

Survey of Public Attitudes to Price Fixing in the UK, Germany, Italy and the USA

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Abstract

This paper reports the results of four surveys gauging public attitudes to price fixing and cartel enforcement in the United Kingdom, Germany, Italy and the United States. A previous study was carried out in the UK in 2007. The results show a robust understanding that price fixing is harmful and popular support for enforcement and punishment. In particular, there is a strong expectation that businesses should calculate their prices independently of each other. Overall there is surprising uniformity in opinion between the four jurisdictions despite significant differences in culture and levels of enforcement. Support for the imprisonment of cartelists has significantly increased in the UK since 2007, but the results suggest price-fixing is still viewed as being less serious than traditional crime and some other forms of corporate wrongdoing.

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1. Introduction

This paper reports key results from a study of public attitudes to price fixing and cartel enforcement in the United Kingdom, Germany, Italy and the United States. This builds on an original study carried out in the UK in 2007² and allows us to compare attitudes in these four quite different jurisdictions. The purpose of the study is fourfold. First, to determine the extent to which ordinary members of the public in each jurisdiction recognise cartel conduct is harmful and their expectations of how competing businesses should determine prices. Second, to understand how wrongful cartel conduct is believed to be (especially in

¹ UEA Law School and Centre for Competition Policy, University of East Anglia, Norwich NR4 7TJ; Email: a.stephan@uea.ac.uk. The support of the Economic and Social Research Council (UK) is gratefully acknowledged. The author would like to thank everybody who contributed to the survey design and piloting; in particular to Antje Kreutzmann-Gallasch and Francesca Vantaggito for translating the questionnaires into German and Italian and to all the other members of CCP. I am also very grateful to Caron Beaton-Wells, Ariel Ezrachi, Chris Harding, Alison Jones, Ioannis Lianos, Angus MacCulloch, Daniel Sokol, Florian Wagner-von-Papp, Jennifer Wardhaugh, Bruce Wardhaugh and Peter Whelan for their wonderful comments and conversations.

² A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' [2008] 5(1) Comp. Law Rev. pp. 123-145.

comparison with other forms of wrongdoing) and which forms of punishment are considered appropriate; Third, to gauge the extent to which enforcement tools such as leniency and settlement are considered justified and legitimate; Lastly, to examine how similar attitudes are between the four jurisdictions and draw conclusions on the extent to which greater levels of enforcement have impacted on popular attitudes.

Much of the existing literature on cartel enforcement is theoretical, focusing either on normative aspects of the law or economic modelling of specific collusive and enforcement scenarios.³ The existing empirical literature draws its conclusions almost entirely from information contained in the formal cartel decisions of the European Commission and those of national competition authorities.⁴ Studies have also been carried out in relation to private enforcement.⁵ In addition to the 2007 study mentioned earlier, Caron Beaton-Wells and Christine Parker *et al* have carried out some of the most notable empirical work. This included a comprehensive Australian study of work involving the public, enforcement officials, competition lawyers and members of the business community.⁶

Empirical research of public attitudes is of particular significance for two reasons. Firstly, it informs compliance. Individuals' willingness to desist from price-fixing behaviour and to report it is strongly influenced by whether they recognise the harm it causes and the extent to which they feel it is objectionable. Indeed, desistence is more likely where there is a perception that others consider the behaviour to be wrong and that there is some sort of social stigma attached to it. Significant lapses in knowledge, understanding or perception

³ Notable examples from law include: C Harding and J Joshua, *Regulating Cartels in Europe* (OUP 2010); P Whelan, "Cartel criminalization and the challenge of 'moral wrongfulness'" (2013) *OJLS* 33(2), pp535-561; B Wardhaugh, 'A normative approach to the criminalization of cartel activity' (2012) *Legal Studies* 32(3), pp369-395; C Beaton-Wells and F Haines, 'Ambiguities in Criminalising Cartels: A Political Economy' (2012) *Brit. J. Criminol.* 52, pp 953-973; W Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) *World Competition* 29(2), pp. 183-208.

⁴ Examples include: A Stephan, 'An Empirical Assessment of the European Leniency Notice' (2009) *Journal of Competition Law & Economics* 5(3), pp537-561; M Levenstein and V Y Suslow, 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for US and EU fining policies' (2006) *The Antitrust Bulletin* 51(4) 983; JE Harrington, *How Do Cartels Operate?* (Now Publishers 2006); J Connor, *Global Price Fixing* 2nd Ed (Springer: Berlin 2007).

⁵ For example: BJ Rodger, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004 – Part I' (2006) *ECLR* 241.

⁶ There are various outputs relating to these studies. See: C Beaton-Wells *et al* 'The Cartel Project: Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement' (2011) University of Melbourne Legal Studies Research Paper No. 519; C Parker and N Stepanenko, 'Compliance and Enforcement Project: Preliminary Research Report' Centre for Competition and Consumer Policy, Regulatory Institutions Network, Australian Competition and Consumer Commission.

may suggest that greater advocacy and public awareness initiatives are necessary. It could also suggest a greater need for compliance training within the business community. Secondly, they are very important to competition authorities. Public support is essential to the long-term legitimacy of competition law, ensuring continued political support and adequate funding for the agency.⁷ Popular recognition that cartel practices are harmful and should be punished also lends support to enforcement and the use of more powerful sanctions. In particular, competition authorities will be keen to know whether there is support for continued increases in corporate fines and the use of leniency and settlement policies.

Competition authorities will also want to know whether there is popular support for sanctions against individuals. While these sanctions can be either criminal or administrative, there does appear to be a global movement towards punishing individuals in addition to firms.⁸ Many jurisdictions have decided to criminalise hard-core cartel conduct, placing it alongside society's most serious and objectionable acts. This is controversial because cartels were historically treated with a great measure of ambivalence until quite recently and because the use of criminal law against corporate wrongdoing is viewed by some as an unjustifiable form of extreme regulatory control.⁹ The UK experience of defining a cartel offence around *dishonesty* has highlighted conflicts in the way cartel practices may be perceived by jurors; in particular where it can be argued the conduct was motivated by factors other than greed.¹⁰ Weak public attitudes or indications that cartel conduct is not viewed as criminal may make it less likely that juries or judges will convict those responsible.

The comparative nature of this study adds an aspect not looked at before: whether different cultures, sanctions and levels of enforcement have resulted in diverging public attitudes. It may be helpful to explain here the choice of comparator jurisdictions subject to this study. The United States was included because it has by far the most active antitrust enforcement

⁷ For example: C Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) *Law & Society Review* 40(3), 491.

⁸ A Stephan, 'Four Key Challenges to the Successful Criminalisation of Cartel Laws' (2014) *Journal of Antitrust Enforcement* 2(2) pp 305-332.

⁹ For an excellent analysis and discussion of this see A Jones and R Williams, 'The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?' (2014) *Journal of Antitrust Enforcement* 2(1), pp. 100-125.

¹⁰ A Stephan, 'How Dishonesty Killed the Cartel Offence' (2011) *Crim.L.R.* Vol. 6, pp. 446-455.

regime in the world. For some decades now US authorities have imprisoned thousands of American and foreign nationals for their involvement in cartel conduct. Even the rest of the world put together does not come close to this in terms of criminal enforcement. In the US, all hard-core cartel conduct is treated as criminal and this applies to individuals and undertakings equally. This is very different to the UK where undertakings are subject to only a civil prohibition and where the enforcement regime, under the Competition Act 1998 and Enterprise Act 2002, is comparatively young.

This author was also very keen to compare the UK with other Member States of the European Union. Such a comparison is significant because the most serious breaches of competition law transcend the borders of European Member States. International cartels are best dealt with at the Community level and there has been a steady movement towards the convergence of national competition laws – especially since the introduction of the Modernisation Regulation (Regulation 1/2003). The choice of Germany and Italy was partly determined by the strong concentration of native German and Italian speakers within the University of East Anglia’s Centre for Competition Policy (CCP). This allowed us to accurately translate the questionnaires and conduct piloting. In contrast to some other EU States, these two also have well established online survey industries. Germany has a very different legal tradition to the UK and the US and a distinctive cartel enforcement regime. Cartel practices are dealt with as civil infringements, with the availability of fines against undertakings and individuals, while bid rigging is a crime and is prosecuted separately.¹¹ Italy has a civil enforcement regime similar to that employed at the Community level, with the availability of some criminal sanctions. It represents another distinctive jurisdiction in terms of socio-legal culture and enforcement.

¹¹ See F Wagner-von Papp, ‘What If All Bid Riggers Went to Prison and Nobody Noticed?’ – Criminal Antitrust Law Enforcement in Germany’ in C Beaton-Wells and A Ezrachi, eds, *Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Hart Publishing 2011), pp. 157-182.

2. Methodology

The surveys were carried out online, between 27 June – 15 July 2014, by *YouGov Plc* in the UK, Germany and US, and in cooperation with *Research Now* in Italy.¹² The sample was selected from online panels and drawn to be representative of the general population in each country according to a list of demographic characteristics.¹³ YouGov panel members come from a 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 also employ specialist recruitment agencies to contact specific groups in order to ensure a wide demographic spread.

In conducting the survey, YouGov first selected a representative sub-group from their panel and then emailed them, inviting them to participate by clicking on an internet link. In order to complete the survey they were required to log in, provide their password and their consent. 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 with a particular interest or strong opinion on the survey subject matter.

The sample sizes in the present study were: 2,509 (UK); 2,648 (Germany); 2,521 (Italy); and 2,913 (USA). When the fieldwork is complete, the raw data was adjusted using weights, to compensate for demographic groups that are underrepresented.¹⁴ This is to ensure the published results properly reflect the population they seek to measure. These adjustments include past vote in general elections and newspaper readership, to ensure that the results are *attitudinally* as well as demographically representative.

