Response by Professor Bruce Lyons to Lord Currie's Beesley Lecture:

'Regulation and the competition regime in an age of increased government intervention'

[Contextual note] *The CMA is one of the best and most independent competition authorities in the world, with an excellent record of careful and well explained decisions. It is also preparing for Brexit, politicians are voicing more interventionist policies, and there is a Competition Law Review currently being conducted by BEIS. The outgoing Chairman of the CMA's Beesley lecture argues for greater influence for the Chairman and Chief Executive of the CMA over case decisions, and for the CAT to adopt a purer form of judicial review. It is in this context that the following response should be understood*…

It is a pleasure to have been invited to respond to such a wide-ranging and thought-provoking lecture by Lord Currie. My response focusses on what he says about the CMA and then much more briefly the self-regulatory model of the ASA. There is too little time to cover the topic of online regulation.

First, I echo Lord Currie's view that the creation of the CMA has had some benefits. For example, a couple of statistics are consistent with better coordination between phase 1 and phase 2 merger control. Pre-CMA, around 40% of problematic mergers were remedied in phase 1 by undertakings in lieu of referral, and 60% were referred to phase 2, but post-CMA those proportions have reversed. Needless to say, it is the quality of decisions that matters much more than such statistics, but the indicators on phase 1 and 2 merger coordination are positive.

However, I also echo Lord Currie's view that all is not perfect at the CMA. He is particularly concerned about the appeals system and by the challenges created by Brexit. On the latter, he highlights two examples: the new responsibility of state aid; and big international cases like Google.

How well placed is the CMA to take on an abuse of dominance case like Google? On this, the statistics are less encouraging. The CMA has published just two Ch.2 decisions since its formation five years ago, both in 2016, both for pharmaceuticals, and both coming unstuck in the CAT.[1] Meanwhile, the European Commission has undertaken sixty Art.102 investigations, including 27 decisions in the same period.[2] These include cases against US giants Intel, Google, Amazon and Qualcomm, which would be in the CMA's remit post-Brexit. Tools go rusty if unused, so there must be a question mark against the CMA's experience and ability to challenge potential abuse by internationally dominant firms.

In his analysis of the markets regime, Lord Currie highlights the success of breaking-up BAA, which has introduced genuine competition and tangible benefits for airports in London and the central belt of Scotland. He then points to the problem of political disappointment with the remedies proposed in energy and retail banking, because of their radical focus on encouraging consumers to engage with the market to make competition work. The lesson Lord Currie suggests we learn is that CMA findings in these recent cases should have been better communicated.

[1] GSK paroxatin (pay for delay) part of which the CAT referred to European Court for guidance; and Pfizer/Flynn phenytoin (excessive pricing) which the CAT has provisionally remitted back to the CMA (see section 3 above).

[2] The comparison should not be interpreted as underperformance by the CMA because DG Comp is not comparable in terms of the number of cases.

While I wholeheartedly agree with the need for better communication, my own analysis is somewhat different. I think the communications problem started much earlier, before these investigations were even opened. As I have already said, the BAA break-up is widely seen, including by me, to be a justified and successful remedy. But, abusing the words of Oliver Wendell Holmes "Great cases can make bad precedent." BAA was a classic monopoly with no local rivals, and entry was absolutely impossible. It was the result of privatizing a ready-made state monopoly. It had regulated prices and demonstrably poor quality. The investigation was into a single firm and should more appropriately have been seen as an abuse of dominance, not a market investigation.

BAA was a unique combination of factors, but it has become a widely-touted precedent for break-up in oligopolistic markets, even those which are already structurally potentially competitive. For evidence that break-up would have been inappropriate in, for example energy, we need look no further than the CMA's recent provisional clearance of the merger of SSE and Npower. But when the BAA break-up is repeatedly highlighted every time the CMA argues the case for market investigations, should we be surprised when politicians and the press scream for this remedy even when it would make no economic sense?

Lord Currie next argues that the CMA is caught in a vice between, on the one hand, the rise of litigation, with firms challenging decisions through appeals processes that are "over-elaborate and over-done", and on the other hand, political pressure for fast, effective intervention. To tackle these, he argues for reform in: 1. The appeals process; and 2. The structure of decision making at the CMA. I address these in turn.

Appeals process issues mentioned by Lord Currie include: multiple appeals, an imbalance of resources, access to data rooms, and the CAT stepping too far away from judicial review to substitute its own expert judgement. This, he argues, diverts resources from enforcement and the end result is that consumers suffer. The suggested solution is a 'recalibration' of the appeals system to make it much more purely one of judicial review.

