

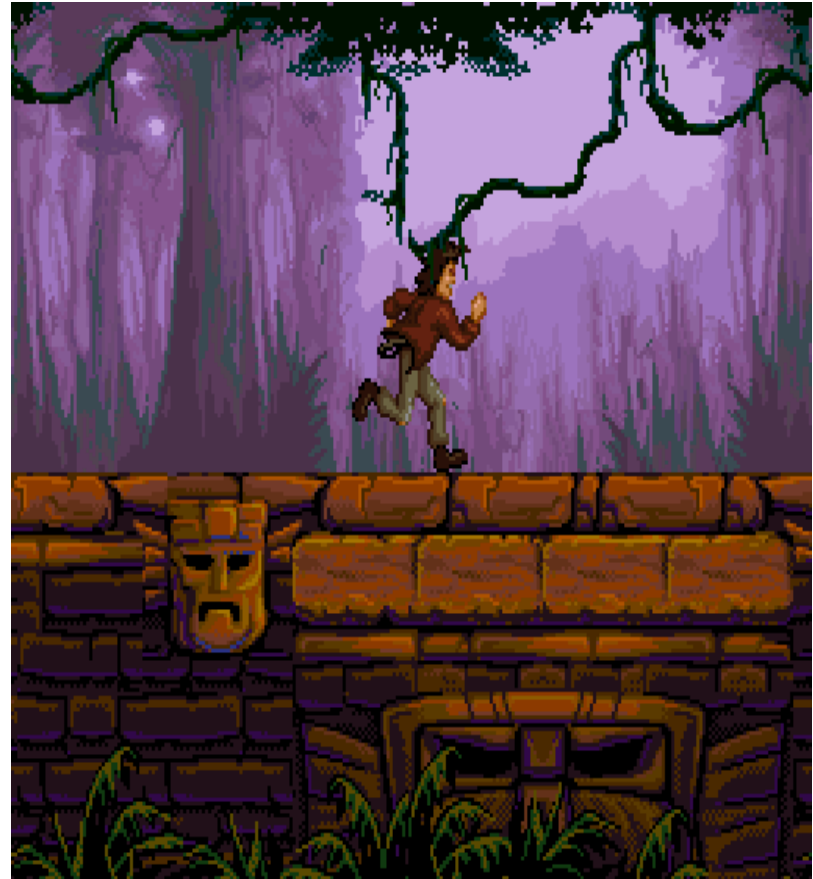


Evidence: the big challenge in the Directive on Damages Actions

PHD Judge Diana Ungureanu

I.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.**



The Directive. Minimum/ maximum standard?



- not prevent MS from maintaining or introducing rules which would lead to wider disclosure of evidence.
- Except- art.6 - disclosure from NCA files
 - Confidential information
 - The right to be heard
- without prejudice to the rights and obligations of national courts under R. 1206/2001-taking evidence



A matter of evidence...

- Disclosure of evidence
- Burden of proof
- Standard of proof
- Presumptions
- The NCA/Comission decission
- Passing on defence
- Quantification of damages

Disclosure.

What? When? Who?

- **WHEN:** upon request of a claimant who has presented a **reasoned justification** containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages
- **WHO:** **national courts are able to order the defendant or a third party to disclose** relevant evidence which lies in their control, subject to the conditions
- **WHAT:** specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification



Protective measures

- confidential information - national courts have at their disposal effective measures to protect such information
- full effect to applicable legal professional privilege- Akzo Nobel
- The right to be heard before the court orders disclosure



The legal privilege

- *AM & S Europe v Commission*: the confidentiality of written communications between lawyers and clients should be protected at Community level-two cumulative conditions:
 - the exchange with the lawyer must be connected to 'the client's rights of defence'
 - the exchange must emanate from 'independent lawyers', that is to say 'lawyers who are not bound to the client by a relationship of employment'.



Case C-550/07 P, **Akzo Nobel**

Measures of inquiry – Commission's powers of investigation – Legal professional privilege – Employment relationship between a lawyer and an undertaking – Exchanges of e-mails

Legal privilege should be recognized to in-house lawyers?



Akzo Nobel Chemicals

- the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship.
- An in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.
- while the rules of professional organisation in Dutch law may strengthen the position of an in-house lawyer within the company, the fact remains that they are not able to ensure a degree of independence comparable to that of an external lawyer.



Akzo Nobel Chemicals

- an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence.
- under the terms of his contract of employment, an in-house lawyer may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the commercial policy of the undertaking. Such functions cannot but reinforce the close ties between the lawyer and his employer.
- It follows, both from the in-house lawyer's economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer.