¹² YouGov Plc UK, 50 Featherstone Street, London EC1Y 8RT; YouGov USA, 285 Hamilton Avenue, Suite 200, Palo Alto, California 94301, USA; YouGov Germany, Gustav-Heinemann-Ulfer 72, 50968 Cologne, Germany; Research Now, 160 Queen Victoria Street, London EC4V 4BF. Fieldwork was carried out between 27 June – 8 July in the UK, 2-7 July 2014 in the US, 4-14 July 2014 in Germany and 5-15 July 2014 in Italy.

¹³ YouGov have around 280,000 panel members in the UK. Demographic characteristics include: 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, income, religion and ethnicity.

¹⁴ For more details see YouGov methodology. Available: <https://yougov.co.uk/about/panel-methodology/>. See also YouGov Questions and Answers. Available: <https://yougov.co.uk/account/faq/>

As with the 2007 study¹⁵, the questions were designed with the help of faculty members, researchers and doctoral candidates within CCP. Piloting was conducted both within CCP and using external individuals with no knowledge of competition policy, including university students. A wider group of antitrust academics beyond UEA were also contacted and given an opportunity to comment on the content and question wording. With the help of American academics, some minor changes were made to the language employed in the US survey to avoid confusion. The German and Italian questionnaires were translated within CCP and underwent some limited further piloting.

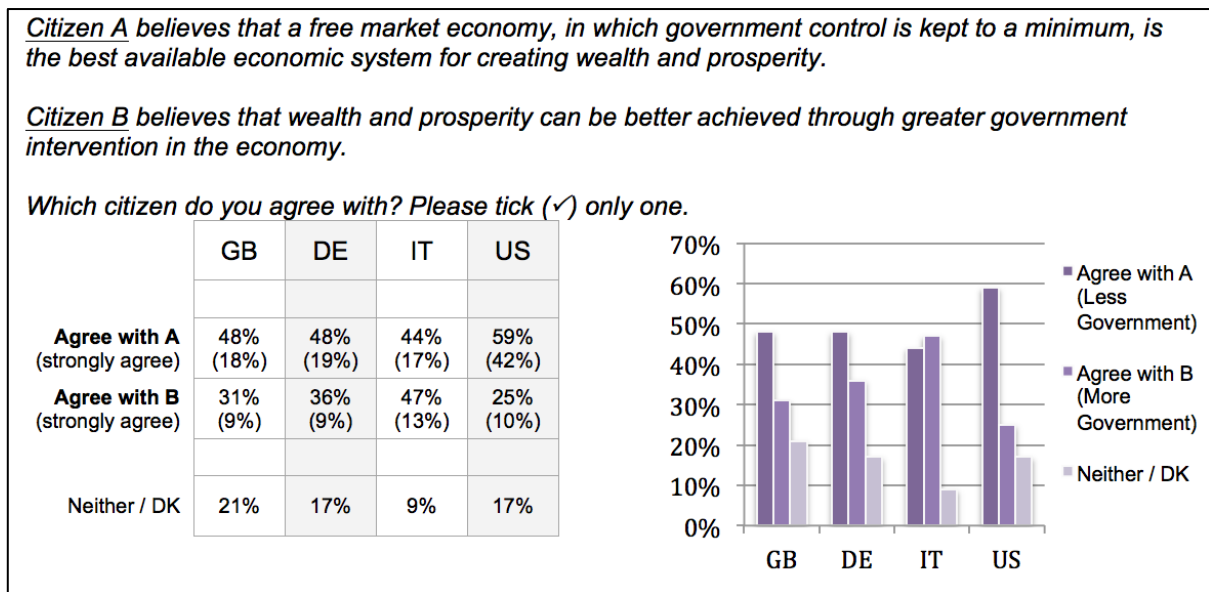
The questionnaires provided respondents with no information about whether cartel conduct was in fact illegal in their respective jurisdictions or the actual sanctions available. The aim was to gauge what people actually thought of the practice and how (if at all) it should be dealt with. The majority of questions provided two balanced alternatives that respondents could either agree with or reject altogether. There were 20 questions in total, 9 of which were only put to those respondents who felt price fixing was harmful and should be punished, based on their responses to the earlier questions.

¹⁵ Stephan (n 2)

3. Attitudes to the free market and trustworthiness of business

The surveys opened with two general introductory questions about the free market and the trustworthiness of businesses. The first asked respondents about their attitudes to government intervention in markets. This sought to determine differences in the level of faith placed in free market forces.

Table 1 – Government intervention in markets



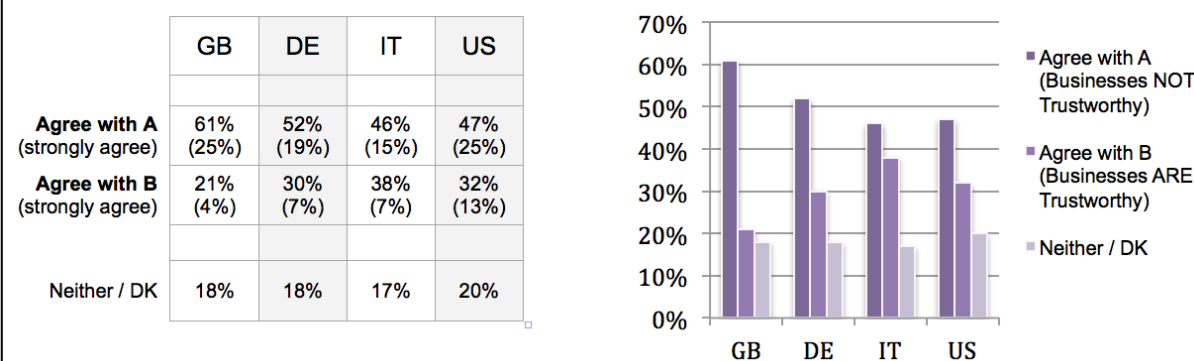
The responses to this first question show differences in culture and perception between the four jurisdictions. Perhaps unsurprisingly, US respondents had the most faith in the free market, preferring minimal government intervention. Attitudes in the UK and Germany were a little more mixed, although still leaning towards less government intervention. By contrast, a greater proportion of Italian respondents believed more government intervention could be beneficial. The second introductory question asked whether respondents trusted the way businesses pursued profit.

Table 2 – Trustworthiness of business community

Citizen A believes that the business community IS NOT trustworthy because firms pursue profits in a manner that largely harms consumers.

Citizen B believes that the business community IS trustworthy because firms pursue profits in a manner that largely benefits consumers.

Which citizen do you agree with? Please tick (✓) only one.

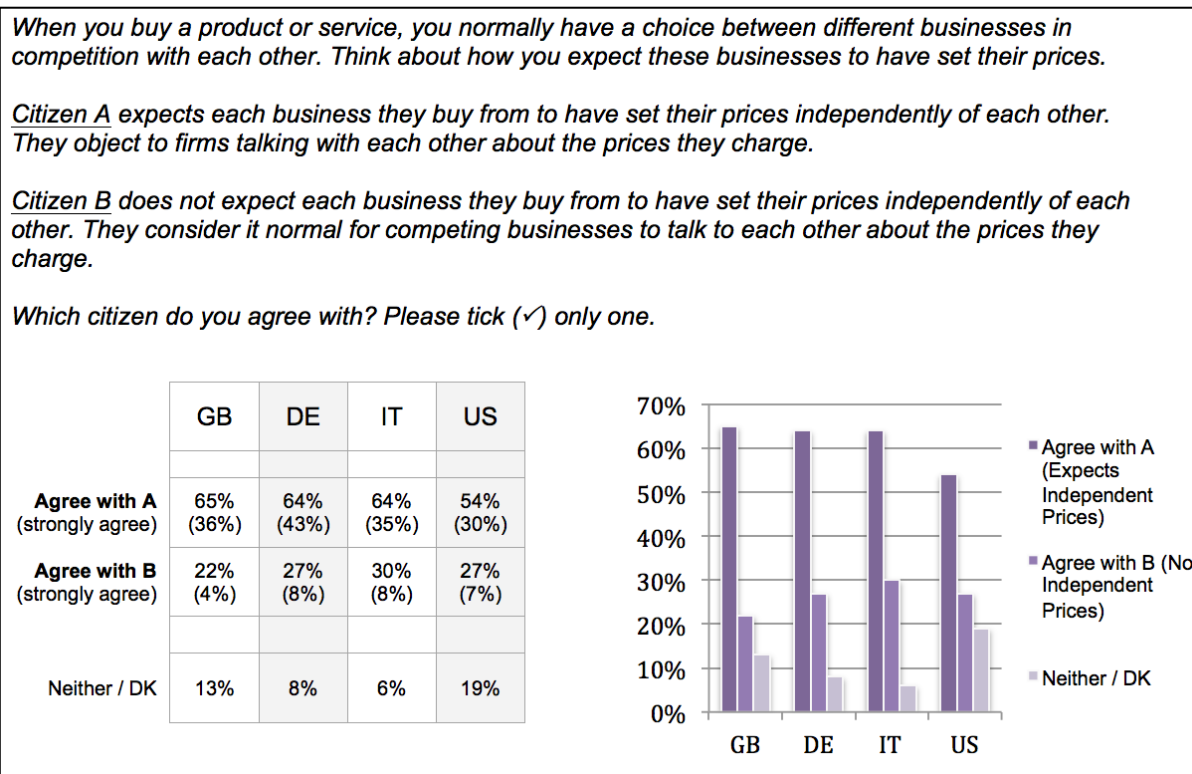


The British were by far the most sceptical here, perhaps because of intense political and media focus on a number of high profile cases of businesses misbehaviour in the years following the financial crisis of 2007, from the miss selling of Payment Protection Insurance to Libor manipulation. Once again we see differences between the four jurisdictions, with a greatest level of trust held by Italians.

