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What Should Economics Do in Antitrust?
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I. Economics as the Study of Exchange

In 1964, the economist James Buchanan famously asked, "What Should Economists Do?" He answered with a critique. Economists had developed useful tools for measuring economic effects, but too often framed their questions as problems of resource allocation: how to assign scarce resources to maximize economic welfare, expressed in dollars and cents, subject to defined constraints.

Buchanan called for a different approach. Economics, in his view, is about trading dynamics and, more specifically, the institutional conditions that make exchange between individuals possible. Citing Adam Smith, he argued that economics concerns "the propensity to truck, barter, and exchange," and that economists "should" focus on that activity and the institutional arrangements arising from it.

That distinction matters for defining competition. Under the resource allocation approach, competition is a condition focused on end states, and the economist's task is largely computational. A perfectly competitive market is defined by assumptions: a large number of price-taking buyers and sellers, perfect information, zero transaction costs, and homogeneous products. The economist then asks whether the market reached that efficient end-state, or whether intervention would raise output or lower price.

Buchanan thought that framework provides the wrong starting point. A model of perfect competition can describe how market forces operate at equilibrium, but, by stipulating away any single participant's influence on market outcomes, it cannot explain the process through which markets become competitive.

His objection was not that perfect competition is unrealistic. Useful models often simplify reality. Rather, its assumptions define away the social and institutional conditions that make

competition possible. As he put it: "A market is not competitive by assumption or by construction. A market becomes competitive, and competitive rules come to be established as institutions emerge to place limits on individual behavior patterns." Competition is therefore a process, emerging through voluntary exchange and through formal and informal rules that structure market interactions.

The two approaches draw on much of the same data, like price and output, but differ in what each asks of it—specifically, whether it shows the market reached an efficient end-state, or whether it explains how institutional arrangements structure exchange. That is the choice to confront in answering what economics should do in an antitrust case.

II. The Value of Economics in Antitrust Cases

Economics offers frameworks for analyzing bargaining dynamics in market settings, which can help identify evidence about how challenged conduct affects the availability of alternatives. Effects evidence can help analyze trading relationships, but it does not offer definitive conclusions standing alone and is relevant only insofar as it is put in context.

A familiar approach stops at metrics, reducing the relevant harm to a price increase or an output reduction. That approach mistakes a symptom for the violation. The federal antitrust laws establish an enforcement framework keyed to conduct, not market outcomes.

The relevant inquiry is therefore narrower and more institutional than whether a market has reached some welfare-maximizing end state. It asks how a challenged practice operates on the conditions of exchange itself: does it let participants transact more effectively within their trading relationships, or does it impede others' ability to transact effectively with rivals?

Economics helps answer those questions by asking who is constrained, what alternatives exist, how bargaining positions shift, and whether the conduct creates or appropriates material value.

Accordingly, before analyzing market effects, it is necessary to identify the nature and scope of the challenged conduct. Difficulties arise when courts treat observed market outcomes as the whole of the inquiry, leading them to misapprehend the causal chain and make unfounded economic assumptions. Starting with identified effects can invite courts to presume that existing outcomes are market-based, without first asking whether the conduct producing them is consistent with institutional commitments that structure exchange in a given commercial setting. The risk is not only that effects may be absent or hard to observe, but that the analysis spots one effect while failing to trace the mechanism through which challenged conduct reallocates costs and benefits among market participants.

Let me illustrate with a few cases.

III. *FTC v. Qualcomm*: Formal versus Economic Incidence

Consider the Ninth Circuit's 2020 decision in *FTC v. Qualcomm*. The opinion accepted that Qualcomm participated in standard-setting for cellular standards and, on the district court's findings, had committed to license its standard-essential patents (SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms.

It also recognized that Qualcomm held a dominant position in modem chips and maintained a "no license, no chips" policy, under which original equipment manufacturers (OEMs) unwilling to accept Qualcomm's terms risked losing access to its chips.

For purposes of its analysis, the court assumed, without deciding, that Qualcomm breached its commitments to license rival chip suppliers and that its royalties may have been unreasonably high. The court nonetheless concluded that this conduct did not harm competition in the supply of chips.

Because OEMs, rather than chip suppliers, paid higher prices and Qualcomm collected the same royalty regardless of whose chips an OEM used, the court reasoned that the royalties were "chip-supplier neutral," and that any harm incurred by OEMs related to licensing outside the relevant chip market.

That reasoning starts in the wrong place of the causal chain. The court reasoned from an observed outcome—elevated royalties—and treated evasion of contractual commitments as collateral to chip competition. But that ordering misses the alleged mechanism of harm: on the court's own assumption, those royalties were the product of a systematic breach of FRAND commitments and reinforced by the 'no license, no chips' policy.

Because Qualcomm both supplied chips and licensed patents necessary to produce standard-compliant devices, it could recover an elevated charge through an integrated return across licensing and chip sales. Rival chip suppliers, lacking licensing revenue to offset those costs, were disadvantaged because OEMs evaluated their chips against an all-in cost that included Qualcomm's terms.

Formal incidence is not economic incidence: uniform collection shows only that OEMs formally paid the surcharge, not whether it raised their effective costs when choosing a rival chip.

When products incorporate standardized technologies, industry standards form a critical part of the institutional conditions of competition. Firms often compare technologies, make sunk

investments, and forego alternatives based on assurances that standardized technologies will be licensed on FRAND terms. That commitment guards against strategic opportunism after standards are adopted: once switching becomes infeasible, the patent holder can demand royalties it could not have obtained ex ante when alternatives remained available.

