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Simon Baker

# Economic Issues in Complex Monopoly Conduct and Market Inquiries

## Overview

- Distinguishing coordinated conduct from non-coordinated conduct
- Remedying tacit coordination
- Merits of a market inquiry regime

## Distinguishing Coordinated and Non-Coordinated Conduct

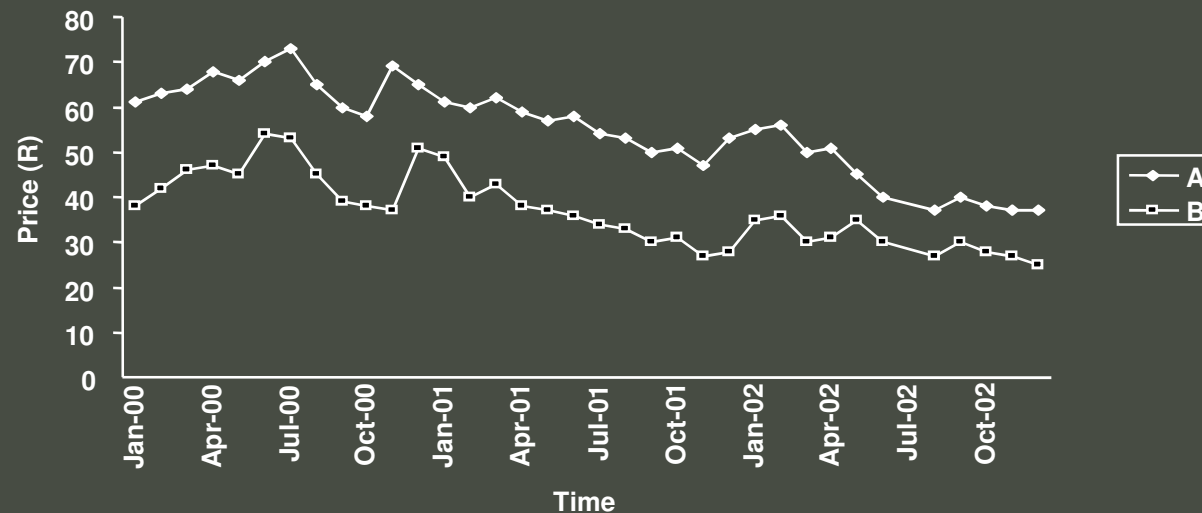
- In the abstract, one can clearly distinguish between examples of coordinated and non-coordinated conduct:
  - non-coordinated conduct: firms do their best taking their rivals' actions as given
  - tacitly coordinated conduct: firms anticipate rivals' responses and so do not act on their short term incentives to cut prices
- However, theory recognises that markets do not sit neatly in one or other category

## Distinguishing Coordinated and Non-Coordinated Conduct

- Tacitly coordinated outcomes can vary from those seen under non-coordination to those seen under monopoly
- A market may have multiple non-coordinated equilibria, as well as multiple coordinated equilibria
  - market shocks may shift a market from one to another
  - different equilibria may have different welfare properties
- Markets may display characteristics of both coordination and non-coordination
  - aspects of coordination over short run pricing
  - non-coordination and intense competition over innovation

## Distinguishing Coordinated and Non-Coordinated Conduct

- Not only difficult to distinguish different market outcomes in theory, it is also difficult to distinguish them empirically



- The co-movement in pricing between Firm A and Firm B is consistent with perfect competition, non-coordinated oligopoly, tacit coordination and cartelisation

## Distinguishing Coordinated and Non-Coordinated Conduct

Even in many non-coordinated situations “...*no firm actively tries to increase its market share [and] no firm actively fights its competitors, because it is in no firm’s individual interest to engage in ‘active’ competition.*”

L.Philips, “*Competition Policy: A Game Theoretic Perspective*” (1995)

“...*the parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain periods. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation...*”

ECJ, *Woodpulp* (1993)

