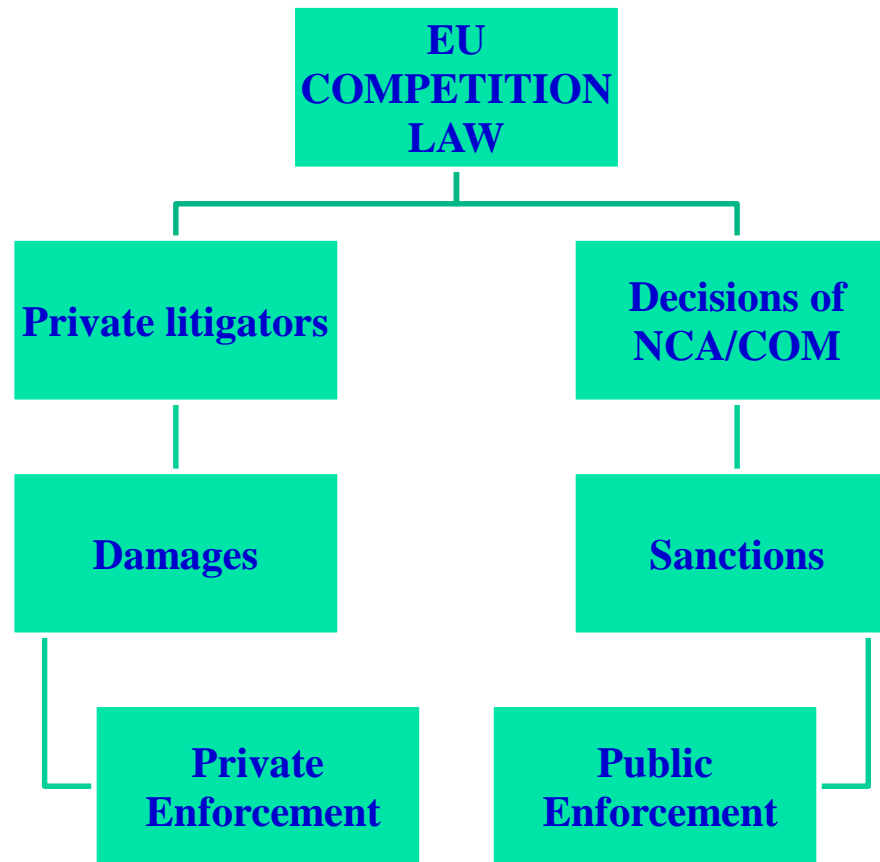




Issues arising from the Directive on Damages Actions and the role of the national judge

PHD Judge Diana Ungureanu

Public enforcement- private enforcement





Impact Study

- amount of compensation that victims of antitrust infringements are currently forgoing ranges from approximately €5.7- €23.3 billion/year
- France: mobile phones cartel – damages 295 – 590 mil. Euro, 2000 – 2002
- UK: antitrust agreement-supermarkets –milk producers- 375 mil. Euro, 2 years
- Netherlands: beer cartel- 400 mil. Euro, 1996 - 1999



The “inception”

- The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not **open to any individual to claim damages for loss caused to him** by a contract or by conduct liable to restrict or distort competition. (par.26, C-453/99, Courage Ltd. v. Bernard Crehan)
- Article 81 EC must be interpreted as meaning that **any individual can rely on the invalidity of an agreement** or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm. (C-295/04 , Manfredi)
- <http://ec.europa.eu/competition/eojade/antitrust/nationalcourts/>



Evolution

- **August 2004** – Comparative Study
- **December 2005** –Green Paper
- **April 2007** – EP ask COM a White Paper
- **December 2007** – Impact Assessment Report
- **April 2008** –WP –public consultation-15 iulie 2008
- **26 martie 2009**- Resolution of EP on the WP
- **11 JUNE 2013**- COM-Proposal for a Directive
- **COM Communication – quantification of damages & Practical Guide on Quantifying Harm**
- **Impact Assesment**
- 26.11.2014- The Directive was signed into law

http://ec.europa.eu/competition/antitrust/actionsdamages/proposed_directive_en.html

