
THE COMPETITION LAW REVIEW

Volume 5 Issue 1 pp 123-145

December 2008

Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain

*Andreas Stephan**

The paper reports on results from a public survey on attitudes to collusion and cartel enforcement in Britain. Respondents demonstrate an understanding that price-fixing is harmful and should be punished. While there is strong support for high corporate fines and naming and shaming, only one in ten Britons think individuals responsible should be imprisoned. Weak perceptions of the severity of price-fixing are confirmed by only six in ten people considering such practices to be dishonest. Sex and age strongly influence attitudes. Education and newspaper readership have less of an effect, indicating poor information dissemination. Only 20 per cent would report their employer's involvement in price-fixing without guarantees of anonymity and/or a reward; 14 per cent would not report at all for fear of potential consequences. Public opinion is divided as to whether leniency programmes are justifiable. Respondents consider public enforcement to be more important than compensating parties injured by cartels.

1. INTRODUCTION

Much of the literature on cartel enforcement is theoretical. The empirical papers that exist in Europe focus mainly on enforcement efforts, and draw their conclusions from the information contained in the formal cartel decisions of the European Commission, D-G Competition.¹ The US literature largely focuses on the characteristics of cartels and their effects.² Christine Parker has conducted a study of the Australian Competition and Consumer Commission's (ACCC) enforcement activity and business responses to it, gauging the opinions of enforcement officials, competition lawyers and

* Lecturer in Law, Norwich Law School and ESRC Centre for Competition Policy, University of East Anglia, NR4 7TJ. Email: a.stephan@uea.ac.uk. My thanks to Graham Loomes, Morten Hviid, Catherine Waddams, and the members of the ESRC Centre for Competition Policy. The support of the Economic and Social Research Council (UK) is also gratefully acknowledged.

¹ Examples include: A Stephan, 'An Empirical Assessment of the 1996 Leniency Notice' (2005) CCP Working Paper 05-10, presented at the 2006 EARIE conference, Amsterdam. Available at: <<http://www.ccp.uea.ac.uk/publicfiles/workingpapers/CCP05-10.pdf>> [all websites accessed 28 May 2008]; Brenner, S, 'An Empirical Study of the European Corporate leniency Program', presented at the 2005 EARIE conference, Porto. Available at: <[http://www.fep.up.pt/conferences/earie2005/cd_rom/Session per cent20VII/VII.G/brenner.pdf](http://www.fep.up.pt/conferences/earie2005/cd_rom/Session%20VII/VII.G/brenner.pdf)>; MP Schinkel et al, 'An empirical analysis of Commission Decisions and their Appeals Histories', presented at the 2004 EARIE conference, Berlin. Available at: <<http://www.diw.de/english/produkte/veranstaltungen/earie2004/papers/docs/2004-462-V01.pdf>>

² Examples include: M Levenstein & VY Suslow, 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy' (2004) 71(3) *Antitrust Law Journal* 801; JM Connor & RH Lande, 'The size of cartel overcharges: Implications for US and EU fining policies' (2006) 51(4) *The Antitrust Bulletin* 983; JE Harrington, 'How Do Cartels Operate?' (2006) unpublished paper, John Hopkins University, available at: <http://www.econ.jhu.edu/pdf/papers/WP531harrington.pdf>.

businessmen.³ Finally, Barry Rodger⁴ is conducting surveys on firms that have been fined for involvement in cartel infringements.

Public attitudes are important to cartel policy in four respects. First, individuals' willingness to desist from price-fixing and other collusive behaviour is strongly influenced by how bad they perceive such behaviour to be. The weight of social stigma imposed upon them if caught can have a strong deterrent effect. In as much as the harm caused by cartels is not obvious to people, greater education about the effects of such infringements, and the importance of enforcement, may be necessary to stiffen deterrence. These perceptions will also determine people's willingness to report such behaviour when they think they may be victims of it, or when they suspect their employer to be participating in it.

Second, because cartels are difficult to detect, competition authorities rely heavily on the use of leniency programmes. These typically grant immunity to the first infringing firm that self-reports an infringement and provides evidence of those involved. If cartel infringements are perceived to be too serious, public attitudes may strongly oppose the use of such detection mechanisms as they allow some guilty parties to go unpunished and allow the sanction on others to be substantially reduced.

Third, cartel enforcement in the EU has been dramatically stepped up in the last decade and public support is needed to ensure its success and to back any additional resources required. Leniency programmes have been adopted on the Community level, in the UK and will soon be available in every Member State. There has also been a significant escalation in the level of fines imposed on infringing firms. In 2007 alone, more than €3 billion was imposed in cartel fines by the European Commission. Some national jurisdictions have also adopted criminal offences; notably in the UK where individuals can be imprisoned for up to five years for price-fixing under Part 6 of the Enterprise Act 2002. Other enforcement mechanisms are being contemplated, such as the introduction of a system of negotiated settlement. The European Commission also hopes to encourage private enforcement, which is currently perceived as weak in Europe as compared to the US. If the strengthening of cartel enforcement is not in tune with public opinion, many of these enforcement mechanisms may prove ineffective.⁵ Competition authorities may also feel a political backlash if public opinion perceives their enforcement efforts to be too draconian.⁶

³ C Parker & N Stepanenko, 'Compliance and Enforcement Project: Preliminary Research Report' (2003) Centre for Competition & Consumer Policy, unpublished paper, available at: <<http://cccp.anu.edu.au/Preliminary%20Research%20Report.pdf>>

⁴ Strathclyde Law School.

⁵ See for example: C Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels' (2006) 14 *Critical Criminology* 181 at 197.

⁶ C Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40(3) *Law & Society Review* 591.

Finally, public attitudes give some indication of the willingness to convict individuals at jury trial: in particular, the extent to which price-fixing is considered dishonest for the purposes of the UK criminal offence.

This paper presents an overview of the results of a survey gauging public attitudes in Britain to price-fixing and cartel enforcement mechanisms. This is the first ever survey of consumer attitudes to cartels. A representative sample of 1,219 residents of Great Britain, aged 18 or over, was surveyed.⁷ The survey was carried out between the 28th–30th March 2007 by YouGov Plc and was commissioned by the ESRC Centre for Competition Policy.

Section 2 of this paper discusses the methodology used in carrying out the survey. Section 3 presents and discusses some of the main survey results, including: the extent to which price fixing is perceived as wrong; the appropriate punishment for firms and individuals; the extent to which price fixing is perceived as dishonest for the purposes of the UK's cartel offence; perceptions of when price fixing should be punished; whether there should be exceptions; attitudes to leniency programmes; willingness to report price fixing; and attitudes towards private enforcement.

2. METHODOLOGY

2.1 How the survey was carried out⁸

YouGov Plc maintains a panel of over 160,000 adults throughout Great Britain. In order to register with YouGov, each panel member completes a detailed profiling questionnaire and sets up an account name and password. This questionnaire enables YouGov to select a representative sample each time they conduct a survey – representative according to the demographic make-up of the population. Information acquired at registration includes: region; age; gender; education; housing tender; size of household; children in household; cars in household; daily newspaper readership; vote in last general election; employment status; sector; income; religion; and ethnicity.

