Introduction

In this deposition the following is argued: post-Brexit the UK should seek to maintain a competition law policy as close as possible to EU competition law, both in its present state and as it develops in future. This is not to argue that the UK should be subject in any way to the jurisdiction of the Court of Justice of the European Union or the General Court. This would be impractical in light of the public international law difficulties that would arise when delineating jurisdiction if we leave the Single Market as well as politically unpalatable. Rather what is argued is that the UK CMA and courts should as far as practically possible apply the competition law of the UK in the same manner as it is applied within the EU. This voluntary, non-binding acknowledgement of EU competition law could be called ‘voluntary coherence’.¹ The reasons for this, which will be elaborated below, are as follows:

- Better short term and long term certainty for businesses
- Normatively and substantively superior law
- Greater scope for co-operation

Better short term and long term certainty for businesses

Short term business certainty

The first reason why it would be better to pursue a policy of consistency with EU competition law post-Brexit is because of the short term benefits to business. The process of Brexit is highly likely to involve a great amount of disruption for businesses active in the UK market for a number of reasons. There are likely to be significant changes in regulations concerning both tariff and non-tariff barriers to the movement of goods and services to and from the ‘rump’ EU. In order to accommodate these changes British and EU businesses will be required to invest substantial amounts of time and energy in altering their current business practices so that the flow of trade both from and to the EU continues in as similar manner as possible. It is also likely to mean that the customs union that previously artificially focused UK trade flows towards the EU will be lifted and British businesses will want to make use of this new liberty (and hopefully new trade deals) to pursue greater trade globally, either to compensate for a reduction in EU trade or, if no such change occurs, to maximise profits generally. British businesses must be able to dedicate their resources to adjusting to the new business environment and pursuing new global opportunities. Further change in an area of law such a competition law will, certainly in the short term, lead to an inefficient division and diversion of focus and resources when they are crucial elsewhere.

Long term certainty for business

Since the start of the year 2017 the CMA has closed seven cases, in the whole of 2016 it closed four cases.² In contrast the EU Commission has so far made 26

¹ Coherence being an ideal term as it describes both elements that hold together as a whole and also something that is logically consistent.
² https://www.gov.uk/cma-cases?keywords=&case_type%5B%5D=ca98-and-civil-cartels&closed_date%5Bfrom%5D=01%2F01%2F2016&closed_date%5Bto%5D=
decisions in 2017 and 16 (the lowest number in four years) in 2016. What this suggests is that if the UK decides to implement its own standalone competition policy there may be a risk that insufficient cases will be adduced for businesses to learn from precedent and use it to guide their understanding of what practices are and are not allowed under UK competition law. Although this could be offset by increased guidance from the CMA (what is sometimes referred to as ‘soft law’) this would increase the workload of the CMA, particularly if there is a large number of markets that need to be assessed individually. Also if on average a large proportion of the decisions currently undertaken by the Commission relate to anti-competitive behaviour that was, at least in part, implemented in the UK, post-Brexit these will come under the UK’s jurisdiction. This will lead to a considerable increase in the workload of the CMA. Consequently, unless there is a government commitment to increase the funding and resources of the CMA proportionately this could potentially lead to either delays in the application of the law, poorly executed investigations or in cases failing to be pursued when the law would mandate it. This could have a damaging effect on the UK economy.

Normatively and substantively superior law
The competition law of the UK should continue to be based on the EU competition law regime because EU competition law is normatively superior to the existing alternatives. In order to explain why this is the case some background on the economic theory upon which EU competition law is built is first needed.

From my own research and that of others it has been shown that EU competition law was originally and largely still is based upon an economic/political theory that originated in Germany called Ordoliberalism. This theory can be credited with giving foundation to the ‘Social Market Economy’ the economic model that lead to the astonishing recovery of the German economy post-World War II, which to this day is known as the ‘Wirtschaftswunder’ (the economic miracle). In contrast, in the United States Ordoliberalism has not influenced antitrust law. Rather since the 1980s the economic theories of the ‘Chicago School’ have influenced the law in the US. The Chicago School’s influence has led to the antitrust authorities applying the law in a very narrow way. What is meant by this is that in order to prove anti-competitive conduct standards of proof are required that are incredibly difficult to achieve. This is because the Chicago School generally takes a stance that antitrust intervention by the courts or government institutions (such as the FTC) may be more damaging than a

6 See for example; A. Peacock, H. Willgerodt (editors), Germany's social market economy: origins and evolution (London : Macmillan 1989)
market failure because market pressure will resolve anti-competitive problems on their own given time.\(^8\) Likewise in relation to mergers, they often favour the formation of larger companies.\(^9\)

Another matter of theory that has great practical import is the aim of competition law. Both the US and EU competition authorities claim to pursue consumer welfare.\(^10\) What is not so commonly highlighted is that their manner of protecting consumer welfare is in fact completely different. This is also due to the different theoretical foundations of the two competition law jurisdictions. The Chicago School considers consumer welfare to be the total productive and allocative efficiency of an economy.\(^11\) What this means in practice is there is a focus on the short term effects of commercial behaviour, such as its effect on the cost of production. From the US view, if a particular anti-competitive behaviour or transaction will make production cheaper then this will lead to a decrease in prices for consumers. This, obviously, is considered beneficial. But this ignores the long term effect of a reduction in competition on the market. Companies who may initially benefit from lower costs and initially pass them on to consumers may from that point on be subject to less competition, giving them the chance to increase prices, innovate less or have less incentive to keep production efficient due to the lack of competitive pressure to do so.