4. Do members of the public expect competitive prices?

This is a very important question to consider. Competition law is built on the idea that firms should make independent decisions about pricing, output and customers. This forces them to compete with each other for business, driving prices down and spurring innovation to the benefit of consumers. Cartel laws seek to detect, punish and deter collusive behaviour that attempts to rob consumers of these benefits. Yet little is known about what consumers actually think about competition and whether, in a liberal free market economy, there is a general presumption that prices on offer in the market are not the result of collusion.

Table 3 – Expectations about how businesses set prices



A clear majority of respondents in each of the four jurisdictions expect the businesses they buy from to have set their prices independently of each other and object to collusion between them. It is important to remember that this question makes no mention of harm; it simply asks what respondents' expectations are. The only surprise is that the expectation of independent prices is weakest in the United States.

This finding is important because cartel sanctions – even those imposed through civil or administrative procedures – are *criminal* in character.¹⁶ They aim not only to redress the wrong but also to punish and deter future cartel conduct. In order for this to be legitimate (especially when using the criminal law), it is important that cartel conduct represents some significant departure from society's expectations of correct behaviour. One possible consequence of a popular presumption of independent pricing is that collusive prices (especially where efforts are made to conceal collusion) amount to a misrepresentation or fraud. This misrepresentation is clear in the case of bid rigging, where firms knowingly submit fake bids or bids they know will not succeed. The very exercise of putting a contract

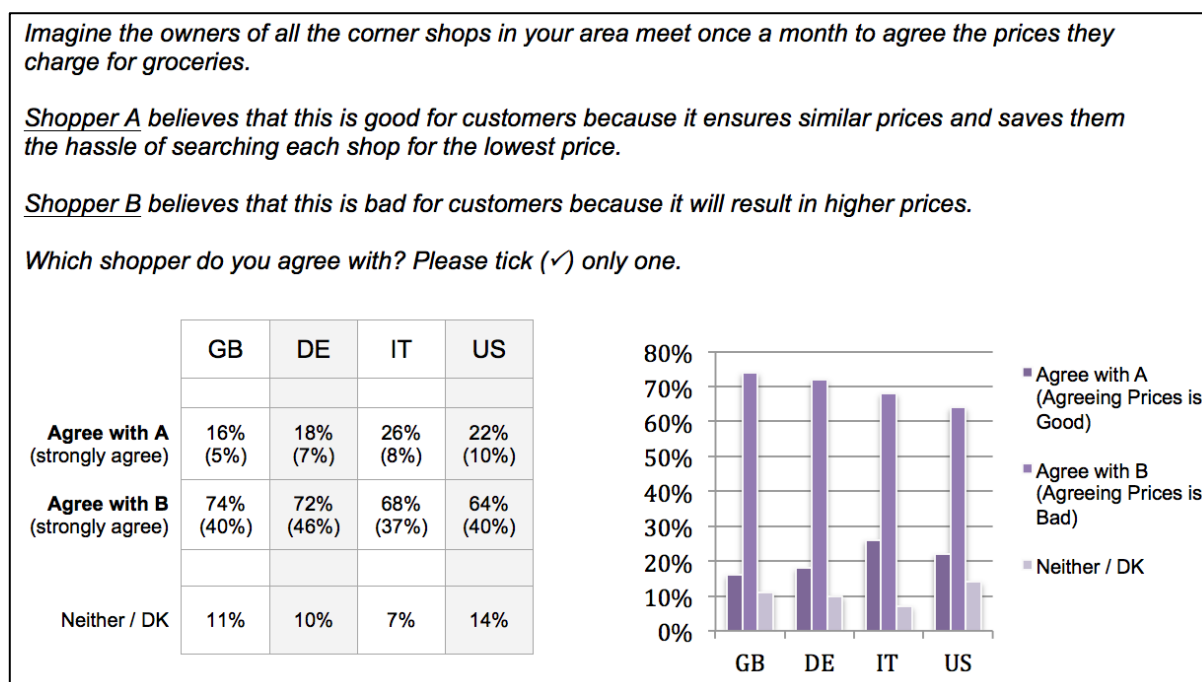
¹⁶ See Wardhaugh (n 3)

out to tender, amounts to a call for competitive independent bids. If consumers expect prices to be independent, then this fraud may also be said to exist in relation to price fixing, output restrictions and market sharing.

4. Is price fixing harmful?

The survey then turned its attention to harm, to see if respondents would recognise that price fixing has negative effects. The first price fixing question gave a scenario of corner shops meeting and agreeing prices.¹⁷ The term ‘price fixing’ was not used in this question. Instead the act of competitors agreeing prices was described in simple terms. The alternative scenarios were also switched so that ‘B’ represented the negative option. This switching of negative and positive between options A and B occurred in different parts of the questionnaire to ensure respondents understood the questions and provided consistent answers throughout. From the results we can see that the respondents did indeed engage with the question.

Table 4 – Price Fixing Question I

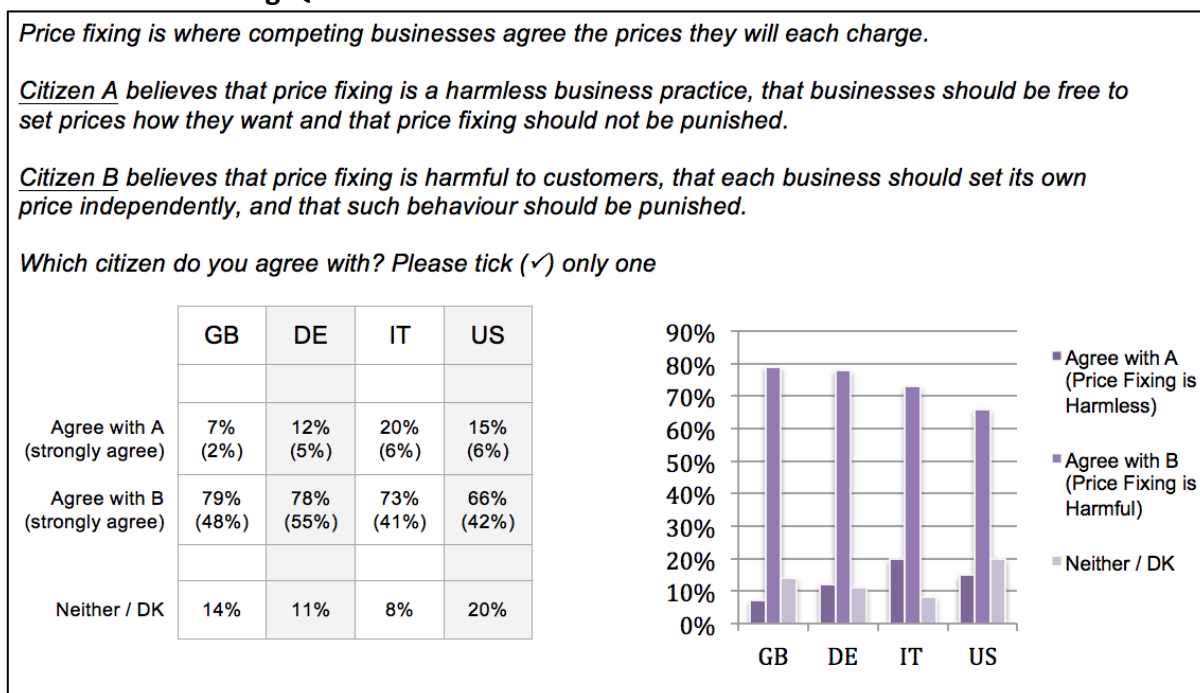


¹⁷ This was changed to ‘grocery stores’ in the US questionnaires and equally appropriate terms were employed in German and Italian.

A strong majority in all four jurisdictions recognised that when competitors meet to discuss prices, this will be bad for customers because it will result in higher prices. Once again, it is perhaps surprising that Americans appear to lag behind Europeans in recognising this. This question was included in the 2007 UK survey, in which 17% of Britons agreed with Shopper A and 69% agreed with Shopper B. That proportion has now increased to 74% suggesting a greater awareness that collusion of this kind will result in higher prices.

The next question introduced respondents to the term ‘price fixing’. The piloting phase of the survey design showed that laypersons did not necessarily associate the term with negative connotations. For example, the term can be used to suggest shops are maintaining their prices and not increasing them, ‘fixing’ low prices. The question provided a simple definition of price fixing and asked respondents whether it is a harmless practice that should not be punished or a harmful practice that should be punished.

Table 5 – Price Fixing Question II



We see a slight increase in the proportion of people who object now that we employ the term ‘price fixing’. Up to this point in the survey we see a strong majority in all four jurisdictions who recognise the harm caused by price fixing and who support enforcement.

This is a healthy endorsement (in principle at least) of competition law, of the enforcement activities of competition authorities and the public money that funds their work. Comparing these results to the 2007 UK survey, we again observe an increase in the proportion of Britons who agree with Citizen B, from 73% to 79% in 2014.