C-199/11- Otis and others

Claim for damages in respect of loss caused to the European Union by a cartel
– Article 47 of the Charter of Fundamental Rights of the European Union – Right to fair hearing – Right of access to a tribunal – Equality of arms – Article 16 of Regulation No 1/2003



Conclusions

- **Article 47 of the Charter of Fundamental Rights of the European Union does not preclude the European Commission from bringing an action before a national court, on behalf of the European Union, for damages in respect of loss sustained by the Union as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 81 EC or Article 101 TFEU.**

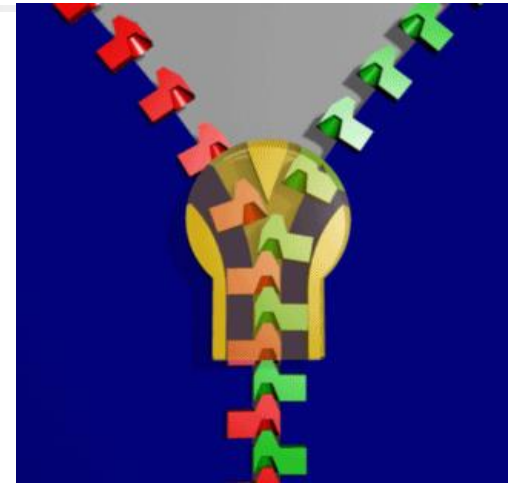
The New Directive.Objectives

- **optimising the interaction between the public and private enforcement of competition law;**
- **ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they suffered.**

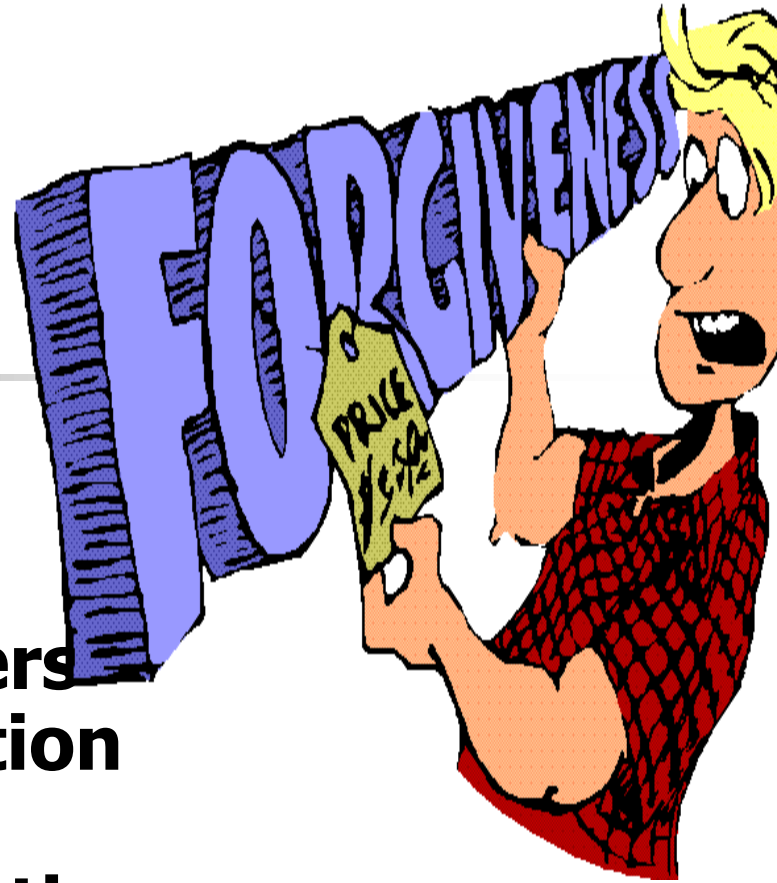


I. Public enforcement/ private enforcement

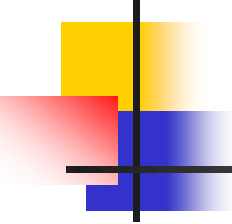
- **Access to evidence:
necessity for claimant-
private enforcement**
- **Leniency policy-necessity for
NCA&COM- public enforcement**
- **Proportionality**



LENIENCY/ DISCLOSURE



- An undertaking that considers cooperating with a competition authority under its leniency programme cannot know at the time of its cooperation whether victims of the competition law infringement will have access to the information it has voluntarily supplied to the competition authority.