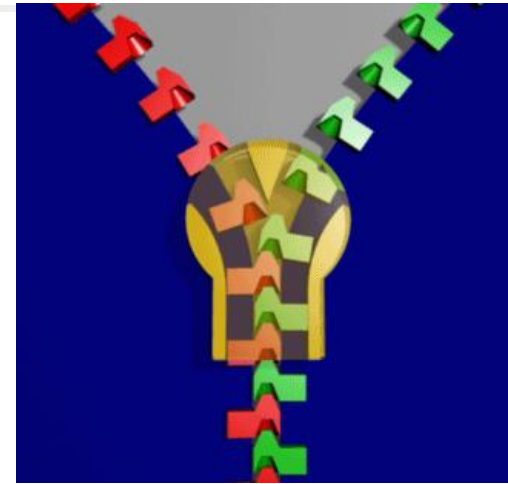


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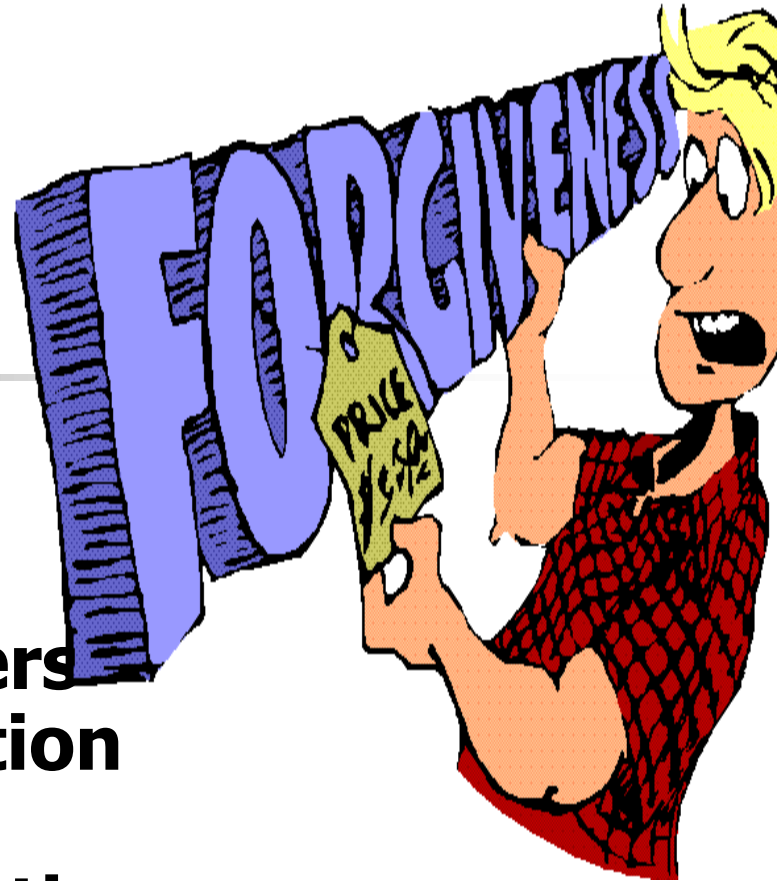
- Regulation No 1/2003 does not aim to require in-house and external lawyers to be treated in the same way as far as concerns legal professional privilege, but aims to reinforce the extent of the Commission's powers of inspection, in particular as regards documents which may be the subject of such measures.

Disclosure of evidence from the file of a NCA

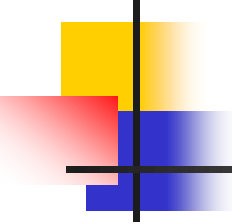
- **Public enforcement/
private enforcement**
- **Access to evidence:
necessity for claimant-
private enforcement**
- **Leniency policy-necessity for NCA&COM-
public enforcement**
- **Proportionality**



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

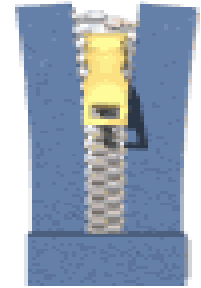
- **French Supreme Court authorises parties to disclose documents in the Autorité's file if it is necessary for the concerned parties to be able to exercise their rights** (Cour de cassation, Commercial Chamber, *Semavem*, 19 January 2010)
- **The Commercial Court in Paris ordered the French competition 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



