Short summary of the conclusions of the discussion

1. Comparison of the two concepts

The vast majority of those participating in the discussion endorsed the theses substantiated in the working paper that the two criteria “market dominance” and “SLC” do not contain any significant differences in their substantial content and that problematic mergers can be assessed with both tests in a rigorous, flexible and effective manner. Ultimately both concepts dealt with the same factual issues (e.g. market definition) and problems (e.g. prognostic risk). In the view of most participants even the evidence of the lack of internal competition in oligopolistic situations does not constitute any specific problem in respective of the market dominance test. In this context the suggestion by one participant to solve the factual question of substantial competition within the so-called oligopoly core by applying stricter presumption or burden of proof regulations within Section 19 of the ARC, met with criticism.

Irrespective of the prohibition criterion used the discussion showed a general preference for a rigorous and consistent assessment of mergers. Individual participants, however, also emphasised the importance of entrepreneurial freedom and an open market for mergers, which also put potential takeover candidates under pressure. In the USA a more generous control of mergers could in principle be better compensated within the framework of abuse control since the US competition authorities had sharper instruments at hand, for instance the possibility of breaking up existing companies, than the European competition authorities.

The statement made in the working paper that ultimately only intensive bilateral and multilateral discussion and cooperation could lead to a harmonisation of application practice or an improvement in competition law, received wide support.

A representative from the European Commission pointed out that both prohibition criteria represented abstract terms which left much room for interpretation and which had over time become more similar. In the General Electric / Honeywell case the different evaluation of the economic conditions and the fact that the possibility of deconcentration only exists in the USA had been the decisive factors. Although the market dominance test had hitherto proven adequate the Commission would generally consider possibilities for improvement and consequently alternative prohibition criteria in its Green paper on the reform of the Merger Regulation.

2. Comparison of the terms “market dominance” and “SLC”

Different opinions emerged with regard to the question as to which of the two terms was more appropriate to cover concentration strategies which restricted competition. One group of participants equated the “market dominance” term with an existing uncontrolled scope of action or the absence of substantial competition, and thus ultimately with the SLC term. The differences between the two criteria were purely of a semantic nature.

Other participants preferred the “market dominance” term since a negative description of competition as absence of market power was more practicable for the competition authorities and provided the companies with more legal security. In the ARC potential

disadvantages of the market dominance term had been avoided in particular by the "paramount market position" concept and the special regulations for oligopolistic market power. In addition the term "strengthening of a dominant position", in comparison to the SLC term did not include a threshold of appreciability and therefore constituted a stricter assessment criterion. In order to assess vertical and conglomerate mergers in particular – even without explicit thresholds of appreciability – a special economic analysis was, however, generally necessary.

The fact that the significant change in US application practice did not require an amendment to the law is in the view of most participants evidence in itself of the somewhat unspecific nature of the SLC concept. These different possibilities of interpreting the central prohibition criterion meant considerable legal insecurity for enterprises. In contrast, the interpretation of the "dominance" term in Germany and the EU had remained comparatively stable, which, in the view of several participants, constitutes a significant advantage of this criterion. An adoption of the SLC test would put authorities in Europe under strong pressure to adapt to US practice and any ensuing changes thereof. This would pose the danger of no longer being able to effectively enforce some competition policy principles and would increase error potential. In so far a certain amount of competition between different application systems was certainly desirable.

Other participants expressed the view that the SLC term enabled a more direct understanding of the real problem as it focussed directly on competition. This view made it easier inter alia to assess so-called substitution competition. In comparison the "dominance" term could lead to a very schematic assessment. Other participants held against this argument that also under the SLC test the effects on competition of a merger have to be assessed on the basis of specific, defined markets. Bypassing this stage of examination would pose the danger of only the institution competition being protected instead of the actual competition taking place in the markets.

Some participants pointed out that on introducing merger control the German lawmaker had, from impressions gained from application practice in the USA at that time, considered the SLC test to be too strict and had deliberately decided in favour of the market dominance criterion, which did not allow such a prohibition practice, which was generally regarded as excessive. It can be deduced from the provisions within the ARC on cartels and some specific legal provisions that according to legislative assessment the SLC term continues to be regarded as the sharper criterion. The requirement in Section 4 of the ARC (no substantial impairment of competition) was, for example, intended as a stronger corrective element over that in Section 3 of the ARC (no creation or strengthening of a dominant position).

3. Consideration of Efficiency Advantages

Many participants warned against softening up merger control by acknowledging an "efficiency defence" modelled on the US example. The majority of participants were of the opinion that ultimately the best guarantee for increased efficiency was to structurally safeguard effective competition in the long-term. In the US, however, merger control often focused on the short-term result of a corporate merger. In the participants' view the German system of a separate ministerial authorisation made it possible to undertake an adequately limited and also transparent consideration of certain forms of efficiency

advantages without distorting the competitive assessment of a concentration. The representative of the European Commission emphasised that it was generally also possible to take efficiency gains into account under European merger control.

In several contributions to the discussion it was pointed out that the justification of the concentration privilege which existed under German law had become questionnable in view of the large number of mergers which had failed in practice or which had not achieved the envisaged efficiency advantages. This applied to minority participations in particular as they were generally not expected to achieve any rationalisation effects or other efficiency advantages.

4. Conclusion

The discussion widely supported the working paper's theses. In particular the participants largely agreed that it was neither necessary nor useful at present to transform the German or the European prohibition criterion into an SLC test.