



University of
Zurich ^{UZH}

Competition Law and Sustainable Innovation

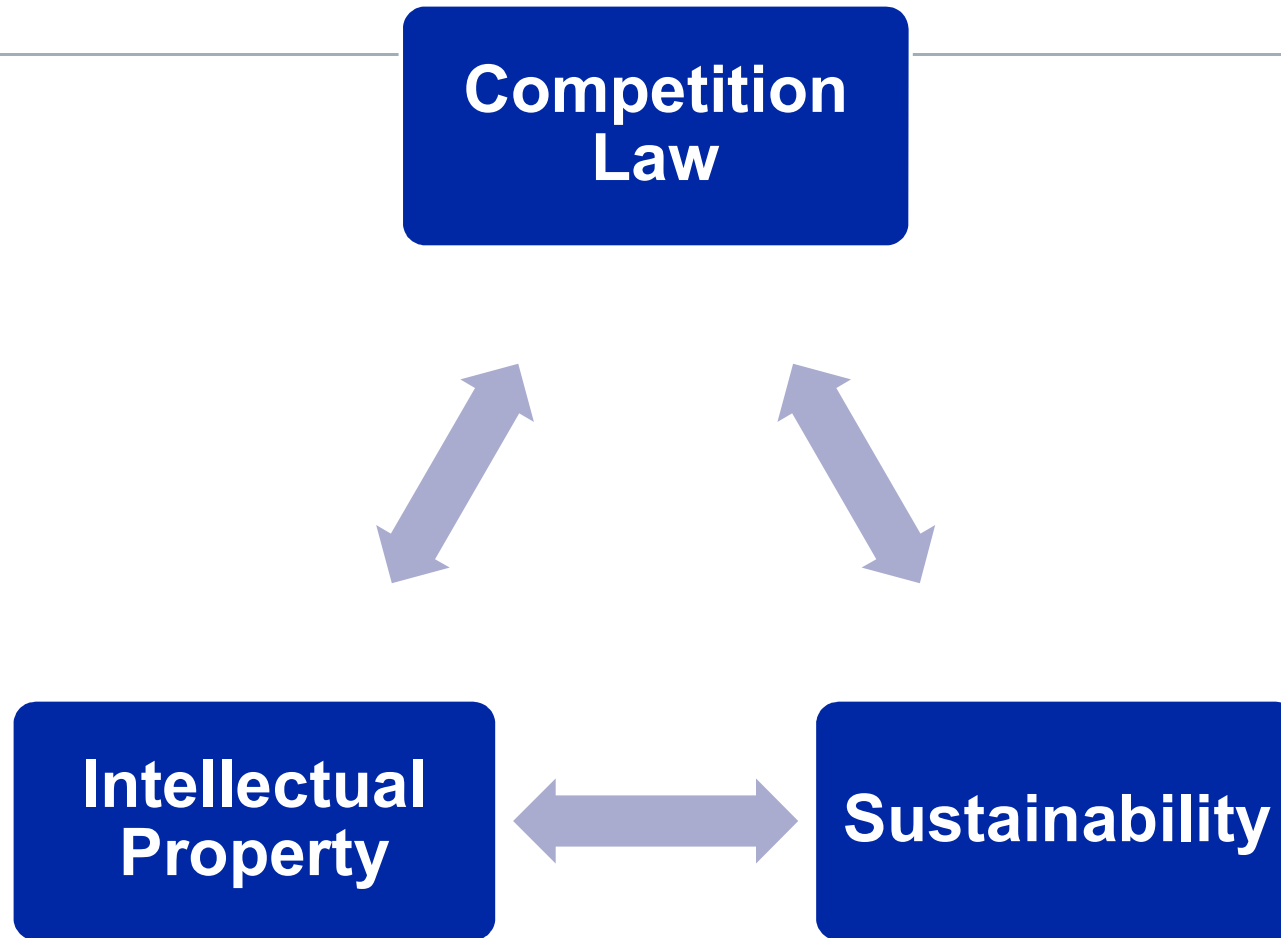
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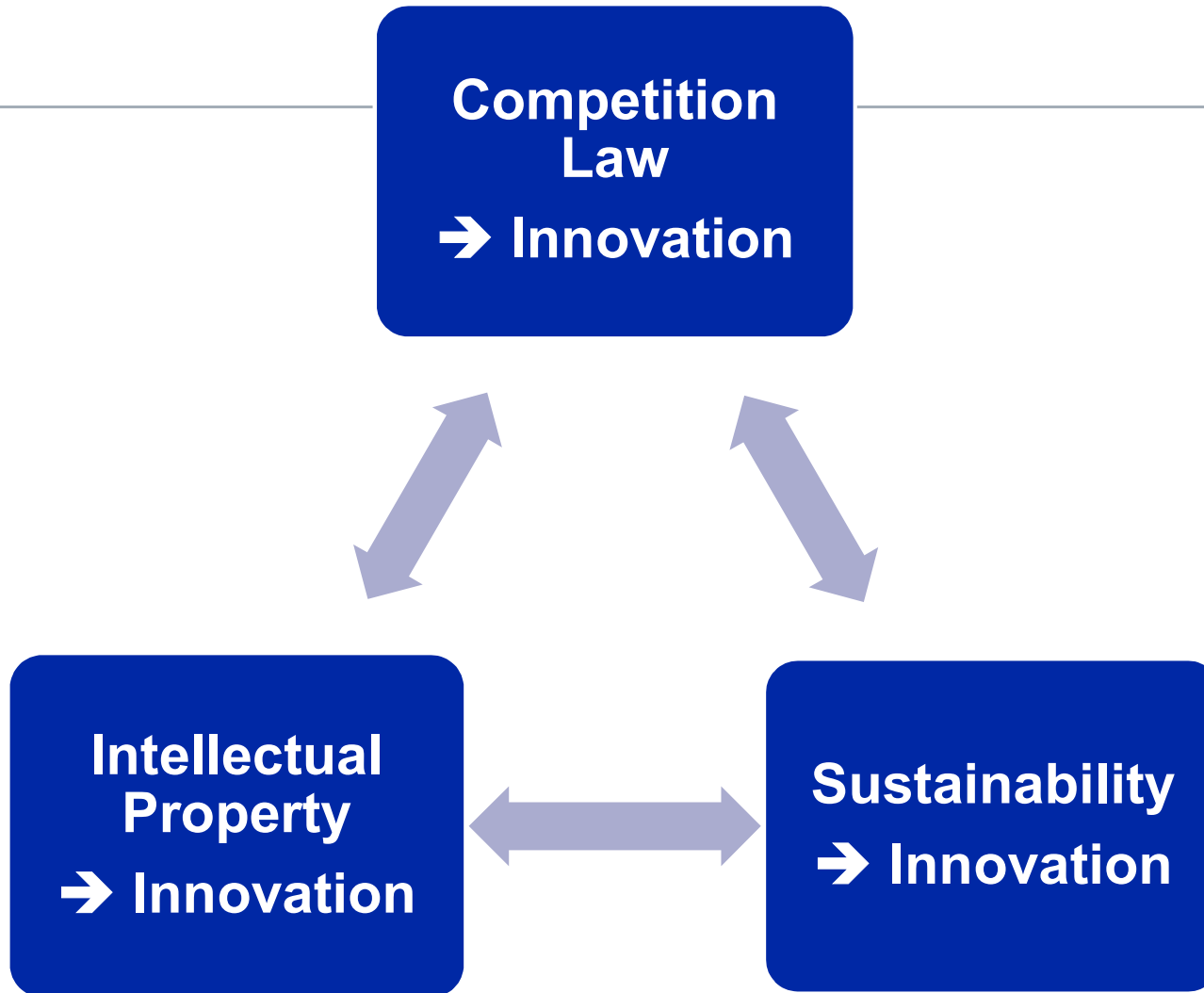
Sustainability of Innovation and Competition