The YouGov pool is recruited from a wide variety of sources. Most have been actively recruited via non-political websites. These range from invitations and pop-up advertisements on ISP home pages to websites on varied subjects. YouGov have also employed specialist recruitment agencies to contact specific groups in order to ensure a wide demographic spread.

In conducting the survey, YouGov first selected a sub-group from their pool that was representative of the population as a whole. They then emailed the selected panel members and invited them to complete the survey by clicking on an Internet link. In

⁷ As a guide: for a 1,000 sample, margin of error is in the region of +/- 3 per cent points based on a 95 per cent confidence interval (YouGov).

⁸ See YouGov 'Questions & Answers' available at: <<http://www.yougov.com/corporate/aboutQA.asp?jID=1&sID=1&UID>> and 'How YouGov Works' available at: <<http://www.yougov.com/corporate/aboutYGWorks.asp?jID=1&sID=1&UID>>

order to complete the survey they were required to log in and provide their password. This ensured that the right people completed the survey, and enabled their answers to be matched to the demographics they provided when they registered with YouGov. Respondents receive a small incentive for completing YouGov surveys. The purpose is to ensure that samples are as representative as possible, and that responses are not tilted towards those passionately interested in the subject of the particular survey.

The survey yielded 1,219 responses out of 3,000 members of the public emailed. This is a response rate of about 41 per cent.⁹ When fieldwork was complete, the raw data was adjusted, taking account of age, gender, social class, newspaper readership and past vote (in a general election), to ensure that the results were representative.¹⁰ Almost all surveys involve weighting, whether they are conducted online, face-to-face or by telephone. This is to ensure that the published results properly reflect the population they seek to measure.¹¹

YouGov surveys are also weighted according to past vote and newspaper readership to ensure that results are attitudinally representative as well as demographically representative of the population.

2.2 Why an online survey?

For the purposes of statistical analysis probability-based sampling is more desirable than quota sampling. Under the former, the entire population is known and a sample can be selected in such a way that every member of the population has an equal chance of being drawn. This reduces selection errors and produces a sample that is likely to yield more accurate results. If one were surveying employees of a company or some other easily identifiable population, probability-based sampling could be easily employed. However the difficulty of public surveys is obtaining correspondence information for the population that is complete and accurate. Population censuses are infrequent and many opt out of the publicly available electoral register. Telephone directories are similarly incomplete and an increasing proportion of people now use mobile phones instead of landlines. For these reasons public surveys tend to rely on a quota sample: a group of people is chosen according to their demographic characteristics. They are representative of the general population and so their responses should accurately reflect public attitudes. The difficulty in such surveys is ensuring that no significant group in the population is excluded or under-represented. YouGov's methods for limiting such effects and compensating for them were described in the previous section.

⁹ Typical response rates in telephone surveys can be as low as 15 per cent. See, *op cit*, n 8, and P Kellner, 'Can Online Polls Produce Accurate Findings?' (2004) 46(1) *International Journal of Market Research* 3.

¹⁰ The combination of sample-selection and weighting techniques currently produces accurate figures for region, employment status and housing tenure, so no further weighting is needed; but, as with potential panel-effects, this data is monitored regularly by YouGov.

¹¹ For example, men comprise 48 per cent of the population and women 52 per cent. The raw figures in the survey were close to this (49 per cent and 51 per cent respectively) but were weighted to reflect the actual population.

Conventional survey methods include postal self-complete questionnaires, telephone interviews and face-to-face interviews. Postal surveys tend to yield poor response rates mainly due to the volume of 'trash mail' received by households, but also because of the effort required in returning the questionnaire. There is also no way of ensuring that the questionnaire is completed properly or by the right person. Telephone and face-to-face surveys also have difficulty obtaining representative samples. Telephone polling companies generally achieve only 15 interviews for every 100 residential numbers they dial.¹² There is a difficulty in finding a time that is convenient for all respondents, particularly those who work long hours. Many will refuse to answer questions to strangers over the phone or face-to-face because they consider these to be an infringement of their privacy. Although interviewers in such methods ensure that respondents understand the questions and complete the survey properly, respondents may be less frank in their answers as they may feel rushed or influenced by the interviewer.

Online surveys have the advantage of being anonymous and convenient. People can fill in the survey in private, at a time of their choosing, at their own pace, and free from interviewer effects. There is no scope for human error in processing questionnaire data, or reading respondents' handwriting. If an answer has not been selected, the respondent cannot move onto the next question page. Online surveys also prevent respondents from returning to earlier questions at the end of a survey and changing their responses, influenced by the content of later questions.

Online surveys can be criticised for being biased towards the wealthier in society and those more technologically-minded. However, internet access has now become affordable, even for low-income households. Moreover one would expect the less technologically minded to be older members of the population, yet in the raw (unweighted) data those aged 55 and over were over-represented.

With online surveys there is a danger that respondents randomly select answers without reading the questions in order to complete surveys as quickly as possible. YouGov occasionally asks respondents classification questions they have answered before to check for consistency, and have found little evidence of this. In this survey, respondents were asked more than one question on a number of themes with the choice of answers switched between negative first and positive first. We do not observe conflicting answers between these questions and so are confident that this criticism does not hold.¹³

A comparison of UK election polls carried out using different research methods since 2001 have shown online polling to be as accurate or better in predicting final election

¹² See YouGov 'Questions & Answers', op cit, n 8, above.

¹³ There is also the suggestion that online surveys are biased towards people who use the internet at work for leisure purposes. We asked respondents the extent to which they agreed with the following statement: 'Using the internet and telephone at work for leisure purposes is not wrong; most people do it, it is almost a perk of the job'. 35 per cent agreed with this statement, whereas 32 per cent disagreed. This result may suggest that the bias described above does not exist among respondents of this survey.

results.¹⁴ Sanders *et al* considered opinion polls covering the 2005 General Election.¹⁵ They found that there were few statistically significant differences between co-efficients generated through a YouGov internet survey and a conventional face-to-face interview method carried out for General Elections since 1963 by the National Centre for Social Research (Natcen).

2. THE SURVEY RESULTS

3.1 Is price-fixing wrong?

To ensure balanced and unbiased results, respondents were mainly presented with various scenarios and were asked to either agree or strongly agree with one of two balanced alternatives. They also had the option to agree with neither, or select ‘don’t know’.¹⁶

To begin with respondents were asked about their shopping preferences:

Table 1: Willingness to Search

SHOPPER A hates shopping around and does not like it when a friend buys the same item as her cheaper in a different shop. She likes prices to be identical in all shops.	
SHOPPER B enjoys shopping around and does not mind her friends sometimes getting a better deal. She likes prices to be different between shops.	
Are you more like Shopper A or Shopper B?	%
Like Shopper A (of which strongly)	18 (6)
Like Shopper B (of which strongly)	66 (19)
Neither Shopper A nor Shopper B	14
Don’t know	3

Clearly respondents prefer prices to be different between shops and enjoy shopping around, even if they sometimes fail to locate the lowest price.