Those respondents who felt price fixing was harmful and should be punished were asked why they held that belief. A number of statements were posed to them:

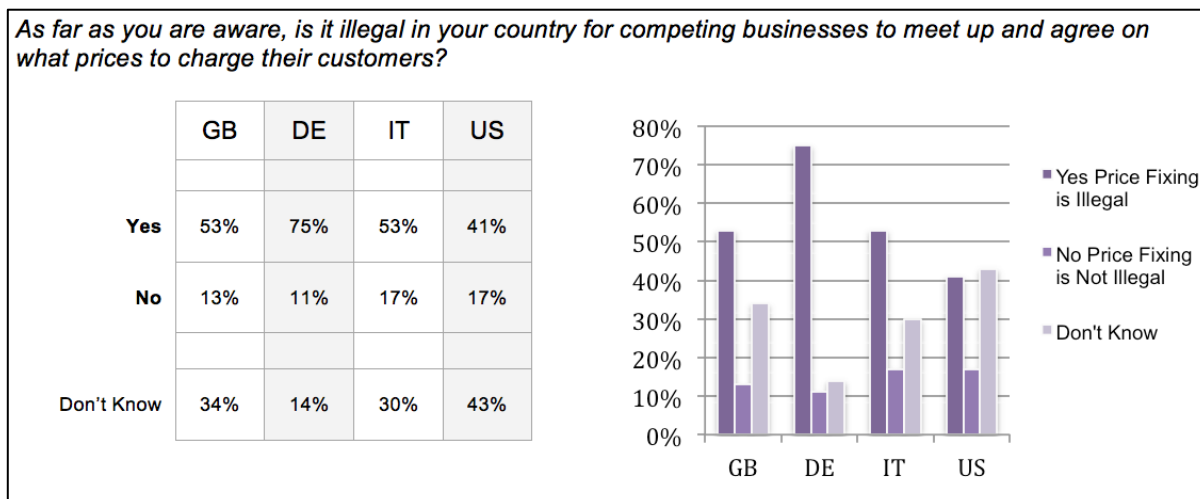
1. *Price fixing results in higher prices*
2. *Price fixing is unethical or immoral*
3. *Price fixing is dishonest*
4. *Price fixing is hidden from consumers*

Looking at the proportion who *strongly* agreed with these statements, the greatest objection among Britons (54%) was the fact the practice is hidden, for Italians (44%) it was that price fixing is unethical or immoral, for Americans (57%) it was dishonest, and for Germans (64%) it was both that it is hidden and dishonest. The significant splits in results between 'somewhat agree' and 'strongly agree' suggest that respondents may not have a strong common sense of why price fixing should be punished. Nevertheless, the overwhelming majority of respondents who felt price fixing should be punished agreed with all four of these statements (to varying extents). It is not possible to make a direct comparison with the dishonesty question contained in the 2007 UK survey because this question took on a different format and was asked to all respondents. Nevertheless, there appears to be a significant increase in the proportion of Britons who feel price fixing is dishonest.

5. Do members of the public think price-fixing is illegal?

As mentioned in the introduction, the questionnaires gave no information about competition policy or the treatment of cartels in law. However, respondents were asked whether they thought price fixing was illegal in their country.

Table 6 – Is Price Fixing illegal in your country?



It is important to point out here that there were a number of high profile cartel cases in Germany over the six-month period immediately preceding the fieldwork. These were widely reported in the German media and involved alleged cartel arrangements in the markets for beer, sausages and in railways.¹⁸ Reporting of these cases in the months leading up to the survey will have raised popular awareness of cartel laws and this perhaps explains why such a high proportion of German respondents knew the practice was illegal. It is likely that these cases will have hardened German respondents' attitudes to cartels in this study.

Germany aside, the results suggest more needs to be done to raise awareness of competition law among members of the public. The share of respondents who thought the practice was legal was fairly low in each jurisdiction, but a significant proportion outside Germany (over 40% in the US) was unsure about the law. This may highlight the need for greater advocacy work, better engagement with the media and more work to encourage businesses to undertake employee compliance training. The results are of particular concern in the UK and US where price fixing is a crime (indeed a felony in the US). The level of confusion among American respondents is especially surprising given the historically high level of US antitrust enforcement; a theme that we pick up on again later in this paper.

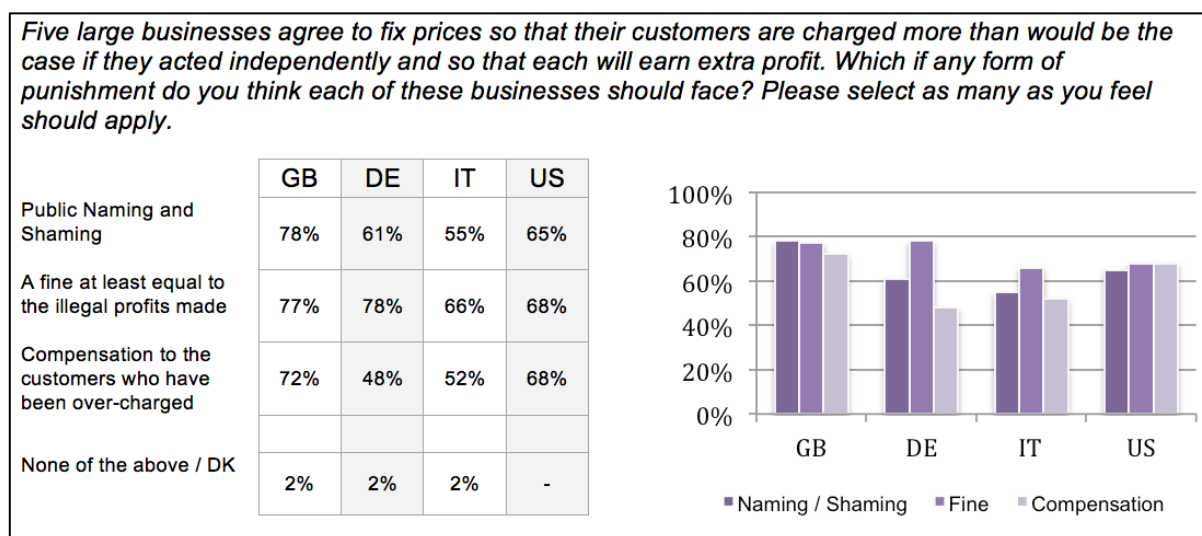
¹⁸ 'Five German brewers fined €106.5m for price-fixing' *Financial Times*, 13 January 2014; 'German sausage cartel caught bangers to rights' *The Guardian*, 15 July 2014; 'German cartel inquiry launched into Deutsche Bahn' *Financial Times*, 30 January 2014.

The UK results are consistent with a recent study prepared for the CMA on UK businesses' understanding of Competition Law, based on a sample of 1,201 interviews.¹⁹ These showed that only just over half of the companies surveyed knew it was illegal for competitors to agree prices, with a third thinking they were allowed to divide customers and less than half unaware that it was illegal to discuss prospective bids with competing bidders.

6. Appropriate sanctions for price-fixing behaviour

The respondents who felt price-fixing was a harmful practice that should be punished were asked which sanctions they felt were appropriate for undertakings and the individuals responsible. They could signal their approval for as many of the sanctions as they wished or for none at all. The first question asked them to consider undertakings.

Table 7 – Support for sanctions against undertakings



Significantly, there is substantial support in all four jurisdictions for the imposition of fines that at least equal the illegal profits earned. The levels of cartel fines have increased significantly in the last two decades, but in Europe they rarely approach anywhere near the

¹⁹ *UK businesses' understanding of Competition Law*, Report prepared for CMA by IFF Research (26 March 2015). Available: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429876/UK_businesses_understanding_of_competition_law_-_report.pdf (accessed 15 July 2015).

10% cap put in place to protect undertakings from bankruptcy.²⁰ As competition law generally imposes a per se type prohibition on hard core cartel conduct, competition authorities do not always make an attempt to estimate the overcharges achieved or indeed the extent to which an arrangement was successfully implemented. However, some economic studies suggest that despite very significant increases, cartel fines have consistently fallen short of the illegal profits that might have been earned from successful cartel arrangements.²¹ This puts into question whether corporate fines alone can really be said to deter future arrangements – especially if prospective cartelists undertake some balancing of their expected gains and costs before engaging in anticompetitive behaviour. In principle at least, there appears to be public support for doing more to ensure sanctions exceed illegal cartel gains.

The picture is a little more mixed when it comes to private enforcement. The stronger support in the two common law jurisdictions perhaps reflects the greater litigation culture there – especially in the US where it appears to be given equal importance to corporate fines. The weaker support in mainland Europe may be seen as vindicating the European Commission’s Directive on actions for damages, in that a cautious approach was taken to promote damage recovery in a way that did not undermine leniency and settlements under public enforcement.²²

Finally, there is support for the public naming and shaming of firms. This also proved popular in the 2007 UK study. In theory, publicising enforcement cases more widely will result in some loss of reputation, as well as achieving educational and deterrent effects. It may also be possible for buyers to reward non-cartel members with future business where they did not control the entire market. However, where an enforcement case does not involve firms that sell a product or service to final consumers, it can be difficult to generate

²⁰ M Hviid and A Stephan, ‘The Graphite Electrodes Cartel: Fines that deter?’ in B Lyons (ed) *Cases in European Competition Policy: the Economic Analysis* (CUP Cambridge, 2009)

