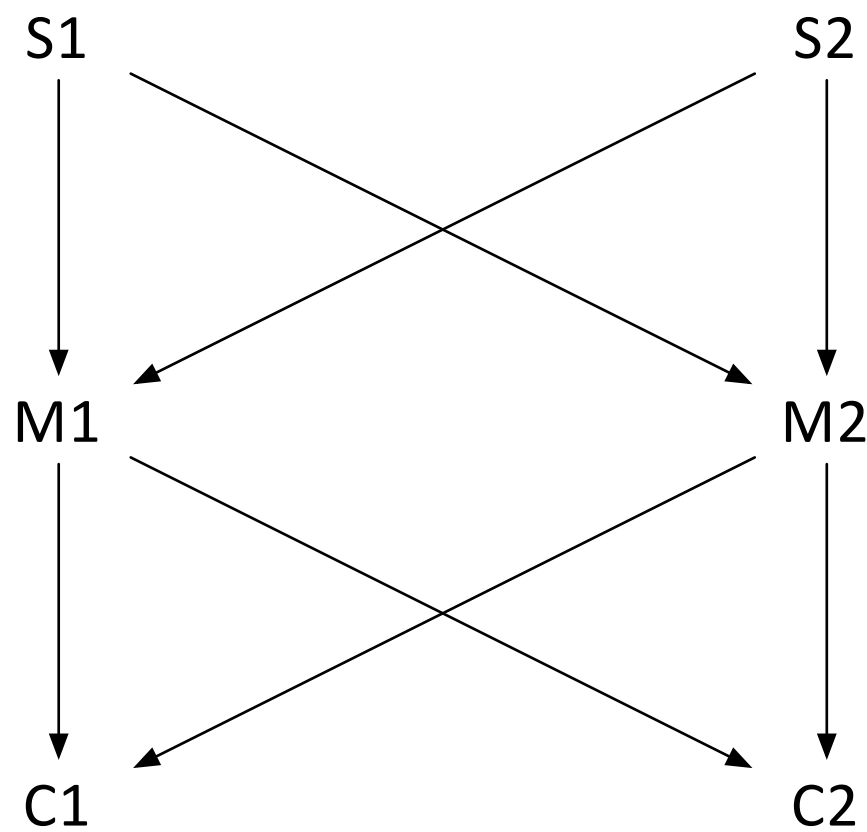


Agreement not to compete
= M1 is the only seller

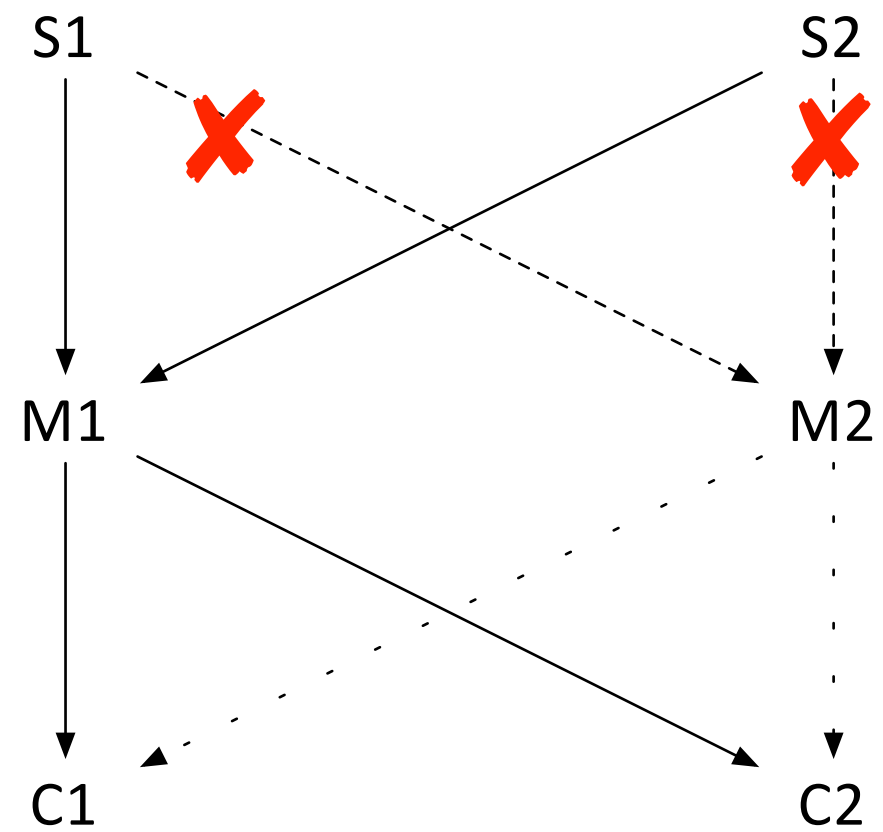


Strategy 2: Exclusion

Competition
= M1 and M2 bid against each other

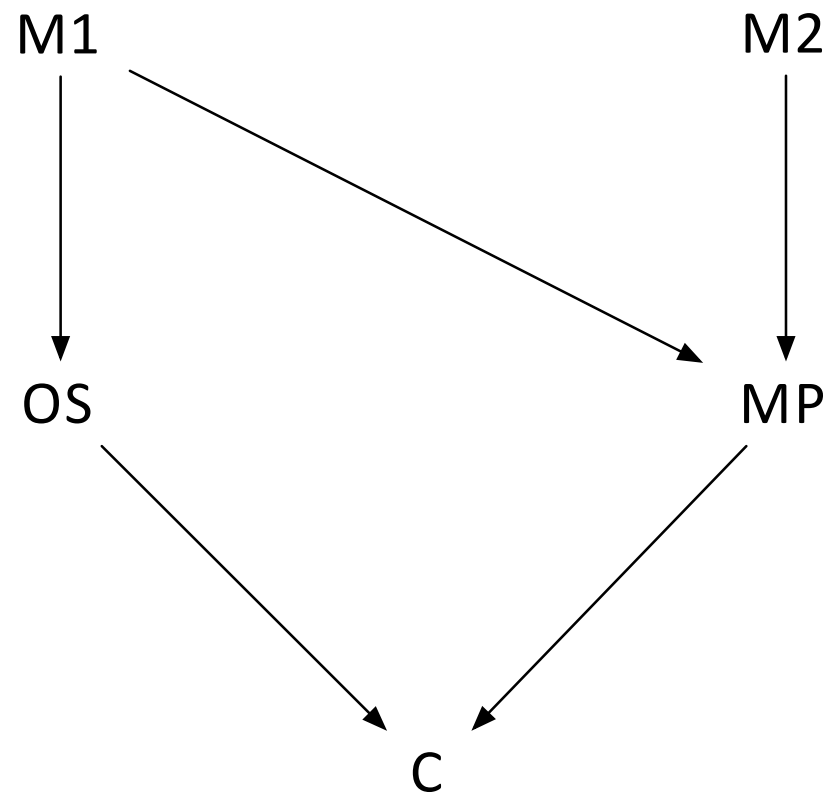


Upstream foreclosure
= M2 cut off from S1 and S2

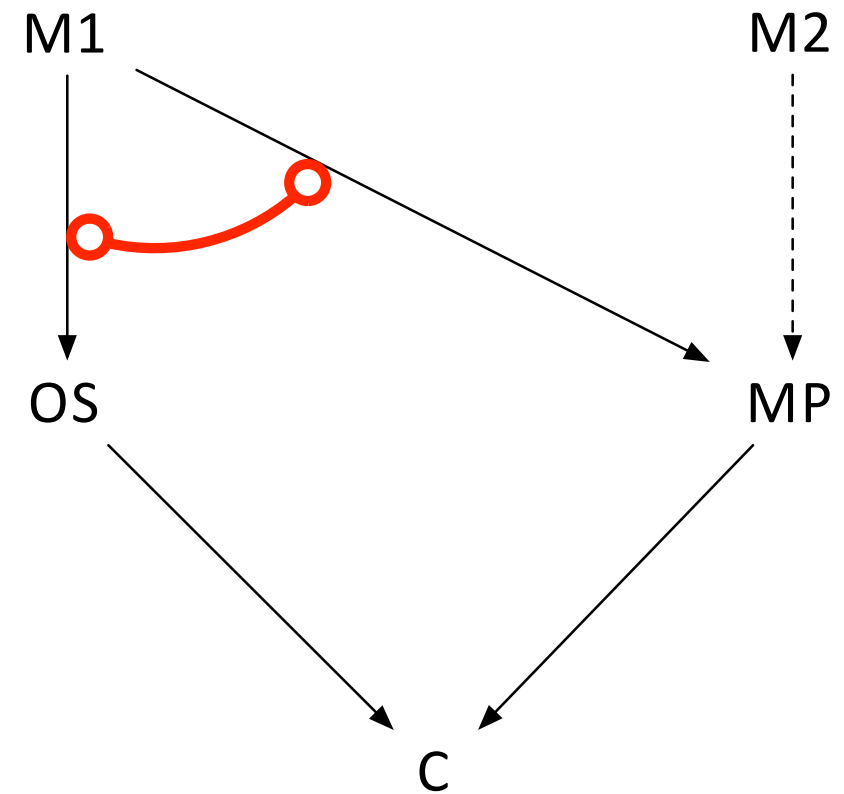


Strategy 3: Leveraging

Full line (M1) v. short line (M2) seller
= M1 sells OS and Media Player (MP)



Leveraging: M1 bundles OS+MP
= demand for M2's MP dries up



Some characteristic properties of high-tech antitrust

- New technologies bring about new business models and competitive strategies – ecosystem competition
- Limited case law – first principles matter
- Rapid change – focus on nascent and potential competition
- Cumulative, incremental, parallel innovation – increasingly at odds with the patent system
- Products are feature driven, often not primarily price driven
- User adoption and network effects are important entry barriers, even if the underlying product (software) is easy to replicate
- Agencies drive the legal developments, not private plaintiffs