Respondents were then asked the first price-fixing question to gauge the extent to which they understand the harmful effects of collusion on price. The term ‘fixing

¹⁴ See *The Economist* <<http://www.economist.com/media/pdf/YGrecord.pdf>>; P Kellner, op cit, n 9; DM Reiner, ‘2006 EPRG Public Opinion Survey on Energy Security: Policy Preferences and Personal Behaviour’ (2006) Judge Business School, University of Cambridge, unpublished paper, available at: <<http://www.electricitypolicy.org.uk/pubs/wp/eprg0706.pdf>>

¹⁵ D Sanders et al, ‘Does Mode Matter for Modelling Political Choice? Evidence From the 2005 British Election Study’ (2007) *Political Analysis* 15 (Autumn).

¹⁶ The ordering of the questions was the same for all respondents. The sequence was designed to limit the effect of earlier questions biasing responses to later questions. Except where otherwise stated, questions were asked to all respondents.

prices' was not employed in this first question to test whether it held negative connotations that would bias responses.

Table 2: Price-Fixing I

Imagine the owners of three corner shops in your area meet once a month to agree on what prices to charge for groceries.	
SHOPPER A believes that this is good for their customers because it ensures similar prices and saves them the hassle of searching each shop for the lowest price.	
SHOPPER B believes that this is bad for their customers because it will result in much higher prices.	
Which shopper do you most agree with?	%
Agree with Shopper A (of which strongly)	17 (4)
Agree with Shopper B (of which strongly)	69 (25)
Neither Shopper A nor Shopper B	12
Don't know	3

The results indicate a strong understanding among respondents that when competitors collude in setting prices, they will look to inflate those prices in order to increase their collective profits to the detriment of their customers.

However when presented with a situation of market sharing where a wide geographic distribution of competitors yields higher prices, but also convenience, a clear majority of respondents demonstrated a willingness to accept this trade-off. This may indicate that where forms of collusion other than price-fixing bring some benefit to consumers, they are more likely to be acceptable.

Table 3: Market Sharing & Convenience

At the beginning of summer, the ice cream sellers in a seaside resort get together and agree where to park their ice cream vans. This ensures they are well spread out from one another.	
TOURIST A believes that this is bad for their customers because each ice cream van will charge much higher prices when situated away from their competitors.	
TOURIST B believes this is good for their customers because they would rather have less distance to walk in order to buy an ice cream, even if that means paying more.	
Which tourist do you most agree with?	%
Agree with Tourist A (of which strongly)	26 (9)
Agree with Tourist B (of which strongly)	43 (9)

Neither Tourist A nor Tourist B	27
Don't know	4

Respondents were then introduced to the term 'fixing prices' and asked whether they believed this to be a harmful practice that should be punished, or a harmless practice that should not.

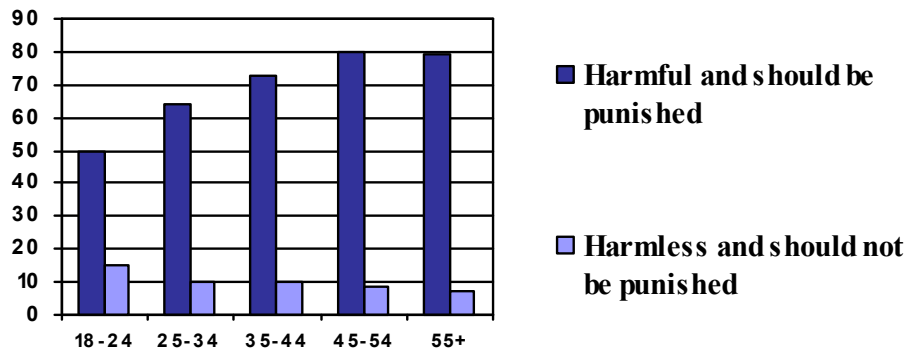
Table 4: Price-Fixing II

<i>The next scenario is about 'fixing prices'. This is when competing businesses agree on what prices they will each charge.</i>	
CITIZEN A believes that 'fixing prices' is a harmless business practice, that businesses should be free to set prices how they want and that such practice should not be punished.	
CITIZEN B believes that 'fixing prices' is harmful to customers, that each business should set its own price independently, and that such practice should be punished.	
Which citizen do you most agree with?	%
Agree with Citizen A (of which strongly)	9 (2)
Agree with Citizen B (of which strongly)	73 (37)
Neither Citizen A nor Citizen B	14
Don't know	5

A majority of respondents recognise that price-fixing is harmful and feel it should be punished. The proportion of negative responses to this question is 4 per cent higher than in the first price-fixing question. This difference may be due to the general nature of this question, as compared to the specific businesses example presented in the first question (corner shops). It may reflect a better understanding of the subject following the introductory questions. Responses may also be affected slightly by the term 'price-fixing'.

Education and newspaper readership appears to have little impact on attitudes towards price-fixing; suggesting that these two mediums are poor at disseminating information about its effects, current cartel laws, and prosecutions in the UK. On the other hand, age seems to have a big impact with only 50 per cent of 18-24s feeling price-fixing is harmful and should be punished, compared to at least 79 per cent of 45s and over (Fig. 5). This suggests that an important source of knowledge about price-fixing may be experience as a consumer.

Fig. 5: Age



Figures 6-8 illustrate attitudes according to certain demographic characteristics. It is observed throughout the survey that men have more hardened attitudes to price-fixing than women. 80 per cent of men think it is harmful and should be punished, compared to only 65 per cent of women (Fig. 6). There is a positive relationship between hardened attitudes and wealth, possibly because of greater spending power (Fig. 7). There is a negative relationship with managerial responsibility (Fig. 8). This is perhaps puzzling given that top-level management should have better knowledge about competition law than anyone else within a firm. However it may be that some managers are influenced by the possibility of crisis cartels, which are discussed later in this paper.