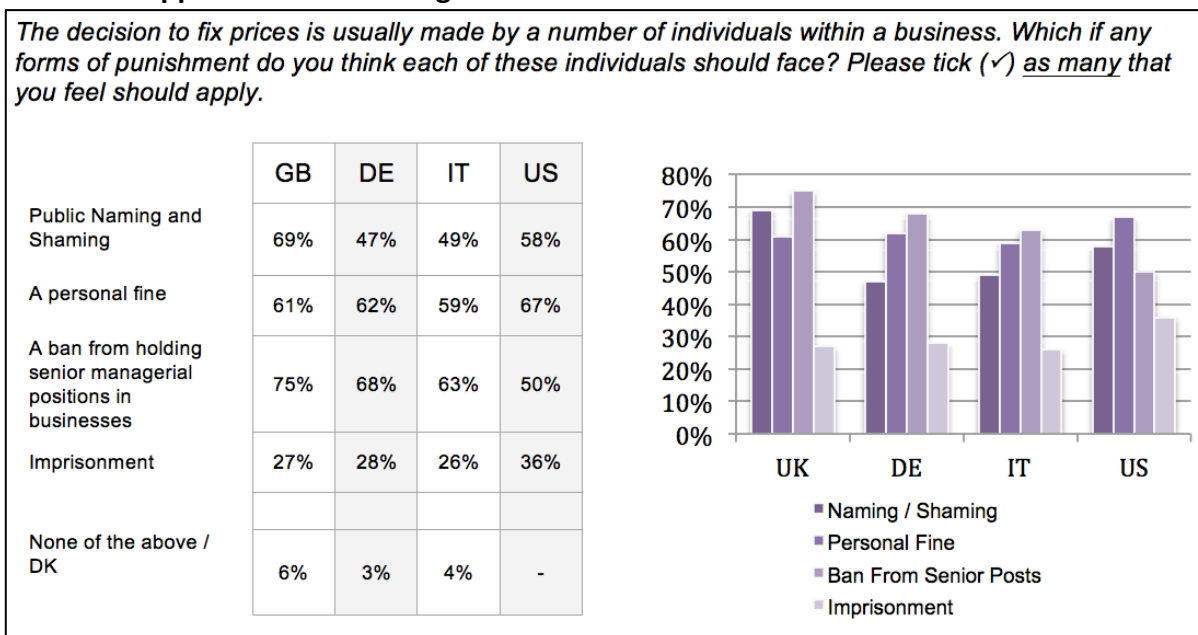
²¹ See in particular, E Combe and C Monnier, ‘Fines against Hard Core Cartels in Europe: The Myth of Over-Enforcement’ (2011) 56 *Antitrust Bull.* 235, and arguments in W Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics* (Kluwer Law International 2002), p39.

²² Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014.

media interest.²³ In addition, the very characteristics that make a cartel possible (high concentration, high barriers to entry and low substitutability) mean buyers quite often have no choice but to continue dealing with a cartel member in the future. However, there is anecdotal evidence that buyers use the prior existence of a cartel to secure more favourable contracts from the infringing firms in the future.²⁴

The study moved on to appropriate sanctions for the individuals involved.

Table 8 – Support for sanctions against individuals



There is strong support for imposing fines on individuals. In the United States it is considered the most appropriate sanction, but in Europe this is second to some form of ban from holding senior managerial positions. As with undertakings, the British are particularly enthusiastic about some form of public naming and shaming too.

The most significant result in this question relates to imprisonment. American respondents were most willing to support imprisonment as an appropriate sanction and this is unsurprising given the strong level of antitrust (and more generally white-collar crime)

²³ A Stephan, 'Cartel Criminalisation: the role of the media in the "battle for hearts and minds"' in C Beaton-Wells and A Ezrachi (eds.) *Criminalising Cartels: Unexplored Dimensions and Unforeseeable Consequences* (Hart Oxford, 2011)

²⁴ In-house lawyers speaking at various competition compliance events have made this suggestion.

enforcement within the United States. Nevertheless, a majority of Americans apparently felt imprisonment was too harsh. The three European jurisdictions provided broadly similar levels of support for imprisonment, even though the UK may be viewed as the only active criminal jurisdiction if we exclude bid-rigging. It would be optimistic to expect an effect of the UK cartel offence on current public opinion, as there have only been three cases to date and the level of media interest has been very limited, except in the failed trial of four British Airways executives in 2010.²⁵ Despite this, the level of support for imprisonment of individuals has increased in the UK from 11 per cent in 2007 to 27 per cent in 2014. We can only speculate as to the cause of this increase, but it may reflect more aggressive attitudes to corporate wrongdoing following the financial crisis and related corporate scandals. The UK increase aside, only a minority of respondents in each of the four jurisdictions felt imprisonment was an appropriate sanction, raising the question of whether there is public support for treating cartel behaviour as a crime.

7. Should price fixing be a crime?

The study included a question that directly asked respondents who felt price fixing should be punished, whether it was serious enough to be treated as a crime. The responses to this question suggested overwhelming support for criminalisation: GB (76%); DE (87%); IT (77%); US (76%). However these responses should be treated with some caution. Although the question was balanced and translated accurately into German and Italian, there is a danger that respondents did not adequately understand that something could be unlawful without being a crime. Upon reflection, more effort should have been made to define the difference between a criminal offence and a civil prohibition. The apparent level of support for criminalisation is not consistent with the relatively weak support for imprisonment, although it is important to point out that crime does not necessarily mean incarceration. For example, driving offences in the UK are dealt with by the criminal law even though they are largely regulatory in purpose.

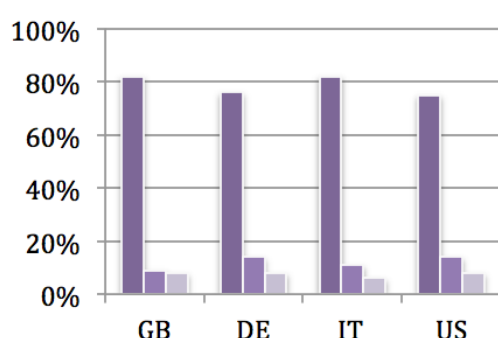
²⁵ See discussion in Stephan (n 10)

To explore further the question of whether there is popular support for cartel conduct to be treated as a crime, we can draw on the results of another question in the survey which asked respondents to think about how serious or objectionable price fixing is *compared to other forms of wrongdoing*. The first set of these might be described as ‘traditional’ crime.

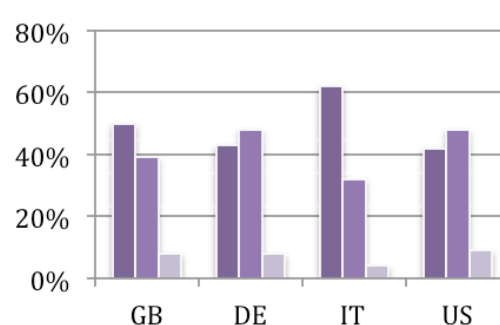
Table 9 – Comparison with ‘traditional’ crime

Thinking about how serious or objectionable price fixing is compared to other forms of wrongdoing, how does the practice compare to...

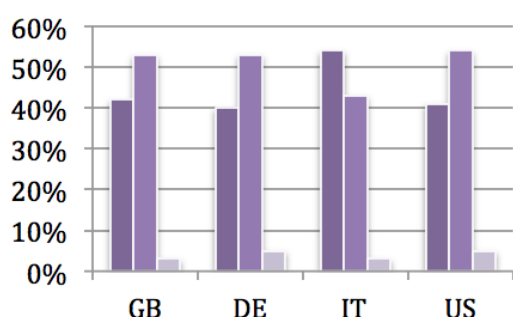
A person physically attacking another person.



Stealing another's property.



Tricking someone into giving their money (fraud).



■ More Serious than Price Fixing
 ■ About the Same
 ■ Less Serious than Price Fixing

The comparison with traditional crime is important. All cartel enforcement, whether criminal or civil, aims to punish existing wrongdoing and deter future breaches of the law. It is arguably always criminal in character by virtue of its punitive purpose, as distinct from a regulation. Competition authorities throughout the world frequently employ language that describes price fixing as a form of theft or fraud, perhaps conscious that the public and the business community do not take cartel practices as seriously as they should.²⁶

²⁶ Perhaps the most famous statement of this kind was by Joel I. Klein, who was Assistant Attorney General of the US Department of Justice Antitrust Division at the time. He asserted that price fixing amounts to ‘theft by well dressed thieves’. JI Klein, ‘The War against International Cartels: Lessons from the Battlefield’ Speech at

Looking at the results in Table 9, it is natural that respondents largely do not feel price fixing is as serious as bodily harm. It would be odd if any type of financial harm were considered more serious than physical harm; however it does not mean that the financial harm should not attract criminal liability. The more pertinent responses are in relation to the traditional property offences. On balance respondents do not consider price fixing to be as serious as theft, but more than 50% of respondents in the UK, Germany and the USA do consider it to be equivalent to a fraud. This is significant because in their minds price fixing has the same qualities of delinquency as the appropriation of money through some misrepresentation or deceit. This is also consistent with the earlier results indicating a presumption that prices should be arrived at by competitors independently of each other. It is notable that Italians are less willing to equate price fixing to fraud and significantly less willing to see parallels with theft.

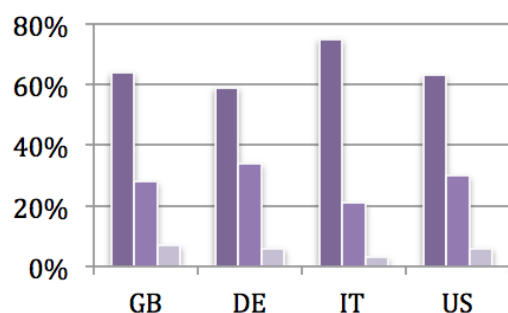
We now turn to comparisons with less established forms of crime and wrongdoing.

the 26th Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, New York, 14 October 1999. Available: <http://www.justice.gov/atr/speech/war-against-international-cartels-lessons-battlefront> (accessed 15 July 2015)

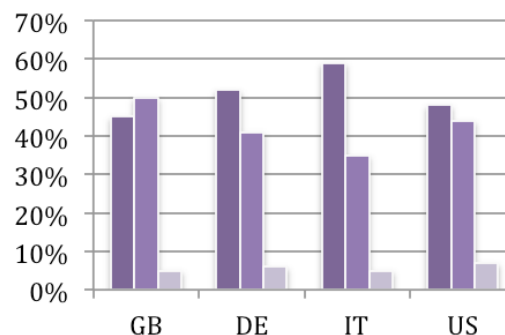
Table 10 – Comparison with ‘non-traditional’ crime and wrongdoing

Thinking about how serious or objectionable price fixing is compared to other forms of wrongdoing, how does the practice compare to...