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1. The Relationship between Competition Law and IP

- In former times, a **conflict between patent protection and competition law** was supposed:
 - patents grant monopolies
 - competition law fights against monopolies

- Since the 1970ies, both fields are perceived not as conflicting, but as **complementary**:
 - patent law **promotes innovation** by granting **exclusive rights**
 - competition law protects the **competitive process** which should also **generate innovation**
- ➔ Hence, both fields share the same goal (i.e. **innovation**)



2. The Relationship between Competition Law and Sustainability

- **Agreements on complying with current environmental law** are no restriction of competition.
- **No restriction of competition** when **setting up environmental labels**
 - Condition: **No exclusivity, no price elements** etc.
- If there is a restriction of competition, an **efficiency justification** is possible.
 - For **Switzerland** Art. 5 para. 2 Swiss Cartel Act: Agreements are justified if:
 - "a. they are necessary in order to reduce production or distribution costs, improve products or production processes, **promote research** into or dissemination of technical or professional know-how, or **exploit resources more rationally**; " [**since 1995**]



➤ **Legislative Materials (1994)**

"For example, candy manufacturers could claim an efficiency improvement if they agreed to **stop packaging their products in aluminum foil** for environmental reasons (energy consumption, waste disposal problems) and instead use another more environmentally friendly material."

- **A sufficient connection to the production process or the products** of the parties is required.



Klimarappen ("Climate Centime"):

2004: The Swiss Petroleum Association planned to bring about a **voluntary agreement** between petroleum importers to **add one to two centimes** to the sales prices of gasoline and diesel. The additional revenue was to go to a foundation that would use the money for CO₂-reducing measures.

- Art. 5 para. 3 Cartel Act: Two centimes is too small an amount in relation to the final price, to have a price harmonizing effect. It is no price cartel (important for sanctions under Swiss law).
- But it is a general restriction of competition that needs justification, Art. 5 para. 2 Cartel Act.
- According to the practice of the Competition Commission, "a sufficiently **close connection with the product or the production process**" is necessary.



- This condition could **not be affirmed**, because the contours of the project were not yet sufficiently clear and therefore there was no certainty as to what the collected money would be used for.
- In general, **it seems questionable whether a CO2 reduction that is obtained merely by an increase in price** due to a restrictive agreement can be recognized as a sufficiently specific efficiency advantage.
- Such an incentive tax should rather be imposed by the **legislature** (or authorized by the government on the basis of Article 8 Cartel Act).
- ➔ In sum, it is not clear at all, how such a system would contribute to **sustainable innovation**



3. The Relationship between Competition Law, IP and Sustainability

- What about **joint research** and **joint solutions** with the goal of **promoting sustainability**?
- In the EU there is the **Block Exemption Regulation on R&D (BER R&D)**
currently under revision
- **BER R&D** grants a large amount of leeway for joint R&D **including access to arising IPRs**
- **Art. 3 (1) BER R& D:**
"The research and development agreement **must stipulate** that **all the parties have full access** to the final results of the joint research and development [...] **including any resulting intellectual property rights and know-how**, for the purposes of further research and development and exploitation, as soon as they become available."



Conclusions

- **Environmental policy** by the state is key, on a **national** and **international** basis
- **Business cooperation** can only **supplement** the right framework, not replace it.
- **Competition law** offers **large flexibilities** for cooperative solutions.
- However, mere **greenwashing** is not conducive to sustainability.
- Only in a **competitive system**, firms will have incentives to **innovate** and to improve their ecological footprint.