C-360/09- Pfleiderer

Competition – Administrative procedure –
Documents and information provided
under a national leniency programme –
Possible negative effects of third-party
access to such documents on the
effectiveness and proper functioning of
cooperation between the authorities
forming the ECJ

Pfleiderer.

The role of national judge

- **Regulation (EC) No 1/2003 doesn't preclude a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement.**
- **It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.**

C-536/11, Donau Chemie AG

Competition – Access to the file – Judicial proceedings relating to fines for infringement of Article 101 TFEU – Third-party undertakings wishing to bring an action for damages – National rules making access to the file subject to the consent of all parties to the proceedings – Principle of effectiveness





§ 39 (2) KartG on access to cartel files

- a third party may only be granted access to the file if all parties involved give their express consent.
- is not limited to information provided by a leniency applicant, but covers all information contained in the cartel file.
- does not only protect information voluntarily submitted, but any information and documentation associated with the respective cartel, even if such cartel was not detected following a leniency application.



Austrian Cartel Court

- **ECJ - *Pfleiderer* - it is for MS to establish and apply national rules on the rights of access, by persons adversely affected by a cartel, to documents relating to leniency procedures.**
- **Austrian Cartel Court- the weighing exercise cannot be decided by the Austrian Cartel Court itself as demanded in the *Pfleiderer* ruling, as it was already decided by the Austrian legislator.**
-  **The Austrian provision on access to cartel files conflicts with EU competition law** 



Conclusions

- **European Union law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved.**



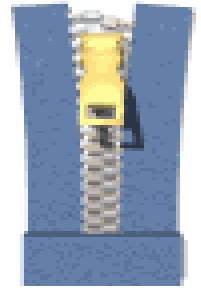
NATIONAL CASES

- **French Supreme Court authorises parties to disclose documents in the Autorité's file if it is necessary for the concerned parties to be able to exercise their rights** (Cour de cassation, Commercial Chamber, *Semavem*, 19 January 2010)
- **The Commercial Court in Paris ordered the French competition authority to disclose documents relating to the settlement of an antitrust investigation in the context of a private damages action.** (*Tribunal de commerce de Paris*, 15th chamber, decision of 24 August 2011 *SAS Ma Liste de Courses v. Société HighCo 3.0, Société HighCo Data, Société Sogec Gestion, Société Sogec Marketing*)

The decision



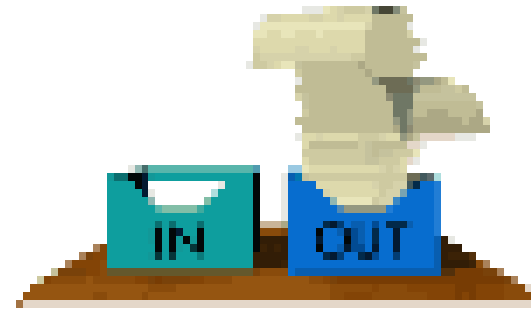
- **The order issued by the Commercial Court:**
- **non-confidential versions of all written and oral statements gathered by the Autorité during its investigation.**
- **the parties' and third parties' written observations, minutes of hearings, replies to questionnaires or requests for documents issued by the investigative services of the Autorité and several other documents placed on the file.**
- **disclosure was justified because the Claimant was merely asking for redacted versions of the documents in order to have available the information it needed to seek redress.**