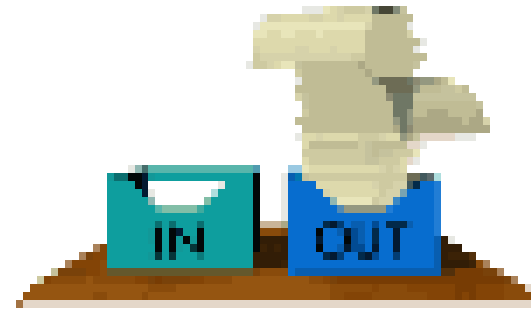
- **The order issued by the Commercial Court:**
- **non-confidential versions of all written and oral statements gathered by the Autorité during its investigation.**
- **the parties' and third parties' written observations, minutes of hearings, replies to questionnaires or requests for documents issued 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.**



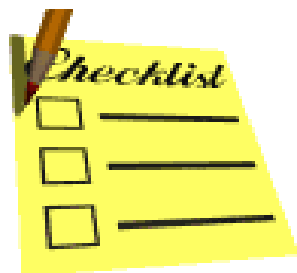
The Directive. Not the rule

- request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence.
- If needed: in addition to art.5- art.6
- without prejudice to:
 - the rules and practices on public access to documents under Regulation 1049/2001
 - the EU/ national rules and practices on the protection of internal documents of NCA and of correspondence between NCA.



Limits of disclosure. Blacklist

- **Art.6 (6): 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.**





Blacklist. What's behind?

- !!!!! a national court can access this evidence **for the sole purpose of ensuring that their contents correspond to the definitions**
- **'leniency statement'** -an oral or written presentation **voluntarily provided** by, or on behalf of, an undertaking or a natural person to a CA or a record thereof, describing the knowledge of this of a cartel and describing its role therein, which presentation was **drawn up specifically for submission to the CA with a view to obtaining immunity or a reduction** of fines under a leniency programme, **not including pre-existing information (par.16)**
- **'pre-existing information'** -**evidence that exists irrespective of the proceedings of a CA, whether or not such information is in the file of a CA;** (par.17)
- **'settlement submission'** - a voluntary presentation by, or on behalf of, an undertaking to a CA describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure;
- may request **assistance only from the NCA.**
- The authors of the evidence in question may also **have the possibility to be heard.**
- In **no case permit other parties or third parties access to that evidence.**
- only parts of the evidence requested could be covered by par. 6

Temporary protection. Grey list



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

Proportionality. More criteria



- whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents or held in the file thereof, rather than by a non-specific application submitted to a NCA
- whether the party requesting disclosure is doing so in relation to an action for damages before a national court
- the need to safeguard the effectiveness of the public enforcement of competition law

CA may, acting on its own initiative, submit observations to the national court on the proportionality of disclosure requests



Limits on the use of evidence

- **Where one of the parties in the action for damages had obtained those documents solely from the file of a CA, such documents are not admissible as evidence in an action for damages/or are admissible only when the authority has closed its proceedings.**
- **Full effect of art.6**



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.**



Penalties

- failure or refusal to comply with the disclosure order of any national court/ obligations imposed by a national court order protecting confidential information;
- destruction of relevant evidence
- effective, proportionate and dissuasive
- The possibility to draw adverse inferences:
 - presuming the relevant issue to be proven
 - dismissing claims and defences in whole or in part
 - the possibility to order the payment of costs.



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 NCA (or by a national review court) similar effect?**



The solution in the Directive

- infringement of competition law found by a final decision of a NCA 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
- final decision **taken in another MS**- at least prima facie evidence that an infringement of competition law has occurred

II.2. 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.**





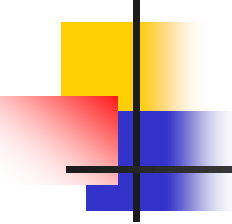
Passing on

- **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

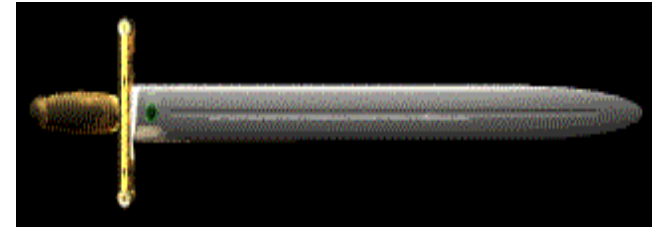
- **the passing-on defence is in principle admissible in German law**
- **Proving the passing-on defence: factors**
- **the burden of proving a claimant passed overcharges on to its customers should at least partially be shifted from defendant to claimant.**