Against that backdrop, conditioning chip access on acceptance of non-FRAND terms could have allowed Qualcomm to place rivals at a cost disadvantage it could not have achieved absent breach. Because OEMs were required to take a license to build a standard-compliant handset, any supra-competitive royalty would function as a surcharge on all devices, including those using competitors' chips.

Leveraging its dominant position in chips to demand non-FRAND terms would thus create cross-market leverage, neutralizing OEMs' practical ability to challenge Qualcomm's terms and pursue alternative chip options.

Whether that theory holds turns on the breach question, which the Ninth Circuit deemed unnecessary to resolve. If Qualcomm complied with its FRAND obligations, breach would not have been available as a mechanism for imposing the surcharge. In an ordinary FRAND negotiation, a dissatisfied implementer can bargain in the shadow of adjudication. The district court found that Qualcomm's "no license, no chips" policy materially weakened that outside option by linking chip supply to acceptance of Qualcomm's licensing terms.

On that account, the challenged conduct was a pervasive practice operating across OEM relationships that affected market-wide substitution conditions. By isolating royalty effects from the assumed breach, the Ninth Circuit drew conclusions about royalty incidence that failed to account for the capacity of Qualcomm's integrated practices to distort the conditions under which OEMs could obtain licensed technologies and negotiate chip prices with rival suppliers.

IV. *In re Merck*: Petitioning versus Misuse of an Approval

Consider next the Third Circuit's 2024 decision in *In re Merck Mumps Vaccine Antitrust Litigation*, where the direct purchaser plaintiffs alleged that Merck's drug label misrepresented the vaccine's efficacy, which raised entry barriers for a rival manufacturer. For purposes of summary judgment, the court accepted that Merck had been the sole U.S. supplier of a mumps vaccine for over a decade; that the FDA had raised concerns the vaccine might lose potency before its shelf life ended; and that, on the plaintiffs' account, Merck concealed the problem, ran a flawed trial, and used the resulting data to preserve label claims prospective rivals would have to match to obtain approval.

A majority nonetheless held, in an unpublished decision, that Merck's conduct constituted protected petitioning activity under the Noerr-Pennington doctrine, even while acknowledging "troubling evidence" that Merck had misrepresented vaccine claims on its FDA-approved label.

That reasoning begins at the wrong end of the causal chain. The majority treated the approved label as the relevant output of the FDA process and characterized the plaintiffs as objecting to the result of the petitioning. But that conclusion is undermined by the majority's own acknowledgement that Merck preserved label claims it knew to be overstated in lieu of correcting them, continuing to make sales under a label that communicated misleading information to patients, physicians, pharmacies, and payers. The majority also acknowledged that Merck was duty-bound to ensure its drug label was accurate, and that it could have disclosed to the FDA that its vaccine might be misbranded and pursued remedial measures, such as reducing the labeled shelf life.

The majority nonetheless reasoned that plaintiffs could not connect Merck's advertising to its rival's delayed entry "without passing through" the approved label. But that conclusion holds only if the inaccuracy of the label and the approval are treated as the same thing. Merck's alleged decision to withhold corrective information was conduct undertaken separately from, and in part before, the FDA's approval.

Even to the extent that part of the injury flowed from the approved label, it does not follow that the injury flowed from protected petitioning. That conclusion conflates the use of an approved label consistent with one's regulatory obligations with the deceptive use of an approved label to enhance one's market position. It also equivocates between a favorable outcome obtained through good-faith petitioning and a distorted regulatory output procured through material misrepresentations.

Although both are the formal result of communications with the FDA, treating them alike overlooks an essential distinction: the alleged use of deception to "corrupt" the agency's decision-making. Whether petitioning is a sham turns not only on whether the petitioner used the governmental process to impose collateral harm on a rival, but also on whether the petitioner distorted regulatory deliberations through deceptive conduct that went to the core of the petition and deprived others of the chance to respond. Further, beyond the FDA process, the affirmative distribution of false information that is material to market participants can impact commercial decision-making, investment pathways for alternatives, and entry conditions.

Petitioning is protected as a means of seeking government action, but in the adjudicatory context that protection depends on the legitimacy of the process and adherence to the institutional expectations that structure exchange in regulated markets. The antitrust inquiry therefore cannot be reduced to the fact that the FDA approved the label. It must ask whether the label was

obtained through abuses of that process, and whether conduct beyond petitioning leverages the result in ways that distort market-facing uses of the label. By maintaining claims it allegedly knew to be overstated, Merck, on the majority's own reasoning, subverted that process, distorting the information conditions that govern vaccine purchases and obscuring the basis on which rivals could gauge their own approval prospects.

V. Concluding Thoughts

A final point about what economics should do in antitrust cases.

The problem courts face is that an approach focused on outcomes does not resolve which effects, metrics, and parameters are legally relevant.

Static metrics like price and output are therefore the wrong unit of analysis because they do not, standing alone, distinguish conduct that creates value within a trading relationship from conduct that appropriates value by leveraging market power to distort others' dealings with rivals. Only when empirical benchmarks are assessed against institutional conditions can a court draw that distinction.

Institutional analysis is also more practical for answering the core legal question: whether competitive decision-making was distorted. Empirical modeling can yield precise outputs, but can also pose tractability concerns and still requires interpretation to connect those outputs to that question. Institutional conditions, by contrast, can be directly observed from ordinary-course business records, contracts, and market testimony, and often speak more directly to market participants' expectations and reliance interests. In that sense, they are as fit for economic study as the outputs of an econometric model.

A proper use of economics in antitrust accounts for process as well as outcomes.

To close with a final quote from Buchanan: the "mutuality of advantage from voluntary exchange is, of course, the most fundamental of all understandings in economics." That insight is an important part of the answer to what economics should do in antitrust.