In the EU the aim of competition is also to protect consumer welfare, but this is done by protecting the competitive process itself. That is to say EU competition law, being based on Ordoliberalism, prioritises the protection of competition and free choice within the market place.\(^12\) Where this is preserved markets will continue to function and generate the positive results associated with competitive markets in the long term. Whereas where the competitive structure on a market is damaged, even when there is short term gain for consumers the long term damage associated with a lack of competition will inevitably hurt consumers. Therefore rather than try to investigate what impact a particular transaction will have on short term prices EU competition law protects the customer’s ability to choose the source of their products and services and allows them to decide what is most important to them. This means that the Commission does not have to try to decide for the consumer whether to not, for example, the benefit of lower prices outweighs a reduction in the selection of

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\(^8\) See Easterbrook (a proponent of the Chicago School approach) for a concise essay on the core Chicago School tenets; Frank H. Easterbrook, ‘Workable Antitrust Policy’ (1986) 84 Mich. L. Rev. 1696

\(^9\) Ibid


\(^12\) See my own forthcoming research ‘From Ordoliberalism to Behavioural Economics and Beyond’ and Peter Behrens, ‘The consumer choice paradigm in German ordoliberalism and its impact on EU competition law’ in P. Nihoul, N. Charbit, E. Ramundo (eds), Choice — A New Standard for Competition Law Analysis? (New York, Quality Books, Inc. 2016)
products or services available to them, each consumer gets to make the choice for themselves.

It is arguable that the very flaws that are being reported now regarding the US economy having a 'competition problem' are a direct result of this difference. That is not to say the US is uncompetitive, but rather given the size of its market, high level of economic and cultural integration and highly skilled work force its markets are not performing at an optimal competitive level.\(^\text{13}\)

This problem can be averted by following an EU approach where the competition authorities in the UK seek to protect the competitive process itself, by protecting customer freedom. By doing this the UK may avoid the pitfalls that have beset the US economy due to their application of antitrust law. This is all the more important when considering the Bank of England's report into the productivity puzzle that demonstrated that productivity growth was slowest in markets with a low level competition.\(^\text{14}\)

It is of course possible that rather than follow either the theory and aims pursued by the US or the EU the UK could seek to forge its own way but given both the US and EU regimes are founded upon the economic theories that have developed in their jurisdictions there would be no bedrock UK specific competition-economic theory upon which to base the law. This could lead to a meandering competition policy that risks being inconsistent and unpredictable. Further diversion from either the EU or the US approach would (unless justified on the basis of being notably superior to either of those approaches in effect) merely lead to higher costs of compliance, greater uncertainty and slower business transactions. The result then would be a less attractive business environment at a time when the UK needs to be world leading in this respect.

\(^\text{13}\) https://promarket.org/the-white-house-acknowledges-the-u-s-has-a-concentration-problem-president-obama-launches-new-pro-competition-initiative/ (Accessed on 09/10/2017) ‘The CEA goes on to diagnose one of the major ailments affecting the American economy today: in parts of the economy, at least, competition appears to be declining.’; https://www.theatlantic.com/magazine/archive/2016/10/americas-monopoly-problem/497549/ (Accessed on 09/10/2017) ‘The bigness of business is a result of federal policy, which, in the past three decades, has deliberately made it easier for large companies to dominate their markets, provided that they keep prices down. After years of sluggish wage growth and low levels of entrepreneurship, some people are starting to worry that America’s biggest companies are growing at the expense of the economy, even if they offer consumers good deals… So antitrust law shifted over the course of the 20th century from principally protecting competition to principally protecting consumers. Today many reformers are calling for the pendulum to swing back.’; https://www.bloomberg.com/news/articles/2017-07-20/should-america-s-tech-giants-be-broken-up (Accessed on 09/10/2017) ‘Chicago scholars upended antitrust law by arguing that the benefits of economic efficiency created by mergers outweighed any concerns over company size... From 1970 to 1999, the U.S. brought an average of 15.7 monopoly cases a year. That number has since fallen—to fewer than three a year from 2000 to 2014... Problem is, the Chicago School’s focus on the impact on consumers—at least as it’s applied in the U.S.—won’t help antitrust enforcers to drain those moats...Instead of applying conventional antitrust theory, such as the effect of a merger on consumer prices, enforcers may need to consider alternative tools.

Greater scope for co-operation
If the UK regime does continue to follow the EU competition system there is will be a great scope for cooperation. This is not just because both administrations will be pursuing the same aims and therefore be united in their pursuits, but from the perspective of the administrative burden if both the EU and the UK competition authorities are applying the same competition policy this will mean they will be asking similar questions. This means that the data that the EU obtains may well be relevant to the UK investigation and the data the UK obtains is likely to be relevant to the EU’s investigation. This could cut administration and investigation costs, potentially minimise duplication of work and lead to faster and lower cost enforcement.

Conclusion
As a result of the above it is posited that the competition policy of greatest benefit to the UK economy and its citizens post-Brexit is ‘voluntary coherence’. By choosing to follow EU competition law even though the UK is not actually bound to it (assuming a hard Brexit) competition law will form a firm and consistent area of law that will cause very little disruption to businesses based in the UK. This will have benefits both in the short and long term. It will ensure that UK competition law is based upon a superior competition-economic theory that will in practice protect the competitive process rather than prioritising short term cost saving. Finally it will make any future cooperation with the EU Commission both easier and cheaper, enhancing our relationship with our new biggest foreign market. In short, it is the best choice for stability and long term economic strength and vitality.

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