

**Intergovernmental Group of Experts on Competition Law and
Policy, Fifteenth Session**

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Round Table on:

***"Examining the interface between the objectives of
competition policy and intellectual property"***

Contribution

by

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The views expressed are those of the author(s) and do not necessarily reflect the views of
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The interface between the objectives of competition policy and intellectual property

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“The monopoly-competition dialectic is inherent to the political economy of capitalism” (CRISTOPHERS)

The core issue is to determine the optimal level of competition Law intervention in the field of intellectual property rights

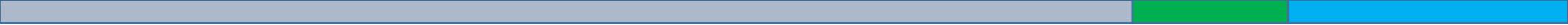
The debate about the objectives of competition Law

- The academics have not yet reached an agreement on what is the main goal of competition Law
- In many cases, the debate about the objectives of competition Law goes behind its enforcement by Competition Agencies and Courts

The debate about the objectives of competition Law

- Consumer welfare – economic efficiency (Bork, Hovenkamp)
- Consumer protection (Lande)
- Consumer at the heart of competition policy (Monti, Kroes)
- Protect the process of competition from restraint and distortion (Gerber, European Treaties)
- Economic, social and political objectives (Monti)
- 3 groups of objectives: market integration, consumer welfare and justice and equity (Padilla, Ahlborn)
- Connection with the objectives of industrial policy
- Protecting small business
- Protecting the environment?

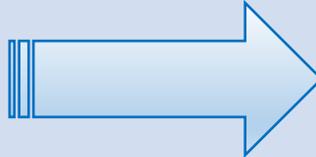
The objectives of competition law and policy results of the questionnaires sent by the OECD (2003)



Two core objectives

- Promoting and protecting the competitive process
- Attaining greater economic efficiency

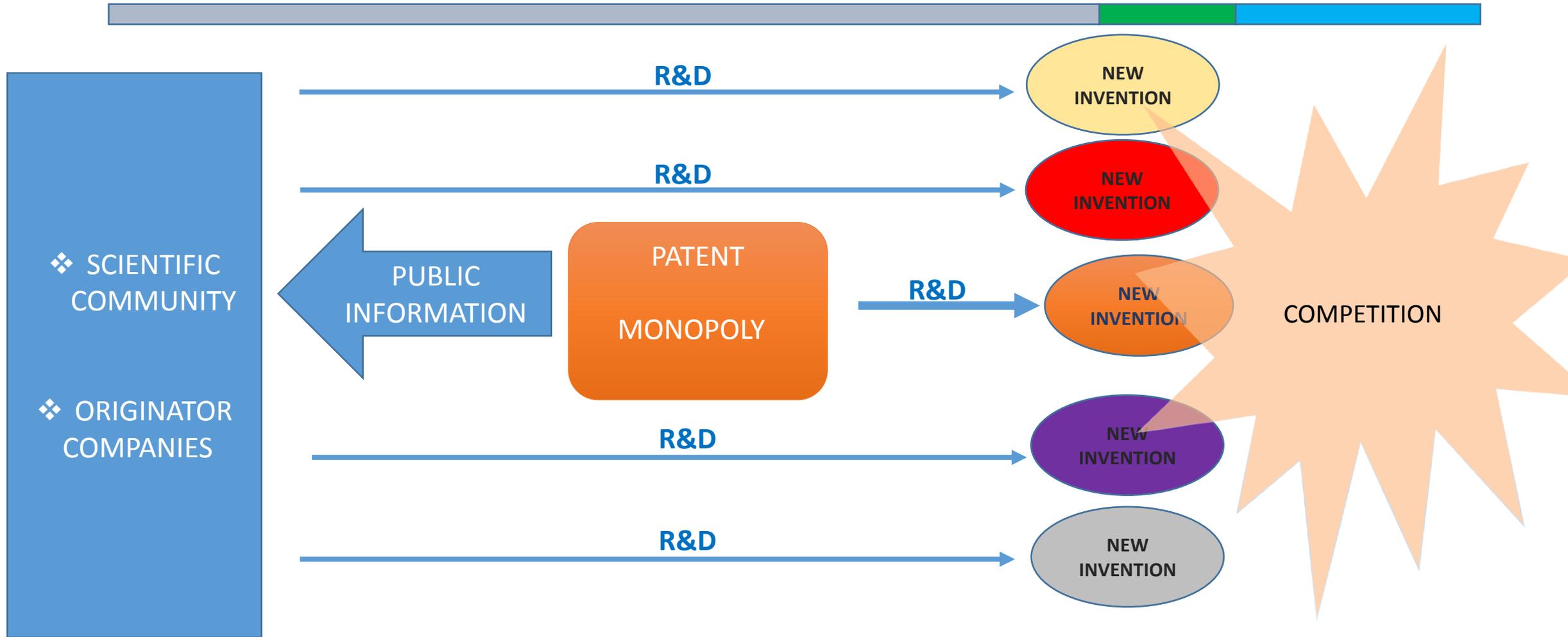
The best way to promote innovation

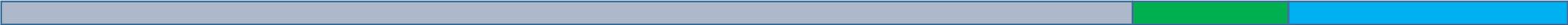
1) Intellectual property		Legal monopolies
2) Free and vigorous competition		The fewer monopolies the better
3) A balance between intellectual property and competition		Effective competition

This balance may have been lost as a result of the generalization of certain patent related practices with the object of extending the period or the scope of protection initially granted by a patent

- Patent pools
- Patent trolls
- Evergreening
- Pay for delay
- Sham litigation

An “ideal” example of the patent system



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- If these conducts are deemed legal according patent Law, the only way to fight them is a rigorous competition Law enforcement in the area of intellectual property

Three groups of cases

1. Patents procured by fraudulent representation

2. Abusive uses of the exclusive right

3. Patents legitimate procured and valid but their excessive number and scope raise rivals research and development cost or prevent entry

Problems found by competition agencies when dealing with cases of this nature

- Novelty: - Abuse of a regulatory process
 - Abuse of rights
- Difficulty in identifying “anticompetitive” patent filings. Risk of false positives
- Collision between competition and IP laws
- The lack of explicit references in competition or IP laws
- False believe about the adverse effects on innovation of a rigorous enforcement of competition law to IP rights

Are we witnessing the beginning of a new era in the relationship between intellectual property and competition Law in Europe?

Some facts

- More consumer oriented antitrust enforcement
- Exclusionary abuses are now the core of enforcement of article 102 to dominant undertakings
- The conclusions of the European Commission`s Pharmaceutical Sector Inquiry Report
- Cases like “Astra-Zeneca” or “Lundbeck”
- State of opinion increasingly favorable.