Fig. 6: Gender

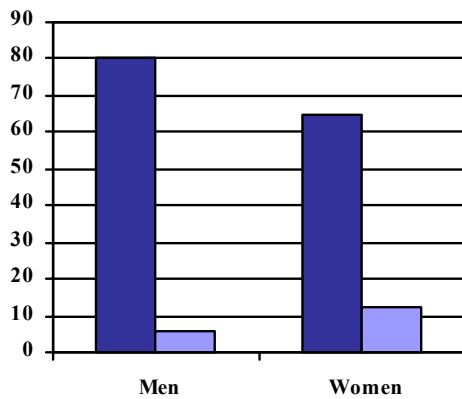


Fig. 7: Social Grade / Wealth

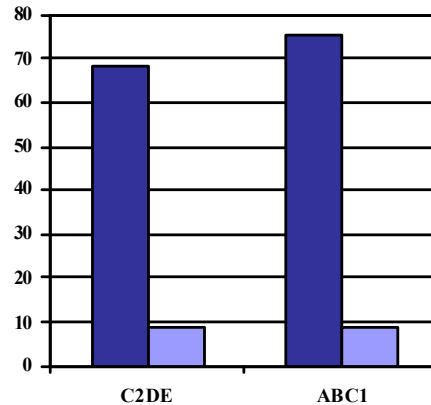
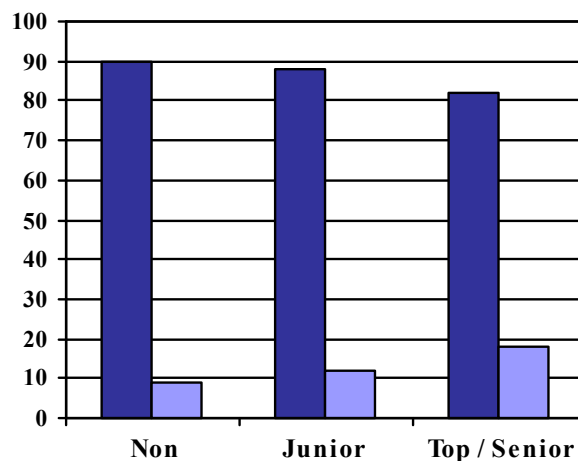


Fig. 8: Managerial Responsibility



3.2 Appropriate punishment for firms

The results in Table 4 confirm strong public support for punishing price-fixing behaviour, but do not tell us how severe the act of price-fixing is perceived to be. At no point in this survey was it revealed to respondents whether price-fixing is illegal in the UK or how it is punishable. All respondents except those who felt price-fixing is harmless (1,110 respondents) were asked a series of questions designed to gauge what they felt is the appropriate punishment for price-fixing. Respondents were presented with a range of punishments which businesses could face for such behaviour and were asked to select which (if any) they felt should apply.

Table 9: Punishment for Firms*

Five large businesses agree to fix prices so that their customers are charged more than would be the case if they acted independently, and so that each will earn extra profit...	
If each of these BUSINESSES were to be punished, which, if any, of the following do you think each of these businesses should face?	%
Public naming and shaming	68
Compensation to over-charged customers	56
Fine equal to the extra profits made	17¹⁷
Fine greater than the extra profits made	48
Other	4
Don't know	6
None of these/No punishment	2

* Those who agreed with Citizen B (who believed that 'fixing prices' is harmful to customers) or were undecided/did not know

The main sanction imposed by competition authorities in the UK and EC is administrative fines. There appears to be substantial public support for imposing fines on price-fixing firms. Interestingly the support is far stronger for fines that exceed the extra profits earned through the cartel, rather than fines proportionate to those profits. A weak majority believe that these firms should be made to compensate affected customers. The sanction with the strongest support is public naming and shaming. Consumers made aware of a firm's anti-competitive behaviour may make efforts to take their business elsewhere. However sanctions aimed at affecting a firm's reputation faces two problems. First, most cartels prosecuted by the European Commission in the last decade concern upstream markets where the immediate victims of price-fixing are other firms purchasing goods. These firms may simply pass on the higher prices to final consumers. Second, the very characteristics that make price-fixing possible (few firms

¹⁷ The results have been adjusted so that those respondents who selected both 'fine equal to' and 'fine greater than' the extra profits made, are classed as having selected only the latter.

in the industry, barriers to entry, low substitutability of the good produced) also mean that buyers have little choice but to continue purchasing from these firms post-collusion, regardless of how low their opinion of them becomes.

3.3 Appropriate punishment for individuals

Table 10: Punishment for Individuals*

The decision to fix prices is usually made by a number of INDIVIDUALS within a business...	
In addition to the punishment (if any) you stated businesses should receive, if each of the INDIVIDUALS in a business were to be punished, which, if any, of the following do you think each of these individuals should face?	%
Public naming and shaming	55
A ban from holding senior managerial positions in businesses	48
A personal fine	42
Imprisonment	11
Other	2
Don't know	9
None of these/No punishment	5

* Those who agreed with Citizen B (who believed that 'fixing prices' is harmful to customers) or were undecided/did not know

The vast majority of respondents who felt firms should be punished for price-fixing behaviour also felt that the individuals responsible within those businesses should be punished. Bans from holding senior managerial positions and personal fines both have significant public support. The most popular sanction again proved to be public naming and shaming. Table 11 indicates that it is generally the same people who believe that firms and individuals should face public naming and shaming, rather than just one or the other.

Table 11: Public Naming & Shaming Comparison

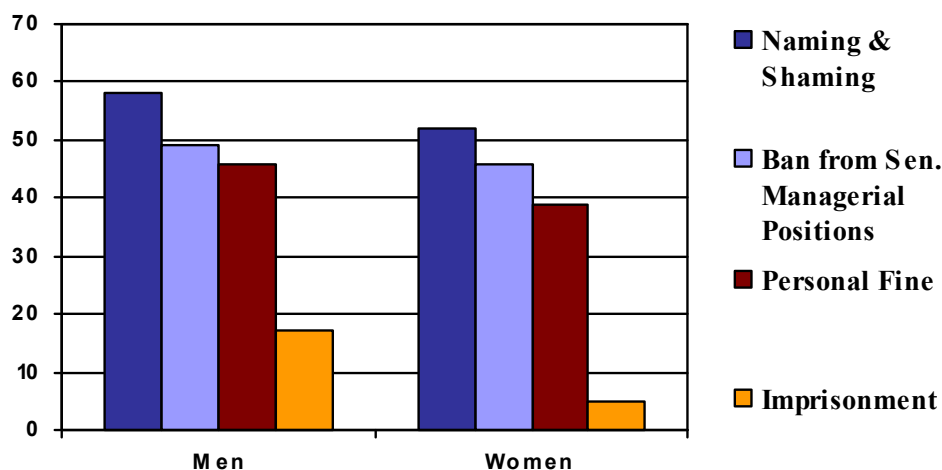
Public Naming & Shaming	Individuals		
	%	YES	NO
Firms	YES	50	18
	NO	5	27

It is unclear what effect, if any, the public naming and shaming of individuals has. Many of these individuals may otherwise be considered 'decent' members of their

community.¹⁸ If their actions are known within their industries, and firms worry about reputation, then these individuals may find it difficult to seek employment.