Ma Liste de Courses

- **the commitments ended the alleged anticompetitive practices, but they did not repair the alleged harm suffered by MLDC.**
- **the administrative decision - not a bar to the damages action by the Claimant.**
- **Art. L. 463-6 Fr. Com.c., prohibiting the disclosure of information covered by the confidentiality of the investigation by the Aut., could not limit the power of the Court to order the production of documents in application of Art. 138 of the Fr. C. civ. proc.**

Consequences



- **although settlement has the advantage of enabling them to escape a fine and a formal finding of infringement by the Autorité, it does not confer immunity.**
- **Private damages actions may still be pursued. A settlement procedure already suggests that the Autorité had legitimate competition concerns— that a violation of competition rules is likely to have taken place—but the disclosure of the documents in the Autorité’s file would probably help claimants in proving a competition infringement before a court.**



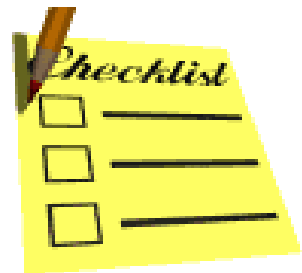
Outremer Telecom vs. Orange Caraïbe, France Télécom

- **The Court decided that the production of these documents could not be qualified as “*disclosure*” since the documents were known by the parties and there was no third party involved in the action.**
- **These documents were necessary for the exercise of the rights of defence of *Orange Caraïbe* and *France Telecom*.**
- **The Court dismissed *Outremer Telecom*’s objection to the production of confidential documents.**

The solution of the Directive.

Limits of disclosure

- **absolute protection- a national court can never order disclosure in an action for damages- for two types of documents:**
- **the leniency corporate statements**
- **and settlement submissions.**





Temporary protection

- **Temporary protection for documents that:**
 - **the parties have specifically prepared for the purpose of public enforcement proceedings**
 - **or the competition authority has drawn up in the course of its proceedings**
- **Those documents can be disclosed for the purpose of an antitrust damages action only after the competition authority has closed its proceedings.**



Protective measures

- **Where one of the parties in the action for damages had obtained those documents from the file of a competition authority, such documents are not admissible as evidence in an action for damages/or are admissible only when the authority has closed its proceedings.**



Conditions for disclosure

- **the party requesting disclosure has**
- **(a) shown that evidence in the control of the other party or a third party is relevant in terms of substantiating his claim or defence; and**
- **(b) specified either pieces of this evidence or categories of this evidence defined as precisely and narrowly as he can on the basis of reasonably available facts.**



Proportionality

- national courts limit disclosure of evidence to that which is proportionate.
- shall consider the legitimate interests of all parties and third parties concerned.
- Criteria:
 - (a) the likelihood that the alleged infringement of competition law occurred;
 - (b) the scope and cost of disclosure, especially for any third parties concerned;
 - (c) whether the evidence to be disclosed contains confidential information, especially concerning any third parties, and the arrangements for protecting such confidential information; and
 - (d) in cases where the infringement is being or has been investigated by a NCA, whether the request has been formulated specifically with regard to the nature, object or content of such documents rather than by a non-specific request concerning documents submitted to a NCA or held in the file of such NCA.



Person who can use the evidence

- **only the person who obtained access to the file (or his legal successor in the rights related to the claim) should be able to use those documents as evidence in an action for damages.**
- **to prevent documents obtained through access to a competition authority's file becoming an object of trade.**



Procedural rights

- **to protect confidential information from improper use to the greatest extent**
- **to give full effect to legal privileges and other rights not to be compelled to disclose evidence**
- **no penalty for non-compliance with such an order may be imposed until the addressee of such an order has been heard by the court.**



The amendments-3.08.2015

- [Commission Regulation \(EU\) 2015/1348](#) amending Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82
- [Communication from the Commission](#) — Amendments to the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004
- [Communication from the Commission](#) — Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases
- [Communication from the Commission](#) — Amendments to the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases
- [Communication from the Commission](#) — Amendments to the Commission Notice on the cooperation between the Commission and courts of the EU Member States in the application of Articles 81 and 82 EC