“*Complex monopoly conduct provision should be separate from market inquiry in order to allow the Commission to use its discretion to deal effectively with a particular uncompetitive behaviour without commencing an inquiry first when in fact the uncompetitive outcomes are obvious*”

DTI *Consultation* (2008)

## Remedying Tacit Coordination I

- Tacit coordination requires an economic environment structurally and characteristically conducive to it
- Can try to cure it by addressing the underlying features which make tacit coordination possible (i.e. treat the causes)
  - change market structure (e.g. divestments)
  - prohibit facilitating practices (e.g. particular forms of info exchange)
  - encourage destabilisation (e.g. lower regulatory barriers to entry)
- Can try to treat the effects of tacit coordination
  - prohibit tacitly coordinated conduct (e.g. fine and deter)
  - directly impose more desirable market outcomes (e.g. price control)

## Remedying Tacit Coordination II

- Structural remedies plausible, but may not be possible, efficient, equitable or proportionate in practice
- Prohibition of facilitating practices attractive, but not always relevant (and arguably covered by standard provisions of competition law)
- Destabilisation measures, such as lowering regulatory entry barriers, are likely unrelated to market conduct (desirable in variety of settings)
- General conduct remedies amount to nothing more than an exhortation to determine conduct without regard to rivals' actions (meaningless)
- Abuses arising from tacit coordination are largely exploitative, not exclusionary, so specific conduct remedies are complex and intrusive

## Remedying Tacit Coordination III

- Proposed provision exclusively focuses on conduct remedies, but aside from prohibition of facilitating practices, it is difficult to envisage a conduct remedy that falls short of full scale regulatory intervention

*“The fact that co-ordinated interaction falling short of reaching explicit terms of agreement is arguably legal in many countries is not traceable to some inexplicable gap in antitrust coverage. The omission can be traced to difficulties in devising a suitable remedy. Once firms are aware of their interdependence they cannot be expected or easily compelled to ignore that in deciding their competitive behaviour.”*

- OECD Roundtable on Oligopoly Markets (1999)

## Merits of Market Inquiries I

### Pros

- Permits investigation of any market type, without need to pre-categorise as coordinated or uncoordinated, or attribute “fault”
- Allows for investigation of combinations of perceived market failings and framing of coherent remedy package
- Can provide a “lightening conductor” to reduce risk of ad hoc political interventions

### Cons

- Danger of fishing expeditions, lack of focus and imprecisely framed theory of market failure, allied with significant discretion
- Because it is designed to catch “difficult cases” often results in ineffectual token remedies

## Merits of Market Inquiries II

### Groceries Market (2008)

- Lightning conductor: prompted by complaints from small retailers association
- Combinations of issues: coordination allegations, single firm dominance in some local markets and buyer power over suppliers
- Coherent remedy package: change to planning and legal regime to lower barriers to entry and tightening of existing code of conduct

## Merits of Market Inquiries III

### New Cars (2000)

- Lightning conductor: consumers association concerns over car prices
- Combinations of issues: vertical agreements (selective and exclusive distribution) and setting of recommended prices
- Coherent remedy package: recommended range of measures prohibiting selective and exclusive distribution
- Facilitated move from one non-coordinated equilibrium to another

## Merits of Market Inquiries III

### Package Holidays (1997)

- Lightning conductor: concern over increased concentration amongst tour operators and vertical integration between tour operators and travel agents
- Combinations of issues: non-coordinated oligopoly, vertical integration, principal-agent problems
- Coherent remedy package: posters alerting customers to ownership links between agent and tour operators

## Conclusions

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- In practice, distinguishing between coordinated and non-coordinated conduct is extremely difficult
- Finding a remedy to tacitly coordinated exploitative conduct which falls short of full scale regulation is even harder
- Wide scope and potentially broad range of remedies is both a strength and a potential weakness of market inquiries
- Ability to target “no fault” conduct and propose integrated package of remedies, can be the tool to solve “difficult cases”
- Considerable discretion and lack of limiting principles can encourage over intervention in markets that are basically working as well as can be expected.