Some of this I can agree with. Multiple appeals by Ryanair is likely a deliberately disruptive tactic that would be a major concern if it was commonplace. The imbalance of resources might also be a concern – in the tobacco appeal, 7 QCs for the firms were lined up against one for the OFT, and a similar imbalance was found in the number of economic experts. Many lawyers say this does not bias the outcome. I am less sure, but I would add my own worry that courtroom-style clashes of experts on the details of economic modelling result in a Govesque dismissal of experts. Furthermore, there is an awkward change in roles for the CMA in the current system. It is meant to start its original investigation as an impartial inquisitor, but if appealed, it finds itself in an uncertain position between inquisitor and prosecutor before the CAT. So, I agree with Lord Currie that we need to move the system back towards judicial review. However, I disagree over how to achieve this.

It would be wrong to believe that all appeals in the highlighted categories are mischievous. Take access to data rooms. In market investigations, the CMA is able to compile unique datasets by combining confidential data from various market participants to test alternative theories of harm. Quite rightly, corporate executives cannot be allowed access to the data on rivals because it may give them an unfair advantage or facilitate collusion. However, this does not apply to independent advisors under strict confidentiality obligations. A data room can allow the data and associated econometric analysis to be checked for mistakes, and to be looked at in different ways that might better test for competitive harm. It is best practice if their results can then be fed into the CMA's decision process *before* a final decision, not after.

Let me give an example in which a data room appeal was essential for a fair outcome. The context is the CMA's decision to break up HCA's London hospitals as part of the private healthcare market investigation. I must declare an interest as I was an expert adviser to HCA and the KPMG competition team that went into the data room. The CMA had relied on 'evidence' of HCA prices relative to a competitor but had refused to disclose the claimed evidence. HCA had to appeal to the CAT to get access to a data room which the CAT granted. We found important errors in the CMA's data analysis, and used a positive reworking of the data to show that HCA's prices properly adjusted for morbidity were not higher. This was used to support an appeal on the substantive decision. The CMA soon realised its mistakes and itself *asked* the CAT to quash its decision on adverse effects and to quash its decision to force the break-up of HCA in central London. The CAT agreed and both decisions were remitted back to the CMA.[3] To cut a very long story short, the CMA abandoned its price comparisons and decided not to break up HCA. More generally, this appeal also appears to have changed CMA policy on data rooms for the better.

Next consider Lord Currie's Ch.2 excess pricing example. I was not involved in the Pfizer and Flynn phenytoin case in any way, but an excess pricing decision is rare and important so I set about writing a blog with a colleague who knew his way around the industry standard price database. We wanted to illustrate the egregious twenty-fold price increase for the *capsule* at the centre of the CMA's investigation. On the basis of the CMA press release, a chat to a friendly GP and a few minutes drawing a graph, we wrote the following: "This appears to be a blatant attempt to manipulate the complex system of pharmaceutical price regulation, and the extreme sensitivity of patients to a precise capsule formulation, in order to milk the last bit of profit out of a declining drug." However, we also noticed that there was an even higher unit price for an identical generic *tablet.* So we also wrote: "[This] raises a serious question about what the CMA finds to be an exploitative price – why is the *capsule* price (but not the [higher] *tablet* price) illegal? The answer is important for understanding the precedent being set and so the expectations of the CMA going forward."

It turns out that the CAT also thought this was not sufficiently addressed and remitted the decision for the CMA to explain through the lens of an elaborate multi-step procedure. The CMA has now appealed the CAT's ruling. Without having any inside knowledge of the case, I would have preferred the CMA to accept the remittal as an opportunity to explain its decision so that we have a clear precedent on which to move forward speedily on numerous other pharmaceuticals pricing cases. I return to the depth of the CAT's review shortly.

[For balance, I should add that I have seen the frustrations from both sides as I was a member of the CC panel on the groceries market investigation that had to endure a remittal nearly 10 years ago.]

My point is that many appeals, such as those over the right to a data room, or a balanced justification for benchmarking an excessive price, provide an opportunity to improve procedure and practice, and to set helpful precedents for future cases. This still leaves room for some 'recalibration' of the appeals system, and I will return to this after discussing Lord Currie's proposal on the structure of decision making.

Lord Currie is concerned that the CMA's system of panels (and other decision structures) leaves the Board in a position of 'responsibility without power'. He is particularly concerned that the Chairman and Chief Executive should be given greater influence post-Brexit when the CMA will have to deal with highly political multi-country mergers that currently go to Brussels, and also with the scrutiny of state aid.