II. Ensuring the effective exercise of the victims' right to full compensation

Main obstacles:

- (i) obtaining the evidence needed to prove a case;**
- (ii) the lack of effective collective redress mechanisms, especially for consumers and SMEs;**
- (iii) the absence of clear rules on the passing-on defence;**
- (iv) the absence of a clear probative value of NCA decisions;**
- (v) the possibility to bring an action for damages after a competition authority has found an infringement; and**
- (vi) how to quantify antitrust harm.**



II.1.Effect of national decisions

- **Art.16(1) of Reg.1/2003, a COM decision relating to proceedings under Article 101 or 102 of the Treaty has a probative effect in subsequent actions for damages, as a national court cannot take a decision running counter to such COM decision.**
- **It is appropriate to give final infringement decisions by national competition authorities (or by a national review court) similar effect.**

II.2. Limitation periods



- Purposes:
 - to give victims of a competition law infringement a reasonable opportunity to bring a damages action
 - to ensure an appropriate level of legal certainty for all parties involved,
- Rules on limitation periods for a damages action:
 - allow victims sufficient time (at least five years) to bring an action after they became aware of the infringement, the harm it caused and the identity of the infringer;
 - prevent a limitation period from starting to run before the day on which **a continuous or repeated infringement** ceases; and
 - in case a competition authority opens proceedings into a suspected infringement, the limitation period to bring an action for damages relating to such infringement **is suspended** until at least one year after a decision is final or proceedings are otherwise terminated.



II.3. Joint and several liability

- **several undertakings infringe the competition rules jointly — jointly and severally liable for the entire harm caused liability regime of immunity recipients- to safeguard the attractiveness of the leniency programmes of the COM/NCA**
- **to limit the immunity recipient's liability, as well as his contribution owed to co-infringers under joint and several liability, to the harm he caused to his own direct or indirect purchasers or, in the case of a buying cartel, his direct or indirect providers.**
- **Where a cartel has caused harm only to others than the customers/providers of the infringing undertakings, the immunity recipient would be responsible only for his share of the harm caused by the cartel.**
- **the immunity recipient remains fully liable as a last-resort debtor if the injured parties are unable to obtain full compensation from the other infringers.**

II.4. Passing-on of overcharges

- **direct or indirect purchasers- actual loss (overcharge harm) and loss of profit.**
- **When an injured party has reduced his actual loss by passing it on, partly or entirely, to his own purchasers, the loss thus passed on no longer constitutes harm for which this party has to be compensated.**





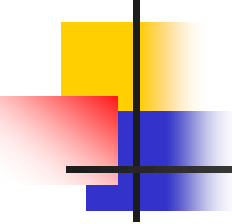
Passing on

- **However, where a loss is passed on, the price increase by the direct purchaser is likely to lead to a reduction in the volume sold.**
- **That loss of profit, as well as the actual loss that was not passed on (in the case of partial passing-on) remains antitrust harm for which the injured party can claim compensation.**



Doux aliments / Ajinomoto Eurolyne

- **The French Commercial Supreme Court validated the passing-on defence in a damages action.**
- **The Court stated that, in a damages case, the judge must assess whether the claimant has passed on to its own clients the overcharge resulting from an infringement.**



German Federal High Court, Case n KZR 75/10, ORWI

- **Claims for damages by indirect purchasers- need to establish that:**
 - **a cartel existed and increased its prices in an agreed manner**
 - **the direct purchaser also increased its prices at the same time and at a similar amount.**
 - **the price increase by the direct purchaser was a consequence of the price increases implemented by the cartel.**



ORWI. Causation

- **Causation of the cartel-induced overcharge for a subsequent price increase by a direct purchaser cannot be presumed.**
- **Relevant factors to be considered in assessing causation:**
 - **elasticity of supply and demand,**
 - **the duration of the cartel infringement**
 - **the intensity of competition on subsequent levels of the distribution chain as.**



