

The Enforcement of Competition Law in the Light of the Proposal for an ECN+-Directive

Enlargement of the leniency program on criminal sanctions (Article 22)

- comments from the perspective of a German lawyer

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Overview

- Is there a need to extend immunity of directors and employees to criminal sanctions
 - in general?
 - with view to the situation in Germany?
- Does Article 22 achieve the goal to reduce legal uncertainty?
- Does EU legislator have the competence to order immunity from criminal sanctions?

Article 22 ECN+-Directive (Commission's proposal)

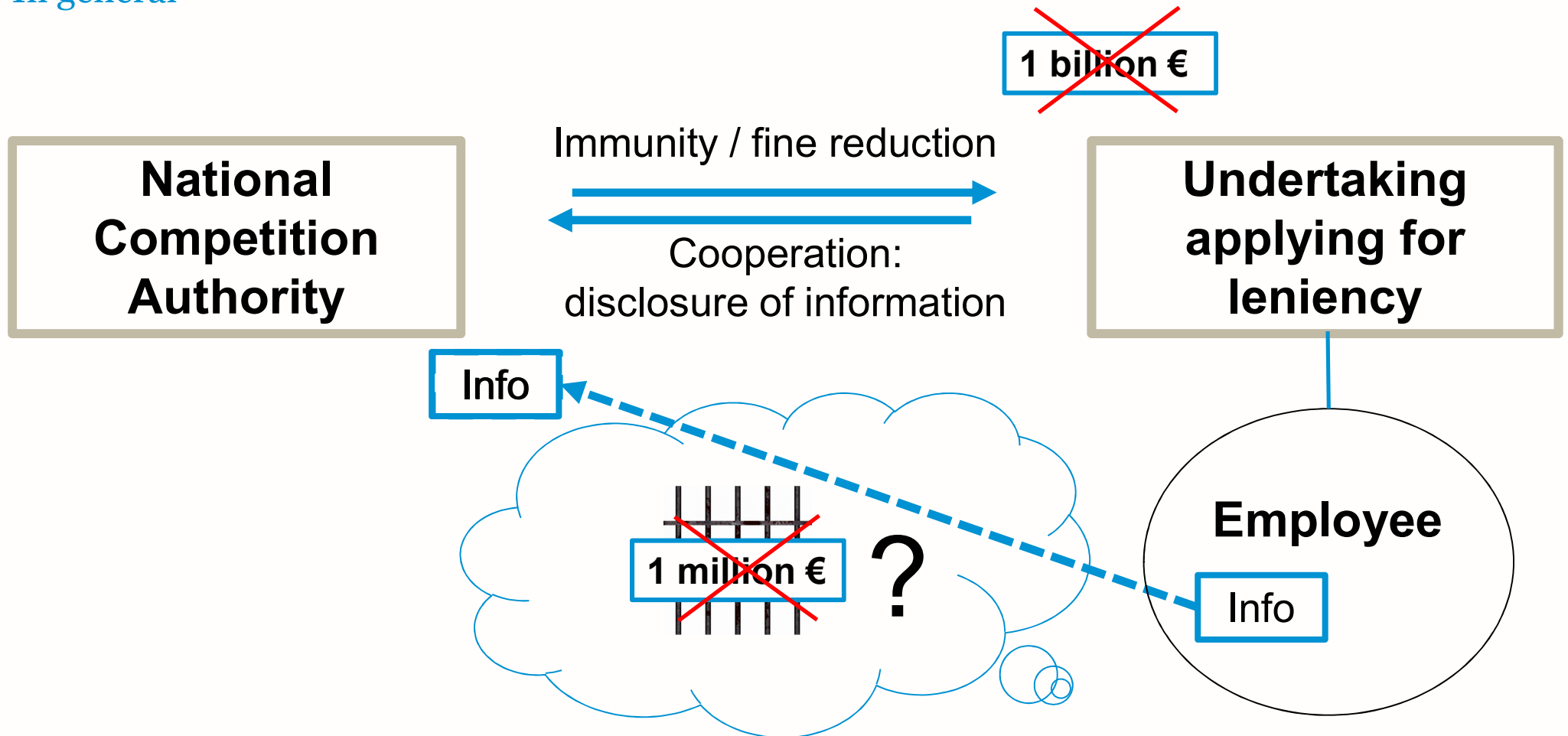
Member States shall ensure that

- 1) current and former employees and directors
- 2) of applicants for immunity from fines to competition authorities
- 3) if these employees and directors actively cooperate with the competition authorities concerned
- 4) and the immunity application predates the start of the criminal proceedings.

are protected - from any criminal and administrative sanctions and
- from sanctions imposed in non-criminal judicial proceedings
for their involvement in the secret cartel covered by the application

