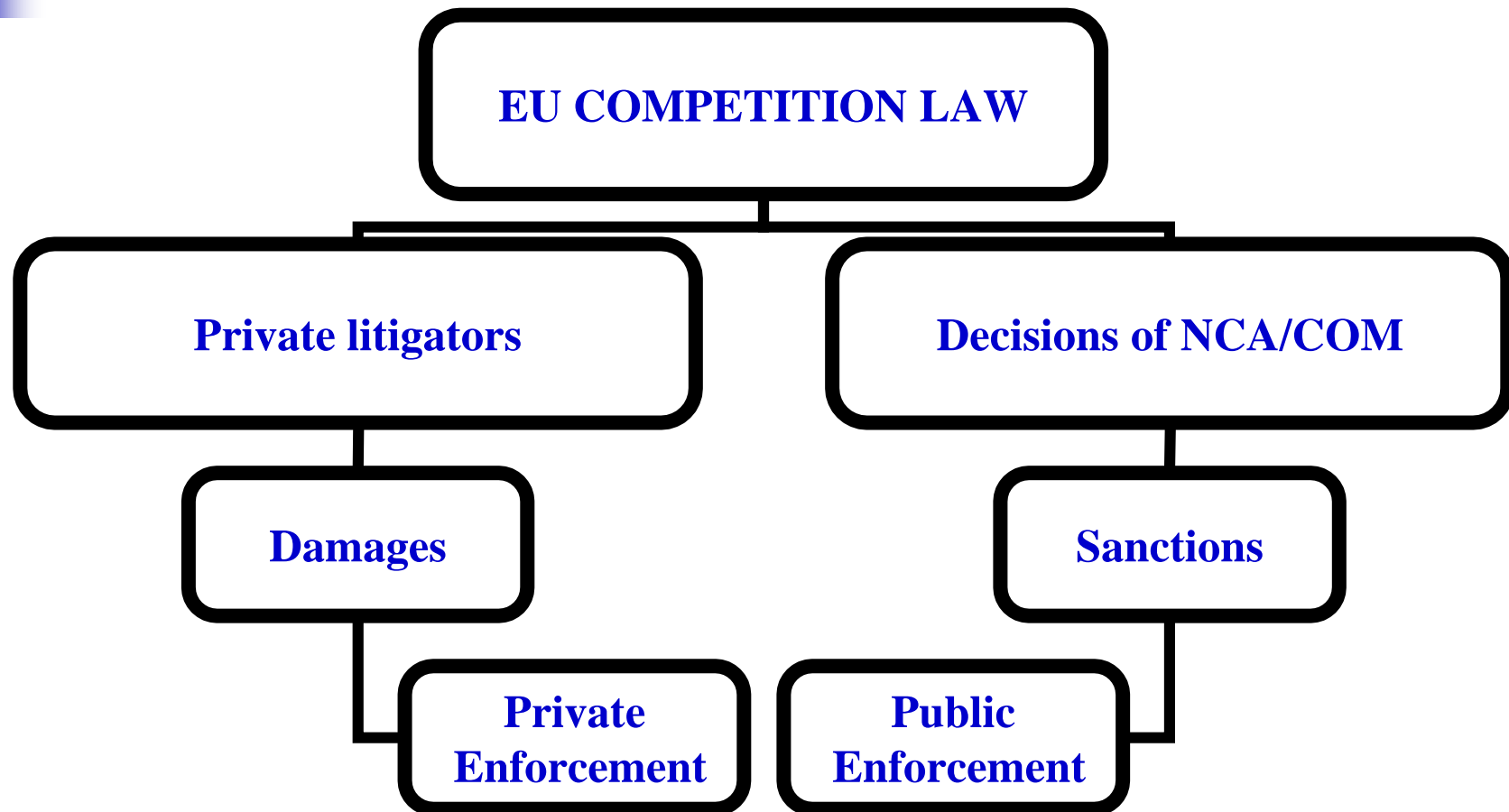




Lessons from teaching the
Antitrust Damages Directive.
Case Study

PHD Judge Diana Ungureanu

Public enforcement- private enforcement



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.**



I. C-557/12, Kone

- **Article 101 TFEU precludes the interpretation and application of domestic legislation enacted by a MS which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions.**



Preliminary question.Austrian law

- Austrian law categorically excludes a right to compensation in a situation such as that at issue, owing to the fact that **the causal link between the loss sustained and the cartel in question is considered**, in the absence of a contractual link with a member of that cartel, to have been broken by the autonomous decision of the undertaking not party to the cartel, but which applied, owing to the existence of the cartel, umbrella pricing.