ORWI. Admissibility of the passing-on defence

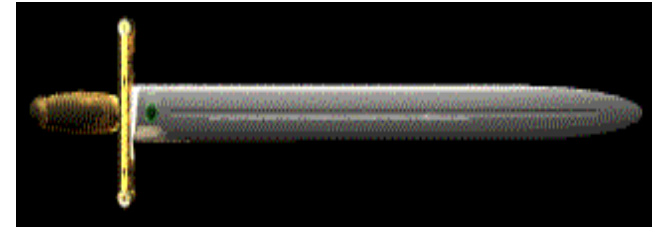
- **the passing-on defence is in principle admissible in German law**
- **Proving the passing-on defence: factors**
- **the burden of proving a claimant passed overcharges on to its customers should at least partially be shifted from defendant to claimant.**



The solution in the Directive

- **Explicitly recognises the possibility for the infringing undertaking to invoke the passing-on defence.**
- **However, in situations where the overcharge was passed on to natural or legal persons at the next level of the supply chain for whom it is legally impossible to claim compensation, the passing-on defence cannot be invoked. (because of national rules on causality, including rules on foreseeability and remoteness).**
- **The burden of proving the passing-on always lies with the infringing undertaking.**
- **Indirect purchaser- a rebuttable presumption -a passing-on to that indirect purchaser occurred.**

Shield/Sword



- **Passing on shield**
- ***The defendant** in an antitrust damages case should be entitled to rely on the passing-on defence against a claim for compensation of the overcharge, brought by a claimant who is not a final consumer".*

BUT:

- The burden of proving the passing-on of overcharge would have to lie with the defendant

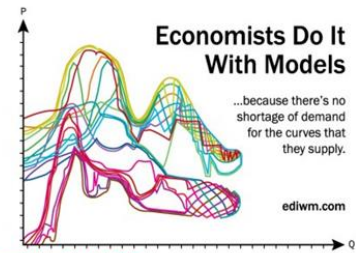
- **Passing-on sword**
- *in order to ease the **Claimant's** burden of proving the passing-on of the overcharge and its extent, he could rely on a presumption that the overcharge that the defendant illegally imposed on the direct purchaser has been passed on in its entirety down to his level*



Quantification of the passing-on

- **the national court should have the power to estimate which share of the overcharge has been passed on to the level of indirect purchasers**
- **national courts should take due account of parallel or preceding actions (or judgments resulting from such actions) in order to avoid under- and over-compensation**
- **Actions that are pending before the courts of different Member States may be considered as related within the meaning of Article 30 of Regulation No 1215/2012, meaning that they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.**
- **any court other than the court first seized may stay its proceedings or decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation of the actions.**

