

Reflections and Conclusions from the Working Sessions on Questions A & B at the Milan 2022 Congress

The New Format

Having previously moved away from making ‘recommendations’, this year’s discussions of Questions A & B also had a new format. In addition to an overview from our two esteemed International Rapporteurs, the concurrent sessions introduced a panel/roundtable debate, which included contributions from several of the National Rapporteurs.

The new format appeared to work well and encouraged active audience participation and engagement. Feedback on the new format during the General Assembly was positive; however, the Scientific Committee welcomes any additional thoughts and comments in preparation for the 2023 Congress.

Discussion on Question A (Competition)

There was a vibrant debate prompted by the presentation of the International Report by Professor Nowag and the excellent written contributions from the National Rapporteurs from 11 national Chapters, several of whom were able to join the panel discussion and helped to generate an interactive and engaging session.

The discussion on Question A (and on the International Report) led to several observations and conclusions:

- Sustainability/green-washing should not be misused to justify infringements of competition law (e.g. anti-competitive coordination, collusion, price fixing). Competition is a key driver for innovation and can help drive sustainability objectives.
- Competition law is certainly not the only, and may not be the best, tool to address sustainability issues, but it can play a role in the move towards a more sustainable society.
- The debate is beginning and/or increasing momentum in a growing number of jurisdictions. Some jurisdictions are more advanced than others in their thinking.
- Certain competition authorities are taking a lead, from advocacy on sustainability issues, to publishing policy papers and guidelines. Certain authorities are proactively leading the debate and not waiting until the cases come to them.
- While there is still not an abundance of cases, the number of cases in different jurisdictions is increasing.
- There are still numerous questions that remain unanswered, in particular – but not limited to - questions relating to the treatment of out-of-market efficiencies.
- Intervention by the legislator could address problems of (democratic) legitimacy and the balancing/weighting exercise to be undertaken by competition authorities.
- Companies should be encouraged to take up the opportunity offered by certain competition authorities to be provided with individual guidance.
- In order to provide greater transparency and clarity to industry, advisors and society as a whole, it would be helpful if individual guidance were at least published as

press release. Publication of more detailed/concrete documents other than press releases, such as individual guidance (comfort/business advice letters) would be preferable from the perspective of transparency, legal certainty, and value for advising on matters of sustainability.

- Guidelines addressing sustainability, or even block exemptions, could provide even greater legal certainty. Although this may be difficult, at least until there are sufficient examples/cases to draw upon.
- International sharing of experience between competition authorities/agencies around the world is highly recommended they have experiences in different fields. Sustainability is a global issue and this requires a global debate.
- The establishment of (global) best practices, possibly with a focus on standards - an area where a lot of experience exists- is strongly encouraged.

In terms of next steps and the role of the LIDC, all of the factors outlined above merit further debate. Potential legislative and soft-law solutions could be explored in the future. In the meantime, the dialogue on the interface of competition law and policy and sustainability should continue (between authorities, practitioners, industry and interest groups). As an international organisation, the LIDC is well-placed to lead and facilitate this discussion and will look for ways to further the international dialogue. Accordingly, the Scientific Committee shall add this to our work programme for 2023 and will explore opportunities for follow-up webinars and/or a working group on sustainability and competition.

Discussion on Question B (Intellectual Property)

There was a fantastic exchange of views in a session chaired by Marco Francetti and led by our International Rapporteur, Christopher de Mauny from Bird & Bird, with several of the National Rapporteurs also participating in the panel discussion.

The discussion on Question A (and on the International Report) led to the conclusion that several topics deserve further consideration:

- Defining “sustainable”/“sustainability”. If IP is to have a role in “sustainability”, a definition of this term would promote legal certainty and facilitate some practical measures. One proposal made in discussion was to adopt a closed list of sustainable technologies/activities, potentially using the UN’s Agenda 2030 goals.
- The international harmonisation of IP should not be overlooked – any desire for substantial change might not be permissible without amendment to international treaties (principally Paris Convention and TRIPS but potentially others).
- Most national reporters considered that radical change to IPR was undesirable and that rights should generally remain technology neutral. Some noted the possibility to classify polluting or other unsustainable technologies as contrary to ordre public, thereby denying patent protection. This is a difficult issue (not least because of point (1), and likely controversy about a further class of ‘damaging’ technologies) but because denial of patent protection for damaging but commercially attractive technologies could indeed increase the use of that technology, with counterproductive results. It should be noted that certain aspects of the patent

system are modified preferentially for medicinal products (etc) and therefore the patent system does not have complete neutrality on technology at present.

- There was support for making less radical changes to the IP system, e.g. to encourage or facilitate the acquisition of IPR over sustainable technologies, or to promote wider use of that technology, e.g. via licensing of IP. Specific areas for further consideration include:
 - Accelerated examination for patent applications for “sustainable” technology, and/or lower fees;
 - Incentives such as ‘patent box’ or other tax reliefs for sustainable technologies that are patented;
 - Incentivisation of licensing, e.g. by further incentivising licences or right, making licence royalties tax-beneficial, etc;
 - The interaction between patents (through which information is ultimately made available to all) and trade secrets (through which information may be protected indefinitely from use by others).
- Licensing was discussed at length. Besides the points mentioned above, consideration should be given to:
 - The applicable conditions for compulsory licensing, as applied to sustainable technologies, should be undertaken;
 - The model of FRAND licensing, applied to a different situation. In particular, there may be a few examples where a prescribed solution is mandated (typically by regulation, rather than by an industry-adopted standard) but more typically a regulatory restriction will lead to a more limited pool of potential solutions but will not prescribe one solution that must be followed. Thus the FRAND model would require refinement, at least in respect of what is considered standard-essential, but also in relation to details such as declaring SEPs.
 - Other tools for incentivising licensing (in particular cross-licensing behaviour) of sustainable technologies, to encourage more widespread use of those technologies.
- Destruction of infringing goods is potentially wasteful and should at least be substituted for recycling.
- Greenwashing may be addressed in part through revisions to trade marks and allied rights. Points to consider include:
 - Requiring evidence of any sustainability characteristics of a product/service express or implied by a trade mark;
 - Looking at how certification and collective marks may be defined to ensure that any marks that endorse sustainability have sufficiently strict requirements for their use to ensure consumer confidence in their sustainability claims;
 - The possibility of introducing an international certification mark for sustainably produced goods, for example, to increase international recognition and confidence in such endorsement;
 - Further prominence or recognition of the possibility of revocation of trade marks for being misleading in the context of ‘greenwashing’.



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- Consideration of the open-source model used for software, and whether such a model could be applied to other (i.e. sustainable) technologies to promote (1) further innovation; and (2) use of those technologies by more persons.
- Consider an expansion of the defence to patent infringement of research, where the research is for sustainable purposes or in sustainable technology, somewhat like the *Bolar* exemption.

In terms of next steps and the role of the LIDC, again, it was considered that all of the factors outlined above merit further debate. As an international organisation, the LIDC is well-placed to lead and facilitate this discussion and will look for ways to further the international dialogue. Accordingly, the Scientific Committee shall also add this to our work programme for 2023 and will explore opportunities for follow-up webinars and/or a working group on sustainability and IP.