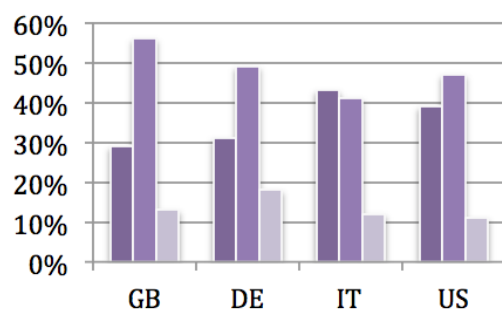
Misleading consumers about the safety of goods.



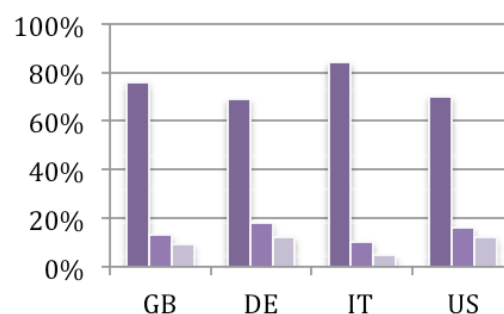
Manipulating accounts to avoid paying tax.



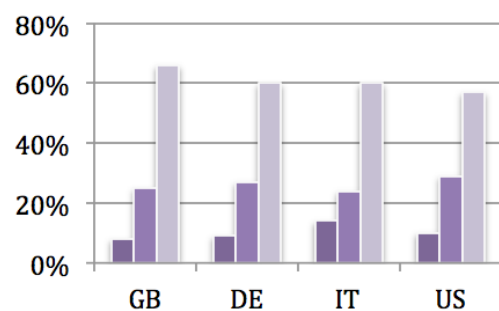
Using insider information in deciding to buy or sell shares.



Driving while under the influence of drink or drugs.



A person illegally downloading music.



■ More Serious than Price Fixing
 ■ About the Same
 ■ Less Serious than Price Fixing

Respondents continued to indicate a stronger objection to activities that pose threats of physical harm, such as misleading consumers about the safety of goods or driving while under the influence of drink or drugs. The remaining results suggest that price fixing generally comes a little lower on the list of activities respondents found objectionable and which potentially should be treated as a crime. Very few respondents across the four jurisdictions felt price fixing was more serious than tax avoidance or insider trading. While both of these activities have more established criminal offences associated with them, it

does suggest that public opinion is comparatively weak when it comes to price fixing. Indeed, it was only the illegal downloading of music that respondents felt was less serious than price fixing. Even there, more than one in five in each jurisdiction felt the two were broadly equivalent.

The results therefore provide a bit of a mixed picture. A significant proportion of respondents do feel price fixing is as serious as fraud and equivalent to other forms of financial crime. Yet attitudes to price fixing are clearly weaker overall, with many feeling the practice is consistently less serious than all the other forms of wrongdoing mentioned in the study, with the exception of copyright infringements. Much of this may be due differences in the level of information available about price-fixing as compared to these other practices.

8. Does secrecy make price fixing more deserving of punishment?

If there is a general presumption that competitors should set their prices independently of each other, it follows that attempts to hide collusion between firms is both a signal of wrongdoing and evidence that those responsible knew what they were doing was wrong. To test whether this was supported by public perceptions, a question on secrecy was put to respondents in each of the four jurisdictions.

Table 11 - Secrecy

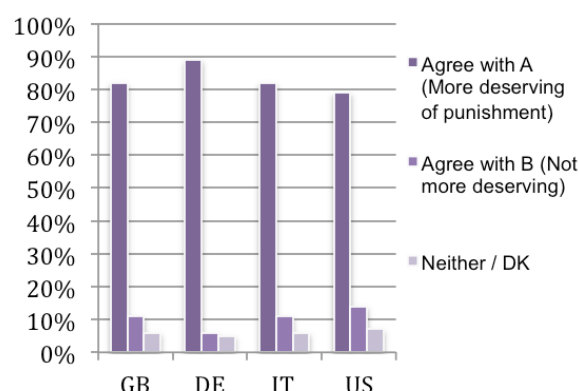
Price fixing is often hidden; the individuals involved in setting prices meet in secret locations, use codenames and make efforts to hide their behaviour from customers, the authorities and others within their firm.

Citizen A believes that secrecy makes price fixing more deserving of punishment because it shows the individuals knew they were engaged in wrongdoing.

Citizen B believes that efforts to hide price fixing are irrelevant to how deserving the conduct is of punishment

Which citizen do you agree with? Please tick (✓) only one

	GB	DE	IT	US
Agree with A (strongly agree)	82% (48%)	89% (66%)	82% (49%)	79% (52%)
Agree with B (strongly agree)	11% (2%)	6% (2%)	11% (2%)	14% (4%)
Neither / DK	6% (2%)	5% (2%)	6% (2%)	7% (4%)



It was necessary to give respondents some explanation of the nature of secrecy in price fixing, so as to avoid any confusion with business confidentiality. In doing so, the question did risk creating a bias towards Citizen A, but it would otherwise have been difficult to ensure respondents fully understood the question. The responses are consistent throughout the four jurisdictions and appear to strongly support the assertion that secrecy makes price fixing more deserving of punishment.

This finding is of particular significance to the United Kingdom, where the criminal cartel offence was recently redesigned around the notion of secrecy. The original offence, under s.188 Enterprise Act 2002, required the prosecution to show individuals had knowingly acted dishonestly according to the standards of reasonable and honest people.²⁷ Dishonesty proved problematic and unpredictable when it came to cartel behaviour, principally because defendants could argue they had acted out of bankruptcy fears or to stabilise the market

²⁷ As set out in *R v Ghosh* [1982] EWCA Crim 2

and therefore were not dishonest.²⁸ The Enterprise and Regulatory Reform Act 2013 removed the requirement of dishonesty and replaced it with a series of carve-outs and defences.²⁹ These apply where a defendant can show they either entered into the cartel arrangements openly or intended to enter into them openly. Criminal liability therefore now lies in knowingly entering into the arrangements and making some effort to hide them from customers and / or the competition authority. We have seen how it is hard to draw any firm conclusions on whether there is public support for cartel conduct to be treated as a crime altogether. However, the results in Table 11 and the earlier (more reliable) findings that members of the public expect competitors to set prices independently of each other, suggest it may be sensible to define a cartel offence around the existence of secrecy.

9. Are leniency and settlement procedures justifiable?

Leniency and direct settlement procedures have become established features of cartel enforcement throughout the world. Leniency in particular is a unique tool that rewards the first cartel member to report their activities with complete immunity from corporate fines and criminal prosecution (where available). In Europe two thirds of cartel cases are uncovered as a result of a leniency application.³⁰ Leniency saves competition authorities the cost of detecting infringements, reduces the cost of gathering evidence and helps ensure cases are completed in good time.

Leniency has been complemented by the use of direct settlement or early resolution procedures. These generally give firms an opportunity to engage in a streamlined procedure that allows them to settle their liability more swiftly in return for some reduction in fine.³¹ The benefit for the competition authority is a faster throughput of cases and fewer challenges to final decisions. In the United States, where cartel enforcement is usually an

²⁸ See in particular arguments in A. MacCulloch, 'Honesty, Morality and the Cartel Offence' (2007) 28(6) ECLR pp. 355-363.

²⁹ A Stephan, 'The UK Cartel Offence: A Purposive Interpretation?' (2014) Crim. L. Rev., Issue 12, pp 879-892.

³⁰ See A Stephan and A Nikpay, 'Leniency Decision-Making from a Corporate Perspective: Complex Realities' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion* (Hart Publishing 2015).

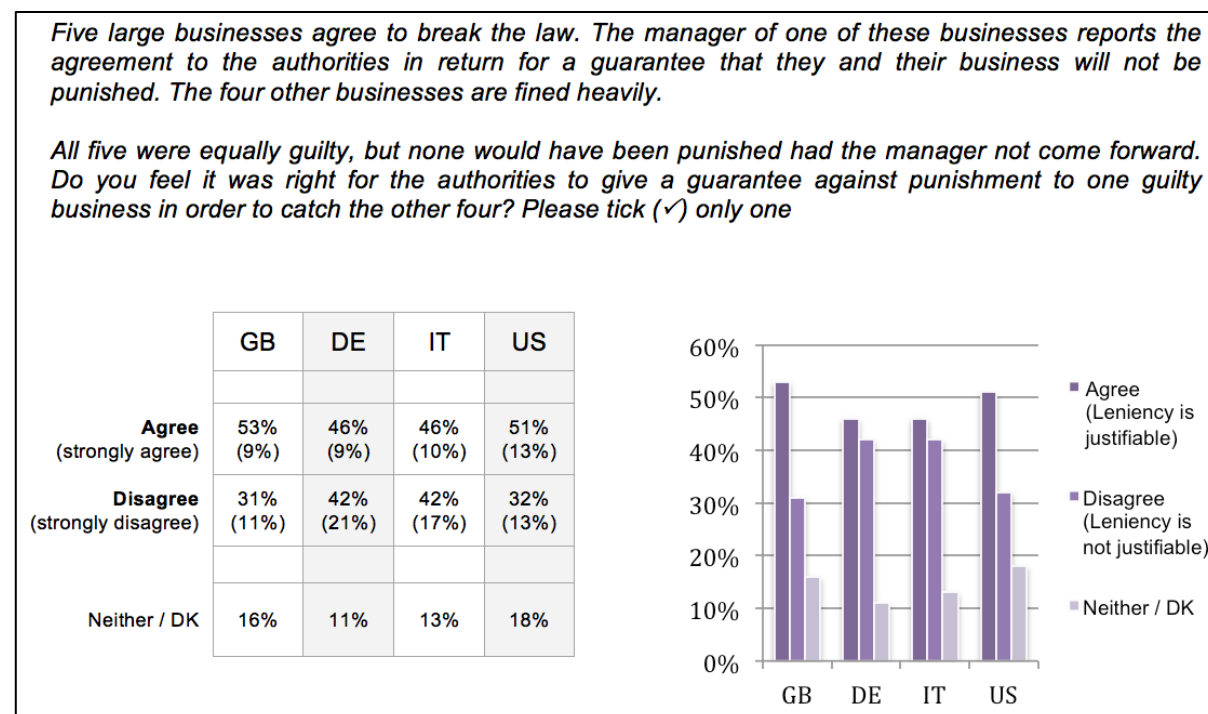
³¹ A Stephan, 'The Direct Settlement of EC Cartel Cases' (July 2009) ICLQ 58(3) pp. 627-654.

