

CPC Conference: Antitrust and Intellectual Property in a Changing Political Climate By Richard Gilbert, Professor of Economics and Chair of the Competition Policy Center

The *Antitrust and Intellectual Property in a Changing Political Climate* conference, held at UC Berkeley on February 5 and 6, 2009, was co-sponsored by the Competition Policy Center (CPC) and the Antitrust and Intellectual Property Law sections of the American Bar Association. The event covered challenging economic and legal issues in patent pooling and patent litigation settlements, intellectual property licensing, market definition and market power in technology markets and standard setting. Focus sessions compared the United States' and the European Union's approaches to antitrust policy regarding intellectual property and antitrust enforcement directions for the Obama administration.

Commissioner Thomas Rosch from the U.S. Federal Trade Commission delivered the keynote address. Mr. Rosch contrasted the traditional framework for antitrust analysis of product markets against the type of analysis required to analyze the effects of mergers and firm conduct on innovation. He compared two strands in the economic theory of innovation: 1) the Schumpeterian view that concentration can enhance incentives for innovation and 2) the theory developed by Arrow and others that competition promotes innovation. Commissioner Rosch highlighted the importance of focusing antitrust analysis not only on prices but also on the speed of innovation and incentives for product quality. He noted that market definition is a challenge for analyzing innovation because boundaries that define potential innovators often are not clear and innovation may change the structure of the market. Antitrust enforcers, therefore, have to consider both static market shares and dynamic variables that shape markets over time. Finally, Commissioner Rosch emphasized the importance of case-by-case analysis, particularly when investigating innovation incentives and effects.

Several panelists noted differing antitrust enforcement attitudes in the US and EU, particularly in regard to accessing essential facilities and licensing intellectual property. In general, there was a concern that firms that compete in a global economy face antitrust criteria that differ from region to region. The most demanding antitrust standard in any region may become the de facto policy that governs the overall operations of a globalized firm. While this regional competition in antitrust enforcement could have adverse incentive effects such as increased costs, panelists considered that the variety of regulations could also help to identify which regulations are more successful than others.

The session on directions for antitrust policy in the new administration featured several past officials from the Department of Justice and the Federal Trade Commission. The discussion emphasized the challenges of the global economic crisis. Demand contraction is likely to result in smaller markets and, therefore, fewer firms for a given market. Competition authorities should then expect more petitions for horizontal mergers. Panelists also warned, however, that antitrust authorities must balance claims of excess capacity against the risks that mergers will harm competition. The panel agreed that cartel behavior is also more likely in an economic crisis, heightening the importance of future monitoring. This is particularly important because cartels *restrict* output, while the economic recovery depends on *increasing* total output.