The results in Tables 10 and 11 may reflect how the perceived personality behind the wrongdoing will always be first and foremost the firm, rather than the individual. A significant divergence of opinion between men and women is again observed:

Fig. 12: Appropriate Punishment – Gender



3.4 Significance for the UK criminal cartel offence

The survey reveals very weak public support for the imprisonment of individuals who have committed price-fixing offences; with only one in ten people (11 per cent) feeling it is appropriate (Table 10). This has strong implications for the criminal offence set out in Part 6 of the Enterprise Act 2002. By virtue of s.188-190, an individual is guilty of a criminal offence if he or she ‘dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented’ any of the arrangements defined in s.188(2) relating to at least two undertakings. The penalty is up to five years imprisonment and/or an unlimited fine, and the required standard of dishonesty is that set out in *R v Ghosh*.¹⁹ In order for an individual to be convicted, a jury must determine that:

1. according to the ordinary standards of reasonable and honest people what was done was dishonest. [If it was not dishonest, the test is not satisfied]
2. [and] ... the defendant himself must have realised that what he was doing was by those standards dishonest. (recital 696)

The survey results are also interesting in light of the House of Lords ruling in *Norris v USA*.²⁰ The US unsuccessfully attempted to extradite the former chairman of Morgan

¹⁸ See for example character references presented in mitigation for JP Lambe following his guilty plea in the *Irish Heating Oil Case*: ‘€4.4m fuel price-fixer gets a €15,000 fine’, *The Irish Independent*, 7 Mar 2006, available at: <http://www.independent.ie/national-news/44m-fuel-pricefixer-gets-a-15000-fine-106337.html>

¹⁹ [1982] 2 ALL ER 689.

²⁰ *Norris v Government of the United States of America and others* [2008] UKHL 16.

Crucible, who is alleged to have played a central role in the price-fixing of carbon products during the 1990s. The alleged conduct occurred before the 2002 Act came into force, and so the US could not rely on the cartel offence to satisfy the dual-criminality requirement of the Extradition Act 2003. Instead, they argued that price fixing constituted the common law crime of conspiracy to defraud at the material time. Conspiracy to defraud hinges on the same standard of dishonesty as the statutory offence. With reference to the historical tolerance with which English law and successive British governments treated cartels in the past, the Lords ruled that price fixing was not dishonest at that time ‘...unless there were aggravating features such as fraud, misrepresentation, violence, intimidation or inducement of a breach of contract, [cartel] agreements were not actionable or indictable’.²¹

The first convictions under the cartel offence have come almost five years after the cartel offence came into force, and have been induced by a US plea bargain. Under this arrangement, the individuals involved in the marine hose cartel – who had already admitted guilt and negotiated prison sentences in the US – agreed to plead guilty to the UK offence in lieu of serving the US jail sentences.²² When the first ‘original’ prosecution comes about, there is no doubt that the Office of Fair Trading (OFT) or the Serious Fraud Office (SFO) will produce evidence that the individual tried to hide cartel meetings, or that they knew such behaviour was illegal, in order to prove dishonesty. However dishonesty is first and foremost an objective judgement, and will be influenced by jurists’ preconceptions about the act of price-fixing and its severity. According to *Norris v USA*, secret price fixing was not dishonest prior to the introduction of the cartel offence – indeed one of the motivations behind criminalisation, was hardening of attitudes towards practices such as price fixing.²³ All respondents in the survey were asked whether they felt price-fixing is dishonest:

Table 13: Dishonesty

	%
Dishonest (of which strongly)	63 (25)
Not Dishonest (of which strongly)	21 (2)
Neither	11
Don’t know	5

Approximately six in every ten Britons (63 per cent) believe price-fixing is dishonest, but only one in four strongly hold that belief. Two in every ten (21 per cent) believe it

²¹ *Ibid*, at 17.

²² OFT Press Release, ‘Three imprisoned in first OFT criminal prosecution for bid-rigging’ (11 June 2008); OFT Press Release, ‘OFT brings criminal charges in international bid rigging, price fixing and market allocation cartel’ (19 December 2007); S D Hammond, ‘Recent developments, trends, and milestones in the Antitrust Division’s criminal enforcement program’, unpublished paper, presented at 56th Annual Spring Meeting, ABA Section of Antitrust Law, Washington DC, 26 March 2008 at 18-19.

²³ A Hammond & R Penrose, ‘The Proposed Criminalisation of Cartels in the UK’, a report prepared for the Office of Fair Trading (November 2001), [2002] UKCLR 97 at 2.5-2.6.

is not dishonest. This figure is lower than one would expect given that the overwhelming majority of respondents do recognise that price-fixing is wrong (Table 4). Figures 14 and 15 confirm effects of age and sex identified earlier in this paper.

Fig. 14: Dishonesty – Age

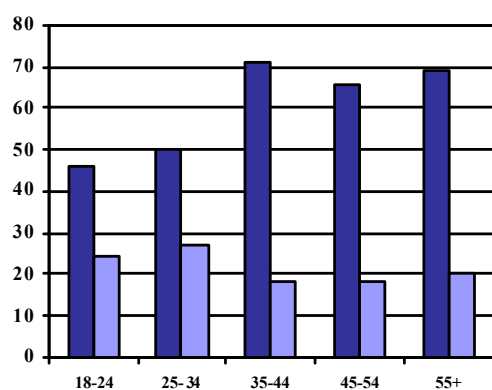
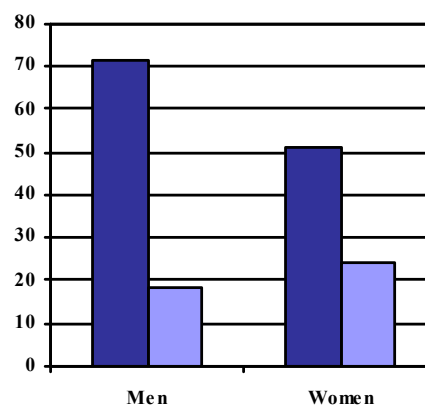


Fig. 15: Dishonesty – Gender



■ Dishonest □ Not Dishonest

The results may reflect insufficient knowledge about the nature of price-fixing, its harmful effects and the laws which ban such behaviour. This lack of knowledge should be remedied in the course of a trial. However, it may also be that the dishonesty test is not well suited to the cartel offence. Its origins are in cases concerning theft, the effects and nature of which may be a lot clearer to people. By contrast, individuals may pay a cartel inflated price for a product but still objectively feel that price was fair. There can also be cases (although unusual) where price fixing and the restriction of output will have positive effects and can be justified by efficiency arguments under Article 81(3) EC.²⁴

We asked respondents the following open question, which meant that they could enter any answer they wished.

Table 16: Equivalence

What other practice and/or behaviour do you think 'fixing prices' is comparable to – in terms of how GOOD or BAD you consider it to be? ²⁵	%
Don't Know	65²⁶
Fraud	8
Theft	7
Other ²⁷	20

²⁴ 'Guidelines on the application of Article 81(3) of the Treaty', OJ 2004, C101/46; *REIMS II* 1999/687, OJ 1999, L275/17.

²⁵ The responses to this question have been classified manually by Stephan (not YouGov) and so there may be some human error.

²⁶ This does not include blank answers. Respondents chose to enter DK.

Only seven per cent of respondents felt that price-fixing is comparable to theft. Eight per cent felt it was comparable to fraud. A strong majority clearly had trouble relating it to any other illegal act with which they were familiar.

