**Antitrust Modernization Commission**

**Comments Regarding Commission Issues for Study –September 29, 2004**

**Submitted by**

Mary Coleman
Director
LECG, LLC
1725 Eye Street, NW
Suite 800
Washington, DC 20006
202-973-9371
mcoleman@lecg.com

Chris Pleatsikas
Principal
LECG, LLC
2000 Powell Street
Suite 600
Emeryville, CA 94608
510-985-6804
chris_pleatsikas@lecg.com

David J. Teece
Professor, Haas School of Business
Director, Institute for Management, Innovation and Organization (IMIO)
F402 Haas School of Business #1930
University of California
Berkeley, CA 94720-1930
510-642-1075
teece@haas.berkeley.edu

**Issue for Consideration:** The treatment of innovation in antitrust cases.

**Summary of Issue:**

Over the past 25 years, economic analysis has gained a substantial, many would say, central, role in the analysis of antitrust issues. However, the economic tools most commonly used to assess the competitive implications of the behavior at issue in an antitrust matter generally rely on static priced based economic theory. In many industries, this provides an excellent foundation for the competitive analysis. However, in some industries, particularly high technology industries, subject to rapid technological change, these tools may not be adequate to assess competition. Such industries raise difficult issues in assessing competition. (1) How does one determine the "relevant" market to assess competition? By definition, products and markets are changing in industries experiencing rapid technological change. Customer reactions to hypothetical changes in price for *current* and *past* products are of limited utility in assessing market boundaries when those products will inevitably (and relatively rapidly) be replaced by new products. (2) What does market power and monopoly power mean in such markets? Most high technology firms have high variable margins. The federal antitrust agencies and some courts appear to use high margins as critical indicia of potential market power (at least for the "hypothetical monopolist"). This is not correct. Highly innovative industries are also likely to be characterized by high fixed and sunk costs and, thus, high variable margins, whether or not they are highly competitive. . (3) How should one analyze the likely impact of a particular activity (such as a merger) on innovation? The economics of innovation competition are complex and not as well understood in economic theory as price competition. Given these issues, we believe it would be worthwhile for the Commission to consider the role of innovation in antitrust matters.