Grounds

- even if the determination of an offer price is regarded as a purely autonomous decision, taken by the undertaking not party to a cartel, it must none the less be stated that such a decision has been able to be taken by reference to a market price distorted by that cartel and, as a result, contrary to the competition rules.
- 30 It follows that, a loss being suffered by the customer of an undertaking not party to a cartel, but benefiting from the economic conditions of umbrella pricing, because of an offer price higher than it would have been but for the existence of that cartel is one of the possible effects of the cartel, that the members thereof cannot disregard.



Grounds

- In principle- the domestic law
- The full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets



II. Effect of national decisions

- 1. an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to **be irrefutably established** for the purposes of an action for damages brought before **their national courts** under Article 101 or 102 TFEU or under national competition law.

- 2. where a final decision is **taken in another Member State**, that final decision may, in accordance with national law, be presented before their national courts as **at least prima facie evidence** that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.



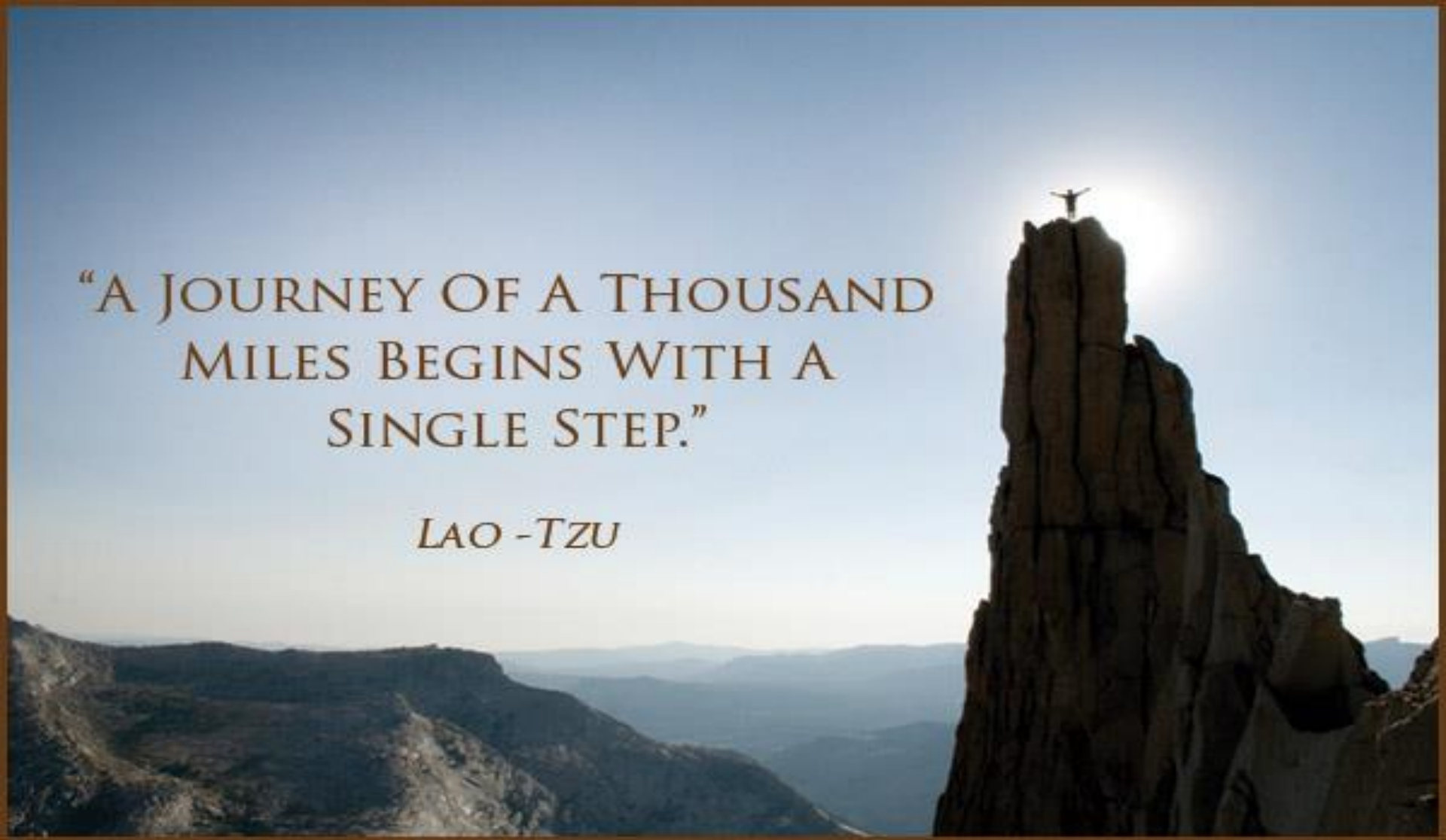
III. The presumption of harm

- neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult.
- the national courts should be empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.
- It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.



IV. 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.



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

LAO - TZU

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