3.5 When price-fixing should be punished

Table 17: When Punishment Should Occur*

WHEN do you think businesses and individuals should be punished for agreeing to fix prices?	%
Whenever price-fixing has occurred, even if prices have not gone up	56
Only if prices have gone up	24
Only if prices have gone up by at least a fifth	6
Other	2
Don't know	11
None of these	2

* Those who agreed with Citizen B (who believed that 'fixing prices' is harmful to customers) or were undecided/did not know

A majority of those who support punishment believe it should be imposed whenever price-fixing has occurred, even if prices have not gone up. Many cartels occur as a result of crisis in an industry and only succeed in reducing the speed with which prices are falling, rather than achieving a price increase.²⁸ For the purposes of deterrence it is also important that all such agreements are punished regardless of whether they are implemented or effective.²⁹

However some economists, most notably Richard Posner,³⁰ contend that cartels should only be punished if they succeed in raising prices. Rather than imposing punishments only on cartel infringements that have an effect, competition law generally focuses on the intention to fix prices, regardless of whether this actually has an impact on prices. It is for this reason that tacit collusion cannot be punished.³¹ Posner argues that while

²⁷ All other responses including a small number of incoherent inputs.

²⁸ See Stephan, op cit, n 1.

²⁹ See M Motta, *Competition Policy*, Cambridge, CUP, 2004 at 185-190.

³⁰ RA Posner, *Antitrust Law*, 2nd ed, Chicago, UCP, 2001 at Chapter 3.

³¹ Where prices increase as a result of collusion between competitors, without an explicit agreement existing between them. This is usually observed in oligopolistic markets where there are few competitors. 'Tacit collusion' can also be described as 'coordinated effects' and 'conscious parallelism'; The European Commission famously had a decision in such a case annulled by the European Court of Justice. In *Wood Pulp (A Ahlström Oy v Commission* [1993] 4 CMLR 407), the Commission argued that price announcements (purportedly used as a signalling tool) constituted an infringement of Article 81 EC. The case showed that alleged collusive behaviour, short of an explicit agreement, can easily be doubted using different economic arguments. These can usually explain the observed behaviour as something other than tacit collusion. The Commission is unlikely to attempt such a case again as it would need to anticipate and rebut all such possible arguments at appeal.

competition authorities' limited resources are being employed to punish failed cartels, more serious successful price-fixing goes unpunished and undetected because overt communication must be proved. He suggests that an effects-based economic approach should be employed instead.³²

3.6 Exceptions to price-fixing laws

Many cartels are formed as a reaction to crises in an industry, such as long-term decline, or new competition from another part of the world.³³ It can be argued that such collusive agreements have the protection of employment as one of their aims. There is a question of whether cartels conceived with such motivations should be treated any differently to cartels formed purely out of greed. A firm's ability to pay is taken into consideration as a mitigating circumstance when the European Commission calculates fines.³⁴ If such firms are undergoing financial difficulties there are strong implications for loss of employment within the Community. Arguments of virtuous intentions by cartelists could also jeopardise a conviction under the criminal offence, as this would suggest the individual could not have realised that what they were doing was dishonest according to the standards of 'reasonable and honest people'.³⁵

We asked respondents who felt price-fixing should be punished whether there should be any exceptional circumstances. This was an open question; respondents were free to enter any answer they wished.

Table 18: Situations Where there Should be No Punishment*

Can you think of a situation where you feel fixing prices should NOT be punished? ³⁶	%
None	49
Don't Know	34
Where it benefits consumers / lowers prices	8
Where it protects employment or small businesses	2
Other ³⁷	7

* Those who agreed with Citizen B (who believed that 'fixing prices' is harmful to customers) or were undecided/did not know

³² See Posner, *op cit*, n 30, at 69-93.

³³ See Stephan, *op cit*, n 1.

³⁴ A Stephan, 'The Bankruptcy Wildcard in Cartel Cases' [2006] *Journal of Business Law* 511-534.

³⁵ A MacCulloch, 'Honesty, Morality and the Cartel Offence' [2007] *ECLR* 355-363.

³⁶ The responses to this question have been classified manually by Stephan (not YouGov) and so there may be some human error. Respondents were instructed: 'If there is no situation, please type in 'NONE' or if you don't know, please type in 'DK''.

³⁷ All other responses including a small number of incoherent inputs.

The results show limited support for justifications on the basis of benefits to consumers in the style of Article 81(3) EC exemptions. One third of respondents were uncertain.

Later in the survey, we asked all respondents whether factories that formed a cartel to avoid closing down in an area with high unemployment should be exempt from price fixing laws.

Table 19: Crisis Cartels & Protecting Employment

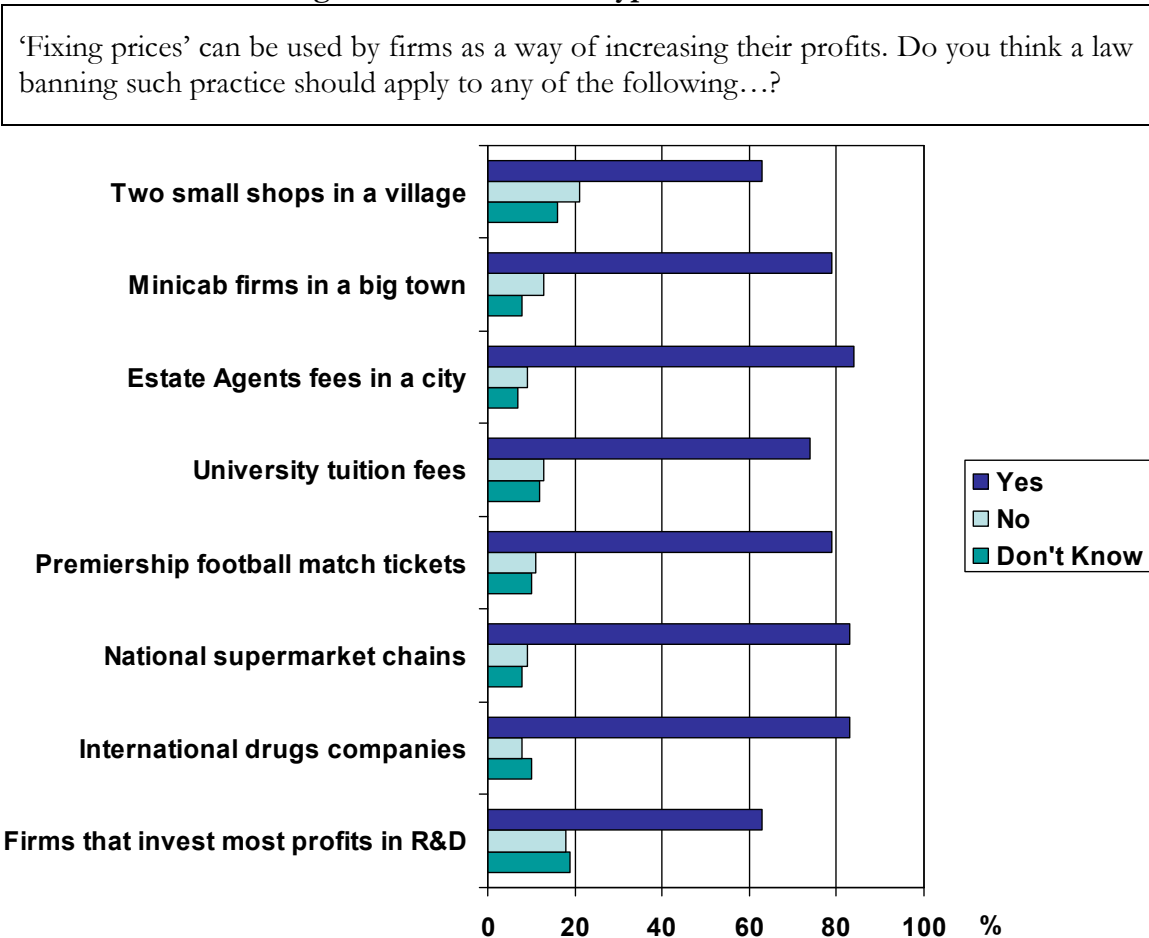
In a country where price-fixing is illegal, three factories are the main employers in a poor region where unemployment is high. In order to avoid closing down, the factory owners agree to fix prices at a higher level than would otherwise be the case.	
POLITICIAN A believes that these factories should be exempt from price-fixing laws in order to protect jobs in this poor region.	
POLITICIAN B believes these factories should face the same consequences as any other business that breaks the law.	
Which politician do you most agree with?	%
Agree with Politician A (of which strongly)	23 (4)
Agree with Politician B (of which strongly)	49 (8)
Neither Politician A nor Politician B	17
Don't know	11