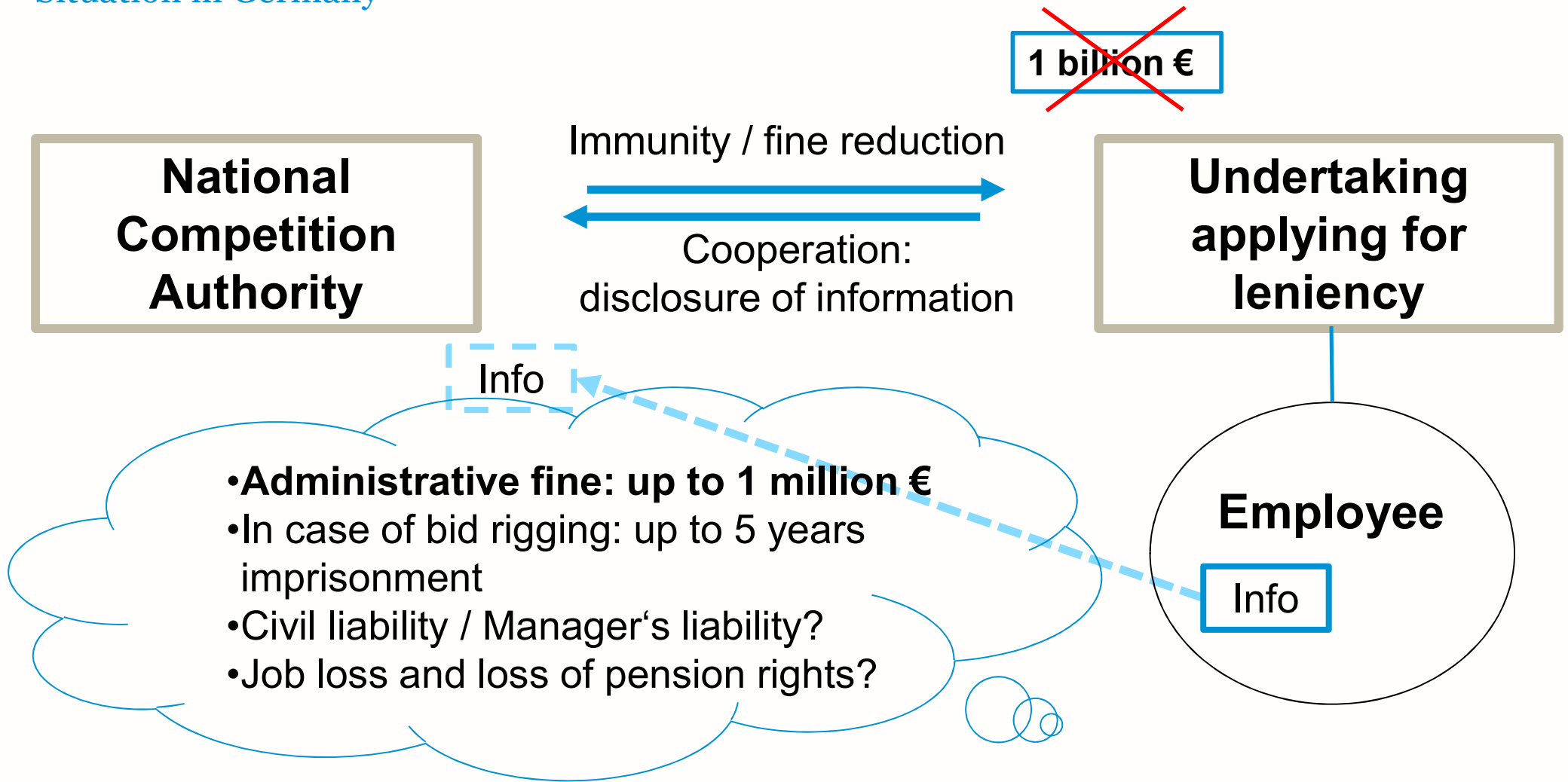
Need to protect employees from criminal sanctions?

In general



Need to protect employees from criminal sanctions?

Situation in Germany



Does Article 22 achieve reduce legal uncertainty?

Protection from criminal sanctions for cartel behaviour, but still some uncertainty

- Protection of employees of the first undertaking only, or also of further undertakings applying for immunity?
- What if the employee is willing to cooperate, but not the undertaking?
- What kind of sanctions are covered by Article 22?
 - Secret cartels – Article 101 TFEU, Sec. 1 ARC (= § 1 GWB) ✓
 - Bid rigging – Sec. 298 C.C. ✓
 - Fraud (Sec. 263 C.C.)? Corruption (Sec. 299 C.C.)? ?
 - Civil liability? ✗
- Protection only if undertaking's immunity application is made prior to the beginning of criminal proceeding?

EU competence to order immunity from criminal sanctions?

- Criminal law belongs to the core competences of the member states
- Only limited competences of the EU
 - Article 83 (2) TFEU (minimum standard setting, but not restricting national law)?
 - Art. 103 and 114 TFEU?
 - Effet utile – fully harmonized leniency rules necessary for the effective enforcement of European law?
- Direct feedback to national legislator implementing the directive; but maximum harmonization approach does not leave room for political discretion
- Required legislative measure: amendment of the Criminal Code

Thank you very much!

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