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

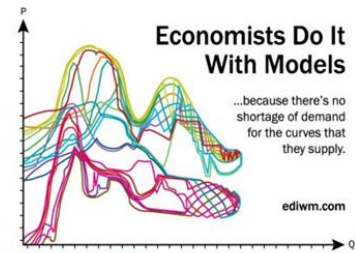
- **Passing-on sword**
- *in order to ease the **Claimant's** burden of proving the passing-on of the overcharge and its extent, he could rely on a presumption that the overcharge that the defendant illegally imposed on the direct purchaser has been passed on in its entirety down to his level*



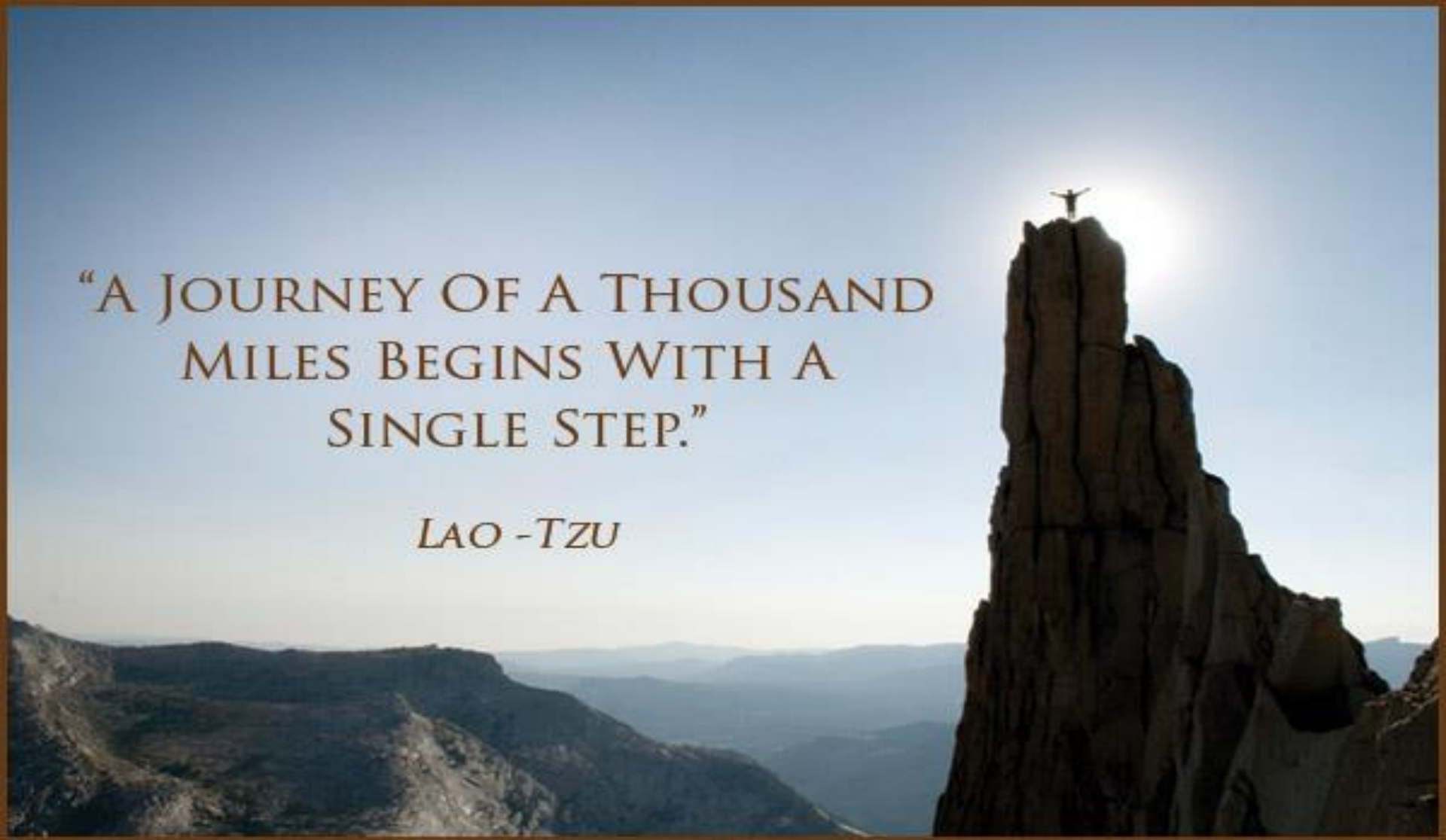
Quantification of the passing-on

- **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.3. 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.**



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

LAO - TZU

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