[3] https://www.gov.uk/government/news/cat-ruling-on-private-healthcare-remittal

I argue exactly the opposite. The more politically sensitive are competition decisions, the more crucial it is to have a buffer between Ministers and those making expert competition decisions on legal and economic grounds. More than ever, we need an independent system that cannot be accused of caving into political pressure.

Take state aid. The reason why the European Commission can take decisive decisions is that it is so remote from the capitals of member states and their regions. This distance is invaluable. In contrast, if the Minister sits just a few stops down the Jubilee Line, and if the Chairman and Chief Executive of the CMA are in regular communication pleading for budget, it would be extremely difficult to make credibly impartial decisions. Future governments of either populist right or socialist left would only ratchet up that pressure. It may be uncomfortable, but the CMA leadership has to be a buffer to protect the integrity of decisions.

This takes me to wider CMA decision making. This is currently a strange mixture of executive-led case decision groups and non-executive independent expert panels. There is no rational reason for this. These are historical accidents left over from the merger of the OFT (which had a decision structure based on a European Commission Directorate and applied this to its portfolio of Competition Act cases) and the CC (with a decision structure based on a Royal Commission and used for its portfolio of Phase 2 mergers and markets cases). The independent panel system inherited from the CC is great for range of experience, independence from political influence, and separation of phase 1 and phase 2. The case decision group has the edge on consistency across decisions. The best of both worlds could be achieved by a unified model of decision groups. This would retain independent experts as decision makers, but there would be fewer of them with each taking on more cases. They should also have less influence on staff preparation of evidence.

To return to the issue of recalibrating the appeals system, my proposals to enhance both independence and consistency would shift the CMA in a direction that could rightly demand a purer form of judicial review from the CAT. It is no coincidence that the phenytoin Competition Act appeal at the CAT was a merits appeal, whereas the Supreme Court was content to defer to the CMA's expert judgement in a merger case. I fear that Lord Currie's advocacy of greater power to the Board to both refer and influence decisions would only intensify the opposite pressure for more merits reviews. I have been strident in my response because I do not want to see a long-independent institution go down the corporate governance path of a commercial, rather than a judicial, institution – and in doing so, leave itself exposed to both a surfeit of merits appeals and undue political influence.

Finally, I turn to the ASA. There is a sharp contrast between Lord Currie's proposals for the CMA – to give stronger decision power to the Chairman and Chief Executive and to reduce the grounds for appeal – and his eloquent defence of the ASA as a model of successful self-regulation underpinned by the statutory powers of Trading Standards. Provoked by this, I want to finish with a couple of thoughts on what the ASA and CMA might learn from each other. The following thoughts are intentionally speculative.

What can the ASA learn from the CMA? Lord Currie says the ASA load would be impossible without its 'self-regulatory compliance funnel'. Is this true? To play devil's advocate, if the penalties for putting out misleading advertisements were similar to those available to the CMA for Competition Act enforcement (fines up to 10% worldwide turnover and 15 years disqualification for directors), and if an adverse finding by the ASA was a sufficient basis for a damages action by misled consumers, then how many of its c100k cases in the last five years would have come to the ASA? Probably still quite a few, not least from rivals lobbying for advantage, but very many of these

misleading ads would have been deterred before causing any harm. Self-regulation has an ex ante compliance problem, even when it works ex post.

Next, what might the CMA learn from the ASA regulatory model. We can think of the ASA system as one of behavioural remedies that ensure firms do not mislead consumers. More positively, ads can then highlight options and help consumers make better choices. In fact, the CMA has already moved some way in this direction. Most of the remedies in the energy and retail banking markets are about ensuring consumers are presented with information on prices and quality that will help them make better choices. These remedies may not be entirely uncontested, but as with misleading advertising, firms can more readily accept such measures to help consumers and level the competitive playing field.

When a market's problems are about informing and engaging consumers, including business consumers, I wonder if the threat of structural remedies sometimes gets in the way of achieving these positive behavioural outcomes. The threat may focus minds, but also incite a stubborn, defensive and ultimately litigious approach from market leaders. And incite lobbying from rivals who want to undermine the competitiveness of a more successful firm. For markets where the problem appears to be consumer engagement, might some of the benefits of the self-regulatory system be gleaned if the threat of structural remedies could sometimes be curtailed, possibly at the time of referral?

Of course, it is easy to point out these relative advantages of different systems, but much more difficult to integrate them into practical regulation.