entirely criminal procedure, the vast majority of cases are settled by plea bargains. These allow firms and individuals to negotiate and agree their level of punishment in lieu of a criminal trial and with only the formality of court approval.³²

Neither of these tools is without controversy. Leniency allows one party to walk away without punishment, even though they have engaged in an activity that is serious enough to amount to a crime in some jurisdictions. Both leniency and direct settlement also have the effect of reducing the level of sanctions imposed and therefore weakening deterrence. There is even some evidence to suggest firms are using leniency strategically, by only coming forward once the cartel arrangement has failed.³³

The questions relating to leniency and direct settlement were put to all respondents; not just those who felt price fixing should be punished. They were not specific to cartel enforcement and gauged whether these tools were justifiable in general.

Table 12 – Is Leniency Justifiable?

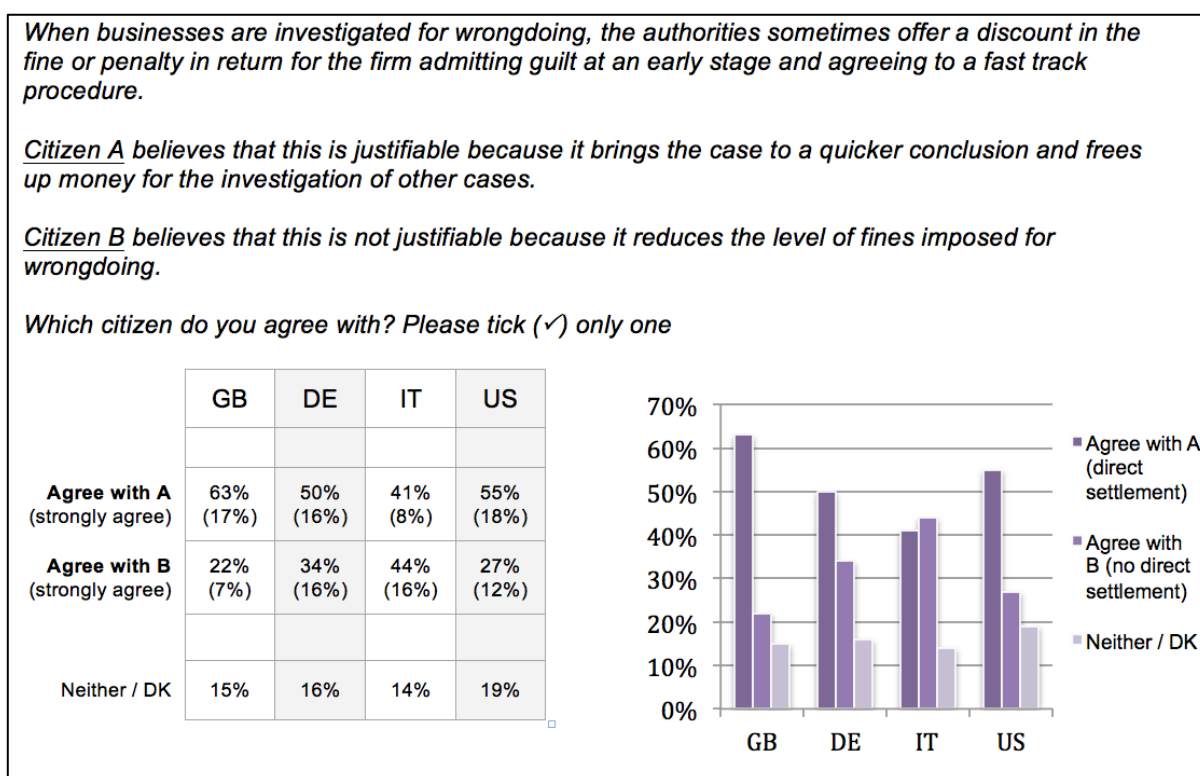


³² For a comparison with the European Settlement Notice see Stephan, Ibid.

³³ Stephan (n 4).

Public opinion appears to be divided on whether it is right to offer immunity to the revealing firm even if not doing so would have meant the infringement going undetected. The UK and the US public appear to be more supportive of leniency. Indeed, opinion in the UK appears to have shifted in favour of leniency since 2007, when 37% agreed and 38% disagreed. The question in the 2007 study related specifically to price fixing and not to businesses breaking the law in general, so some of the increase may be down to the change in focus. However, even in the UK and the US the proportion of individuals who *strongly agreed* with leniency stand at around one in ten. A similar proportion *strongly disagreed* and the responses in Germany and Italy show a pretty even split overall. Leniency may ultimately pose an obstacle to hardening attitudes towards cartel behaviour, because it is difficult to accept that cartel conduct both amounts to a theft or fraud and should be rewarded with an immunity deal whenever the first guilty party steps forward.

Table 13 – Is direct settlement justifiable?



Respondents in the UK, Germany and the US were a little less concerned about the use of direct settlement procedures, even though they result in reduced punishment. Nevertheless, there is significant scepticism; especially in Italy where more respondents felt

direct settlement was not acceptable. The results highlight the need for competition authorities to demonstrate that settlement procedures are helping to enhance the overall effectiveness of enforcement procedures and not simply being used to make their work easier.

10. Public attitudes and corporate compliance

The introduction to this paper identified how public attitudes are important to compliance because of the normative perceptions attached to cartel behaviour and the fact many ordinary members of the public may find themselves in a position to engage in such activity or report it. The survey has established that a clear majority of citizens in each of the four jurisdictions do recognise that price fixing is harmful and should be punished, but what of compliance within the firm? All respondents were asked how they would act if they discovered their managers were involved in an illegal activity that caused financial harm to the customers of their firm.

Table 14 – Whistle blowing

Imagine you work for a company and discover your managers are involved in illegal activity which causes financial (not physical) harm to customers. Others in the firm know what is going on but everyone seems to ignore it. If you report the behaviour it may result in you losing your job.

Which of the following best describes how you would respond in this situation: Please tick (✓) as many as apply



	GB	DE	IT	US
I would not report the activity because I do not want to risk losing my job.	12%	12%	14%	8%
I would not report the activity because it is none of my business.	3%	6%	4%	5%
I would only report the activity if it affected me personally or those close to me.	9%	13%	11%	10%
I would raise the matter internally (with someone other than my managers) before considering whether or not to report the activity to the authorities.	48%	50%	44%	41%
I would immediately report the illegal activity to the authorities.	29%	23%	32%	8%
None of the above.	9%	8%	7%	

The most likely course of action in this scenario is for the individual to raise the matter internally. The level of caution shown by these respondents is quite wise if one considers the experience of reporting wrongdoing to the authorities. The literature on whistle blowers shows that while individuals are willing to help their employer cooperate with the authorities, there are a number of very significant costs and risks associated with individual whistleblowing activity that is not done with the cooperation of the firm. This can have implications for a variety of factors, from future employment prospects to private life and even aspects of personal wellbeing.³⁴ The fact employees may be most likely to report the conduct internally highlights the importance of maintaining compliance programmes, with

³⁴ A Stephan, 'Is the Korean Innovation of Individual Informant Rewards a Viable Detection Tool?' in T Cheng, B Ong and S Marco Colino, eds, *Cartels in Asia* (Kluwer 2015).

the involvement of either an in-house compliance officer or external counsel employed to promote and monitor compliance within the firm. The UK CMA study on businesses' understanding of competition law, suggests that levels of corporate compliance are still low when it comes to small and medium sized businesses.³⁵ The study suggested that 78% of UK businesses had either never heard of competition law or described their familiarity with it as poor. Only 6% had run a competition law training session within the previous year and many gave competition law compliance lower priority than Health and Safety. Only one in five knew cartel practices could lead to imprisonment.

There is a notable divergence in policy between competition authorities when it comes to firms found to have infringed competition law even though they had made serious and comprehensive compliance efforts. The UK's Competition and Markets Authority, for example, offers a 10% discretionary discount where serious compliance efforts were made either before detection or during the period of investigation. The European Commission and US Department of Justice by contrast do not offer an equivalent discount in cartel cases. This issue is subject to debate, with some arguing that the threat of fines alone provides a strong enough incentive for firms to invest in compliance and that failed compliance should not be rewarded.³⁶ Indeed firms with good compliance programmes may also have an advantage in being first through the door of the competition authority and securing immunity. Others suggest that compliance discounts are common in other areas, such as bribery, and that it is unrealistic to expect firms to prevent every infringement. They argue that a modest discount to reward good compliance sends out a positive message and helps encourage businesses to take compliance seriously.³⁷ The question of compliance discounts was put to all respondents.

³⁵ Study prepared for the CMA (n 19)

³⁶ W Wils, 'Antitrust compliance programmes and optimal antitrust enforcement' (2013) *Journal of Antitrust Enforcement* (2013) 1(1) 52-81.

