

Dear Sir/Madam,

I am aware that a number of bodies of which I am a member, including the UKAEL, the Competition Law Association and the Joint Working Party on Competition Law are all responding to the White Paper. I will therefore keep this response very brief. I have discussed these issues with Kieron Beal, another barrister at Matrix, on a number of occasions. This response also reflects his views, which are also contained in a recent paper by him which I have attached to this response ["Crehan and Post-Modern Malaise", [2007] Comp Law Rev Vol. 6 Issue 1, p. 17].

Kieron Beal and I are barristers specialising in competition law. We acted as counsel for Which? in the first and only case brought on behalf of consumers before the Competition Appeal Tribunal, pursuant to section 47B of the Competition Act 1998, a "follow on" action brought against JJB, one of the companies found to have infringed the UK Chapter I prohibition in the *Replica Kit* decision of the Office of Fair Trading. The case settled without any Court ruling, but the experience of that case has given us a substantial insight into the practical difficulties of bringing a consumer action on behalf of individual consumers whose incentives to engage in very complex and expensive litigation for a small sum of money long after the event will invariably be very limited.

The sole point on which we wish to comment is that it appears to us that the White Paper offers a false dichotomy between compensation and deterrence in assessing what approach should be adopted to the promotion of damages actions, particularly on behalf of consumers and small companies, where the costs and risks associated with any action for damages, even on a "follow on" basis, will almost always be out of all proportion to the likely financial benefit to be achieved by such an action.

It appears to us that the policy underlying damages action in such a case should be to avoid the unjust enrichment of the members of a cartel, which in turn suggests that the essential approach to any such action should be for the Court or Tribunal to identify the cartel gain and to require the participants in such anti-competitive activity to disgorge such a gain, subject to the supervision of the Court or Tribunal. If that approach is adopted, it appears to us inevitable that claims would

be brought and managed on a class basis, with individual consumers or small businesses proving against the fund established by the Court or Tribunal subject to its supervisory jurisdiction, and with any balance paid to a suitable recipient, in effect on a cy pres basis. It does not appear to us that the approach adopted in the White Paper will have any material impact - a much bolder approach is needed if any significant level of consumer enforcement of competition law is in fact a policy objective of the Commission.

So far as substantial commercial actions for damages by larger companies are concerned, it appears to us that the “follow on” mechanisms of the UK Competition Act 1998 offer a potentially viable way forward, provided that the national and Community enforcement agencies produce a sufficient flow of decisions, and include within such decisions sufficient detail to enable actions for damages to be brought without excessive costs or litigation risks.

We hope these brief comments are of interest,

Yours sincerely,

Rhodri Thompson QC and Kieron Beal