

“Fix the Penalty for Fixing the Price”

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**By Jennifer Skilbeck
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“The US experience has persuaded the British government to use the enterprise bill to add criminal sanctions to the already punitive civil powers for dealing with price-fixing cartels. Whether this measure will ultimately offer any significant benefits to the UK economy must be doubted.

In 1904 the US economy was dominated by trusts controlling whole industries, from meat to oil to railroads. President Theodore Roosevelt rose to the challenge and began proceedings under the 1890 Sherman Act against JP Morgan’s railroad trust. Morgan is reputed to have responded: “Send your man to see my man and tell him to fix it up,” to which Roosevelt replied: “Nobody treats as a sovereign equal to the President. No private interest can presume to be equal to the government. The government must be superior to all of these.”

The British government has decided to take a similar stand. But although the use of criminal sanctions to control cartels is an appropriate response to the magnitude of the problem posed to the US economy 100 years ago, it is not necessarily suitable for the UK today.

First, as far as international cartels are concerned, any of significance are unlikely to be restricted to UK jurisdiction. Both the US Federal Trade Commission and the European Commission can be relied upon to take appropriate action.

Second, no one has satisfactorily answered the question why a conspiracy to raise prices above some competitive level should uniquely be subject to imprisonment, while a unilateral decision to do the same or to eliminate an efficient competitor remains subject only to civil proceedings. All types of anti-competitive behaviour may be the subject of criminal proceedings in the US under the Sherman Act, even though the Department of Justice’s present inclination is to restrict criminal sanctions to cases of price-fixing.

Third, the actual cost to society imposed by price-fixing agreements is the subject of considerable uncertainty, perhaps even obfuscation. The Department for Trade and Industry and the Office of Fair Trading have been much influenced by suggestions that price-fixing cartels raise prices above the competitive level either to a substantial extent, or over a very large market. The Organisation for Economic Co-operation and Development admits that evidence is difficult to find. The US similarly recognises the

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difficulty in sentencing guidelines, which depend on the “value of trade affected” rather than the extent to which prices have been raised.

None of the US DoJ data attempts to calculate whether a significant, or indeed any, price rise resulted from the cartel activity, but depends entirely on the firm’s turnover as an indication of the market “affected”.

It seems odd that no comparison, relatively simple to make, is available of prices before the substantial literature suggesting that cartels are a last resort when companies’ profits are low. They are often either a result of overcapacity or occur because the industry is otherwise so competitive that profits are marginal compared with those in other parts of the economy. Sotheby’s and Christie’s were facing losses when they agreed to fix commissions.

Indeed OECD evidence shows that the industries in which cartels have been identified are mostly in an essential competitive part of the economy, namely, intermediate homogeneous good (vitamin additives, ready-mixed concrete, military fuel, power cables and flour to name a few examples).

It is unlikely, and certainly unproven, that the activities of those cartels, taken overall, raised the level of the profitability in those industries above the average for the economy as a whole. The competition authorities have also ignored the voluminous research on whether criminal sanctions act as an effective deterrent to collusion.

The final, and in many ways most compelling, point is the huge workload the OFT has already taken on. The Competition Act 1998, in force only since March 2000, brought effective competition control to areas of UK business that had previously been substantially excluded for lack of any effect on trade between states – a precondition for the application of the EU treaty. Many consumer services are subject to effective competition law for the first time. Involvement in the criminal process will add another complex dimension to the work of the OFT, for an unquantified benefit.

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