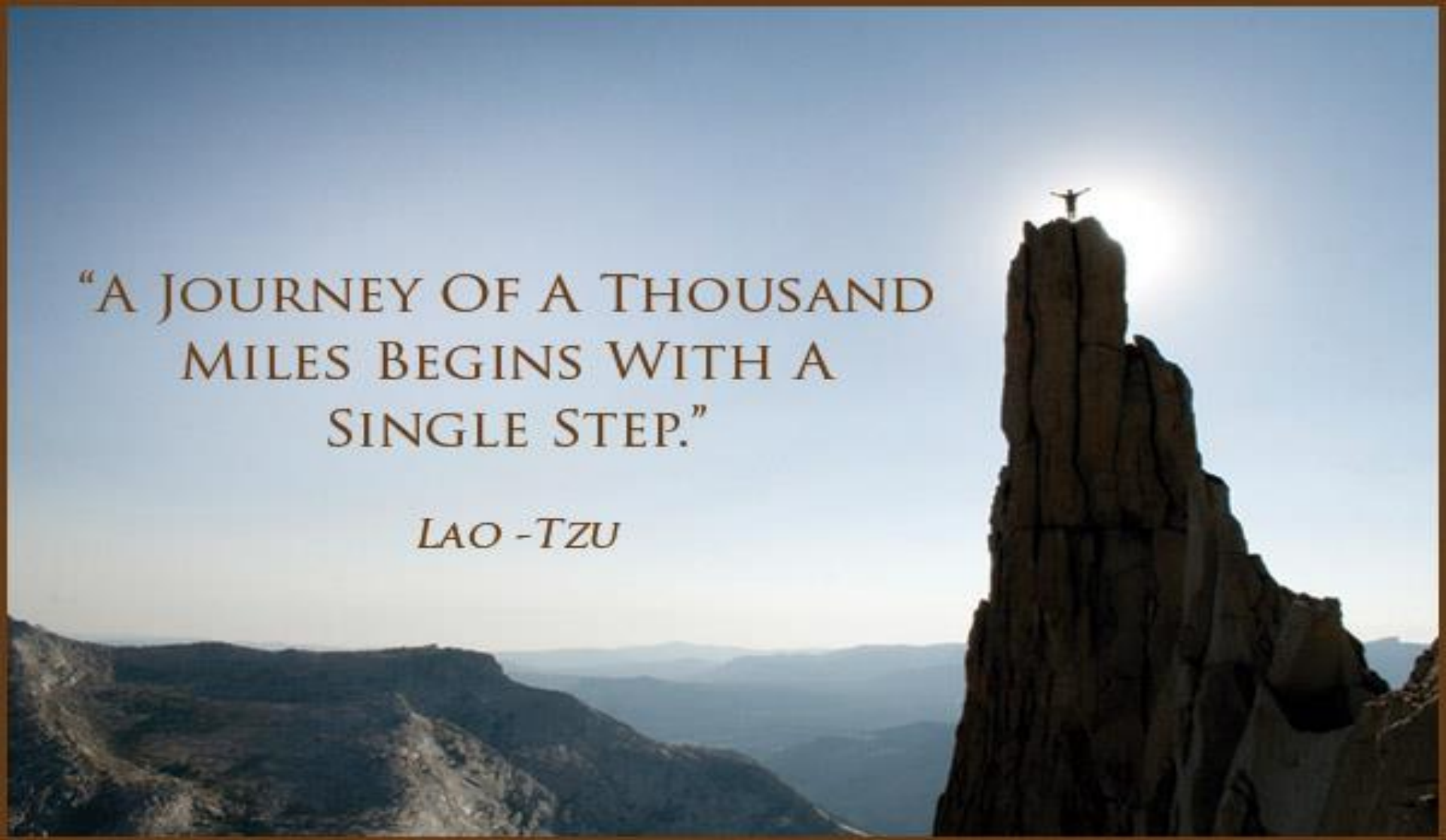
II.5. Quantification damages



- **quantifying antitrust harm- generally very fact-intensive and costly**
- **a rebuttable presumption with regard to the existence of harm resulting from a cartel.**
- **nonbinding guidance Communication on quantifying harm in actions for damages**
- **Commission Staff Working Paper - Practical Guide on quantifying harm in actions for damages based on breaches of EU competition law.**

II.6. Consensual Dispute Resolution

- Optimising the balance between out-of-court settlements and actions for damages:
 - (i) suspension of limitation periods for bringing actions for damages as long as the infringing undertaking and the injured party are engaged in consensual dispute resolution;
 - (ii) suspension of pending proceedings for the duration of consensual dispute resolution;
 - (iii) reduction of the settling injured party's claim by the settling infringer's share of harm. For the remainder of the claim, the settling infringer could only be required to pay damages if the non-settling co-infringers were unable to fully compensate the injured party; and
 - (iv) damages paid through consensual settlements to be taken into account when determining the contribution that a settling infringer needs to pay following a subsequent order to pay damages. (the situation where the settling infringer was not a defendant in the action for damages, but is asked by co-infringers who were ordered to pay damages to contribute under the rules of joint and several liability)



“A JOURNEY OF A THOUSAND
MILES BEGINS WITH A
SINGLE STEP.”

LAO - TZU

dianaungureanu2004@yahoo.com