The proportion of respondents against an exemption remained the same. Presented with a specific scenario, around 20 per cent of those unsure in the open question above supported an exemption. Support for protecting employment in this situation is significant; but perhaps a lot lower than one would expect. These results may signal respondents' greater acceptance of job mobility and declining sympathy towards failing companies.³⁸ It is reasonable to speculate that public opinion in other EU countries such as France may be far more sympathetic to concerns over loss of employment. The effects of age and sex are consistent with earlier results presented in this paper. Education, managerial responsibility and newspaper readership are less significant.

One might think that public support for price-fixing laws only extends to large scale infringements, or those committed by industries enjoying substantial profit. To test this, all respondents were asked whether price-fixing should be banned for various businesses.

³⁸ For example, this was reflected in the surprisingly subdued public reaction to the downfall of MG-Rover in 2005; See generally: BBC News 'MG Rover Collapse' available at: <http://news.bbc.co.uk/1/hi/in_depth/business/2005/mg_rover/default.stm>

Fig. 20: Different Size/Types of Businesses



Support for an exemption to punishing price fixing is weak even for two small shops in a village, or firms that invest most of their profits in research and development. Respondents were particularly unforgiving when it came to pharmaceutical companies, estate agents and supermarkets.

The results presented in this section should give competition authorities greater courage in imposing fines on firms that accurately reflect the infringement they have committed, and should not be side-tracked by concerns over employment or the nature of the infringing business. In Britain at least, the public largely feel that firms should face the same consequences, regardless of the motivation behind price-fixing or their circumstances.

3.7 Attitudes towards leniency programmes

Cartel agreements are secretive in nature and pursuing them through investigations alone is a very costly and ineffective method. Competition authorities have come to strongly rely on leniency programmes. These typically provide immunity from fines to the first firm to self-report an infringement to the authority and disclose information about the other participants. The European Commission first adopted its leniency

programme in 1996. It was reformed in 2002 and again in 2006.³⁹ The UK adopted a leniency programme under the Competition Act 1998.⁴⁰

All respondents were asked whether granting immunity in order to prosecute a cartel that would not otherwise have been detected is justifiable:

Table 21: Immunity under a Leniency Programme

Five large businesses agree to fix prices in a country where this is illegal. The manager of one of these businesses reports the agreement to the authorities in return for a guarantee that they and their business will not be punished. The four other businesses are fined heavily. All five were equally guilty, but none would have been punished had the manager not come forward.	
To what extent do you agree or disagree that it was RIGHT for the authorities to give a guarantee against punishment to one guilty business in order to catch the other four?	%
Agree (of which strongly)	37 (6)
Disagree (of which strongly)	38 (12)
Neither agree nor disagree	17
Don't know	8

The survey reveals weak but significant support for leniency programmes. For many there is something unsavoury about allowing a guilty party to walk away free. The greater the punishment faced by those firms beaten to the immunity 'prize', the more unsavoury it becomes. However, it is this stark difference that also makes leniency programmes effective in uncovering infringements.

In this respect, competition authorities may be faced with a challenge. They are trying to strengthen people's perception of how bad price-fixing is by using highly emotive and moral language.⁴¹ However, as people's perception of cartels hardens, public support for leniency programmes is likely to weaken further. The worse they are perceived to be, the more objectionable letting one go unpunished becomes. Yet such programmes lie at the heart of effective cartel enforcement mechanisms. It may even be that their presence will act as an obstruction to strengthening negative perceptions of cartels. The message sent out may be: if some price-fixers are given immunity then it surely cannot be as bad as theft or fraud? This danger was highlighted in August 2007, following the OFT's announcement of a £121.5 million on British Airways for the fixing of fuel surcharges. Virgin (the other party to the infringement) received

³⁹ 'Commission Notice on Immunity from fines and reduction of fines in cartel cases' OJ 2006, C298/17.

⁴⁰ See 'OFT's Guidance as to the appropriate amount of a penalty' 2004 available at <http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of423.pdf>; and 'Leniency in cartel cases' available at <http://www.of.gov.uk/shared_of/business_leaflets/ca98_mini_guides/of436.pdf>

⁴¹ See discussion in Harding, op cit, n 5, at 183.

immunity, but was criticised for failing to offer the kind of public apologies repeatedly made by the chief executive of British Airways. The following day, the OFT found itself having to defend its leniency programme to the press.⁴²

3.8 Willingness to report price-fixing behaviour

Apart from leniency programmes, competition authorities also rely on complaints to better direct their investigations into cartel agreements. The most obvious source of complaints is the customers of colluding firms, be they final consumers or other businesses. However many cartels are aware of this danger and conduct their collusive behaviour with caution. Prices may rise over long periods of time, justified by purported increases in cost or demand. Cartels may also choose to raise prices, not through price-fixing, but instead through market sharing and output restriction.

The individuals best placed to report cartel behaviour may be the employees of the colluding firms. In the US, the Department of Justice (Antitrust Division) will sometimes enter into plea bargains with individuals involved in collusion, pitting them against their employer in obtaining cooperation. There may also be great potential for the reporting of infringements by individuals not directly involved in price-fixing, but who are aware that it is occurring within their firm. One would expect internal compliance programmes to have mechanisms in place which can be utilised by such individuals. However many firms do not have competition law compliance programmes in place, and there may be reluctance to come forward for fear of adverse consequences internally. We tested respondents' willingness to report their employer's anticompetitive behaviour:

Table 22: Willingness to Report Employer

Six people work for a large business they know to be involved in fixing prices in a country where this is illegal. Each considers whether to report their employer's illegal practice to the authorities. Which employee is most likely to reflect your own actions in this situation?	%
EMPLOYEE A will not report it because they believe price-fixing should not be illegal.	2
EMPLOYEE B immediately reports this practice because it is illegal.	20
EMPLOYEE C will report it only if they can remain anonymous.	49
EMPLOYEE D will report it only if they can remain anonymous and are given a reward equivalent to a month's wages.	2
EMPLOYEE E will report it only if they can remain anonymous and are given a reward equivalent to a year's wages.	4

⁴² For example, R Sunderland, 'OFT defends 'snitch' policy', The Observer, 5 August 2007.