³⁷ D Geradin, 'Antitrust compliance programmes and optimal antitrust enforcement: a reply to Wouter Wils' (2013) *Journal of Antitrust Enforcement* (2013) 1(2) 325-346.

Table 15 – Compliance Discounts

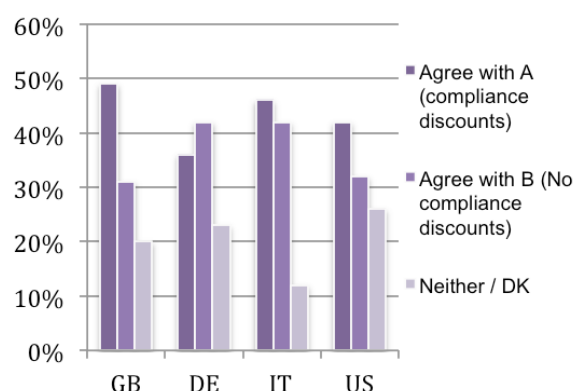
Think about when businesses have been caught breaking the law and are fined for their misbehaviour.

Country A provides a 10% discount in fines where the businesses had previously made efforts to comply with the law, for example through staff training and internal auditing, but where the law was nevertheless broken by a group of employees.

Country B provides no discount in fines regardless of whether the business had previously made any effort to prevent an infringement of the law.

Which country's policy do you agree with? Please tick (✓) only one.

	GB	DE	IT	US
Agree with A (strongly agree)	49% (12%)	36% (11%)	46% (12%)	42% (14%)
Agree with B (strongly agree)	31% (12%)	42% (21%)	42% (17%)	32% (14%)
Neither / DK	20%	23%	12%	26%



Here too public opinion was fairly divided, with the British and Americans more sympathetic towards honest compliance efforts than the Italians and Germans. In all four jurisdictions, a significant proportion of respondents felt that previous compliance efforts should have no bearing on the fine where the law has been broken.

11. Comparisons between the four jurisdictions

One of the most striking findings of this study is how similar public attitudes are between these four jurisdictions, despite significant differences in institutions, legal traditions, culture and levels of enforcement. One would expect both awareness of the law and understanding of the harmful effects of cartels to increase with higher levels of public and private enforcement. Indeed this is crucial to enforcement achieving a greater deterrent effect. A discussion of culture and history is not for this paper, but we can give a quick snapshot of the different levels of enforcement in each of the four jurisdictions subject to this study.

According to the German *Bundeskartellamt* Case Database, the authority has completed 19 cartel cases since 2009 that resulted in an infringement decision.³⁸ Italy's *Autorita Garante Della Concorrenza e Del Mercato*³⁹ completed 30 during the same period and the UK's Competition and Markets Authority (previously the Office of Fair Trading) approximately 10 cases resulting in an infringement decision.⁴⁰ In addition to these, there were two criminal cartel prosecutions in the UK and an undisclosed number of German and Italian bid-rigging cases (some of them criminal) not dealt with by the competition authorities. The European Commission completed a further 30 cartel cases in 2009-2014 involving practices with an appreciable effect on trade between member states. The fines in those cases totalled €9.9 billion.⁴¹

The enforcement picture in the US was quite different over the same period. According to the Department of Justice's own statistics, the level of fines imposed in cartel cases was actually lower than the European Commission, at around \$5.3 billion, with a further \$14 million imposed on individuals.⁴² However, the level of criminal enforcement against individuals far exceeded that of the rest of the world put together. 179 individuals were incarcerated, with a further 70 receiving suspended sentences. These statistics do not show the enormous volume of private enforcement cases, nor the fact the US has a longer track record of antitrust enforcement than the European Commission or many EU Member States. The UK's competition laws, for example, did not legislate for adequate investigative and sanctioning powers until the Competition Act 1998.

The similarities in attitudes despite these differences raise two very important issues. The first is that levels of enforcement do not appear to be having a big impact on popular attitudes. This may simply be down to poor information dissemination about enforcement cases and resulting sanctions, as evidenced by the relatively low proportion of respondents

³⁸ Available via www.bundeskartellamt.de (accessed 15 July 2015)

³⁹ Available via: <http://www.agcm.it/en/competition.html> (accessed 15 July 2015)

⁴⁰ Available via: <https://www.gov.uk/government/organisations/competition-and-markets-authority> and the archived Office of Fair Trading Website (accessed 15 July 2015)

⁴¹ Data taken from author's own database of EU cartel cases.

⁴² Department of Justice, Antitrust Division Workload Statistics. Available: <http://www.justice.gov/atr/public/workload-statistics.html> (accessed 15 July 2015)

who thought price fixing was illegal in their country. Competition cases are not always newsworthy and research by the International Competition Network's Advocacy Working Group shows they often focus on the size of fines rather than the harm or objectionable nature of the conduct itself.⁴³ The fact there is strong popular recognition of cartel harm despite this, is encouraging and suggests that public attitudes could be hardened further through better public education programmes and more effective corporate compliance. It is notable, for example, that UK attitudes are in some respects more hardened than those in the US despite the comparatively low number of cases completed by the UK authority and the fact Britain has such a young cartel enforcement regime. This may be in part due to the willingness of the CMA (and the OFT before it) to engage in advocacy activities and not rely purely on enforcement to get their message across.⁴⁴

The second issue relates to the harmonisation of EU competition law. The broad consensus across the UK, Germany and Italy suggests that public support for enforcement may be significant and comparable across the European Union. This is important because since the Modernisation Regulation (1/2003), EU competition rules have been enforced both at the Community and Member State Level and there has been a steady harmonisation of national enforcement regimes. In the future there will need to be greater convergence when it comes to cartel enforcement. In particular, there is still a need for a single leniency procedure across the EU to avoid uncertainty and confusion where it is unclear whether the Commission or a national competition authority will investigate a cartel case. The relationship between EU (administrative) Competition Law and national criminal offences will also require significant further thought. These can be put to best use as a complement to EU enforcement, but issues relating to parallel civil and criminal procedures may mean that prosecutions are currently only likely in relation to smaller domestic cartel infringements.⁴⁵

⁴³ International Competition Network, *Competition Culture Project Report* (2015) Prepared by the ICN Advocacy Working Group. Available: <http://www.internationalcompetitionnetwork.org/uploads/library/doc1035.pdf> (accessed 15 July 2015); See also Stephan (n 23)

⁴⁴ See for example: 'Achieving a culture of compliance' Speech by Alex Chisholm (CMA Chief Executive) at The Law Society London, 16 May 2014.

⁴⁵ Stephan (n 8)

12. Concluding Remarks

This paper has reported some of the key findings from four surveys gauging public attitudes to price fixing and cartel enforcement in the United Kingdom, Germany, Italy and the United States. Despite differences in their attitudes to government intervention in markets and the trustworthiness of the business community, there is a presumption of open and competitive markets among respondents in all four jurisdictions. When they buy a product or a service, a clear majority of Britons, Germans, Italians and Americans expect competitors to have set their prices independently of each other. A strong majority recognise that price fixing is harmful and should be punished. There is strong support for imposing a variety of sanctions on both businesses and individuals engaged in cartel activity, including fines at least equal to the illegal profits earned. A comparison with the 2007 CCP Cartel Survey suggests that attitudes in the UK have hardened and support for enforcement increased. Yet there is a significant amount of confusion (especially in the United States) about whether price fixing is actually illegal.

The question of whether price fixing should be a crime is a little harder to answer. This study has shown that there is a popular presumption of competitive markets and that it is generally recognised that a departure from independent pricing is objectionable because it causes harm. When asked the question directly, around two thirds of respondents agreed it should be crime and were not persuaded by the suggestion that the criminal law should only be reserved for the most serious breaches of the law, such as murder, rape and the theft of property. These findings may amount to a sufficient justification for criminalisation. However, when asked to compare price fixing to other forms of wrongdoing, on balance, respondents felt that assault, theft, fraud, misleading on product safety, tax evasion, insider trading and drink driving were all more serious than price fixing. Only copyright violations were considered to be less serious. This does not necessarily mean there is insufficient support for treating price fixing as a crime, as some of this may be a reflection of the low level of awareness that price fixing is illegal. Moreover, despite price fixing being viewed as less serious than these other practices on balance, it is notable that a significant proportion of respondents felt price fixing was comparable in severity to fraud and other financial crimes.

Opinion is far more divided on the question of whether cartel enforcement tools are justifiable. There is clearly significant scepticism in all jurisdictions about the use of leniency, direct settlement procedures and the granting of compliance discounts where a firm can demonstrate it made genuine efforts to comply with the law. When put into the position of a company employee who learns of wrongdoing by their managers, respondents' preference was for reporting the activity internally rather than approaching the authorities. This highlights the importance of effective compliance programmes, regardless of where one stands on the question of whether they should be rewarded.

Perhaps the most surprising result in the study is the similarity of public attitudes between these four very different jurisdictions. We know from the opening questions that attitudes on matters such as the role of government do differ; yet on many of the key questions relating to price fixing the results were very similar. This may suggest enforcement has not thus far had a big impact on popular perceptions. We would otherwise have observed less confusion over whether the practice is illegal – especially in the United States. Indeed the hardening of attitudes in the UK as compared to 2007 may in large part be due to the financial crisis and the instances of corporate misbehaviour said to have contributed to it. This might help explain the significant increase in support for imprisonment as a cartel sanction. The high level of awareness in Germany, apparently following significant press coverage of three high profile cases, suggests that enforcement can raise awareness, in the short term at least. However, it may also highlight the need for competition authorities to pursue greater advocacy and public / business engagement activities alongside enforcement.