EMPLOYEE F will not report it because they fear there is too much at stake; they worry they may lose their job.	14
None of them	2
Don't know	7

These results reveal that the majority of respondents would only consider reporting price-fixing if they (at the very least) could be guaranteed anonymity. A significant proportion would not report an infringement, fearing the consequences even where an offer of anonymity and a reward of a year's wages is available. The proportion of people unwilling to report even in return for a reward may very well be under-represented in this survey. When asked if they would hypothetically report a breach of the law, it is easier for respondents to answer yes. A survey question cannot capture the emotional pressures and potential consequences that would exist in such a situation, many of which are unforeseeable. The responses above suggest that competition authorities should have clear mechanisms in place guaranteeing anonymity to potential whistle blowers within a colluding firm.

3.9 Attitudes towards private enforcement

The European Commission and OFT are making efforts to encourage private actions for damages in cartel cases. These can take the form of original actions in cases where an infringement has not been prosecuted by a competition authority. More commonly they take the form of follow-on suits subsequent to the finding of an infringement through public enforcement.⁴³ Respondents were asked whether they felt compensating customers who have been over-charged by price-fixing is more important than imposing deterrent sanctions on infringing firms:

Table 23: Compensation*

Which of these do you consider to be MORE important?	%
Making sure businesses compensate the customers who have paid higher prices as a result of their price-fixing	14
Imposing a punishment on those businesses that is high enough to make others think twice before fixing prices in the future	38
Both are equally important	42

⁴³ See the European Commission's, 'White Paper on damages actions for breach of EC antitrust rules' (Apr 2008) available at: <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf> and Green Paper 'Actions for damages' (Dec 2005) available at: <http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/index_en.html>; see also OFT Discussion Paper 'Private actions in competition law: effective redress for consumers and business' (April 2007), available at: <http://www.of.gov.uk/shared_of/reports/comp_policy/of916.pdf>.

	Don't know	4
	None of these	2

* Those who agreed with Citizen B (who believed that 'fixing prices' is harmful to customers) or were undecided/did not know

Respondents placed greater importance on the imposition of punishment by a competition authority than on ensuring those 'injured' by price-fixing are compensated. The results in this question are consistent with those in Table 10 where 56 per cent of those supporting punishment believed that firms should be made to compensate over-charged customers. Some may simply not consider price-fixing to be serious enough to warrant payments of compensation. Others may recognise how the effects of price-fixing can be diffuse, with the extra cost only representing a small proportion of a final consumer's income. The results may also suggest that people expect the competition authority to compel firms into compensating their customers, rather than expecting buyers to embark on the risky and potentially expensive option of suing for damages.

3. CONCLUDING REMARKS

The survey indicates that the majority of Britons (73 per cent) recognise the harmful effects of price-fixing. They understand that colluding competitors will set prices so as to maximise their collective profits to the detriment of their customers. They also recognise the need for such behaviour to be punished, and do not feel that crisis cartels for the protection of employment or small businesses should be exempt. There is a stark divergence throughout the survey between the attitudes of men and women, the former being far less sympathetic towards price-fixing.

However, while there is strong support for significant fines to be imposed on infringing firms, only 11 per cent feel the imprisonment of individuals is appropriate. The dishonesty test in the UK criminal offence was adopted from criminal law, yet only seven per cent of respondents would compare price-fixing to theft, and only eight per cent to fraud. Most fail to draw obvious parallels between price-fixing and more established crimes. Moreover only two in every four people strongly feel price-fixing is dishonest; suggesting that, while a social stigma against such behaviour exists, it is not strong enough to support imprisonment. This may make it hard to secure a conviction under the UK criminal offence. The sanction most favoured by respondents is the naming and shaming of both price-fixing firms and individuals.

These results may reflect a lack of information and public knowledge about the nature of price-fixing, the extent of the harm that it can cause, and the laws and sanctions which are currently in place to tackle it. The fact that education and newspaper readership have little effect on how hardened people's attitudes are to price-fixing suggests that little information is available through these two mediums. By contrast, the fact that attitudes towards price-fixing harden with age suggests that people's understanding of its harmful effects is derived largely through their experience as consumers. More should be done to increase public awareness about the effects of price-fixing, current cartel laws, and prosecutions. The American Antitrust Institute has

produced an educational video called ‘Fair Fight in the Market Place’,⁴⁴ which is about price-fixing, and is specifically targeted to a high school audience. Schools and local television stations throughout the US are being encouraged to show the film. Given the lengthy nature of cartel cases, increasing public awareness can be a difficult task for competition authorities; as demonstrated by the OFT’s £100,000 payment to Morrisons supermarket in settlement of a defamation case.⁴⁵

Public opinion is divided as to whether the use of immunity in leniency programmes is justifiable. With better education and information about the nature of price-fixing, the public may warm to the use of the criminal offence. However there may be an inherent tension when it comes to leniency: the more severe people perceive the crime of price-fixing to be, the more unsavoury the prospect of granting immunity to an infringing firm may become.

Should they become aware that their employer is involved in price-fixing most respondents show great reluctance to report the infringement *per se*. 14 per cent of respondents would not report the infringement even in return for a reward equivalent to a year’s wages. Competition authorities need to provide clear mechanisms guaranteeing anonymity to whistle-blowing employees as nearly half of respondents would only report if they could rely on such a guarantee.

In relation to private enforcement, respondents generally consider public enforcement to be more important than ensuring compensation is paid to ‘injured’ customers. Indeed, the responses can be read to indicate that people expect the competition authority to impose compensation as a sanction on infringing firms, rather than seeking damages through the courts. This may go some way towards explaining why private enforcement in the UK appears to be weak in comparison to certain other jurisdictions. It also raises questions as to how much time and public money competition authorities should be investing to encourage private actions for damages.

This paper has given an overview of the survey results pending more detailed analysis. This is likely to concentrate on the demographic characteristics of those more hardened to price-fixing and more accepting of enforcement mechanisms; further implications for the UK criminal cartel offence; and a more detailed look at the significance for private enforcement in cartel cases. Plans for future research include the prospect of carrying out a similar survey in a different EU Member State to observe what difference culture, among other factors, has on attitudes to price-fixing and cartel policy.

⁴⁴ See ‘AAI Film FAIR FIGHT IN THE MARKET PLACE is Going National’: <<http://www.antitrustinstitute.org/Archives/fff.ashx>>

⁴⁵ ‘OFT pays damages to Morrisons over dairy price-fixing claim’, The Times, 23 April 2008.