ANNEX I – THRESHOLDS RELATED ISSUES

INTRODUCTION

1. In its Report of 28 June 2000 to the Council on the application of the Merger Regulation thresholds ("the 2000 Report")[1], the Commission outlined its preliminary findings concerning the functioning of the thresholds in Article 1 of the Merger Regulation, including "multiple filings", i.e. concentrations notified in at least two Member States. This annex is intended to provide interested readers with a comprehensive background on which to form their opinions about the functioning of Article 1, while at the same time not overburdening the Green Paper itself with detail. The annex is the result of the Commission's further investigations into these issues since the adoption of the 2000 Report. It is structured in two parts:

   - Section A contains a detailed discussion of the various aspects of relevance for an assessment of the appropriateness of Article 1.

   - Section B presents the results of the investigations undertaken by the Commission for the purposes of preparing the Green Paper.

A. DETAILED DISCUSSION ON MERGER REGULATION THRESHOLDS

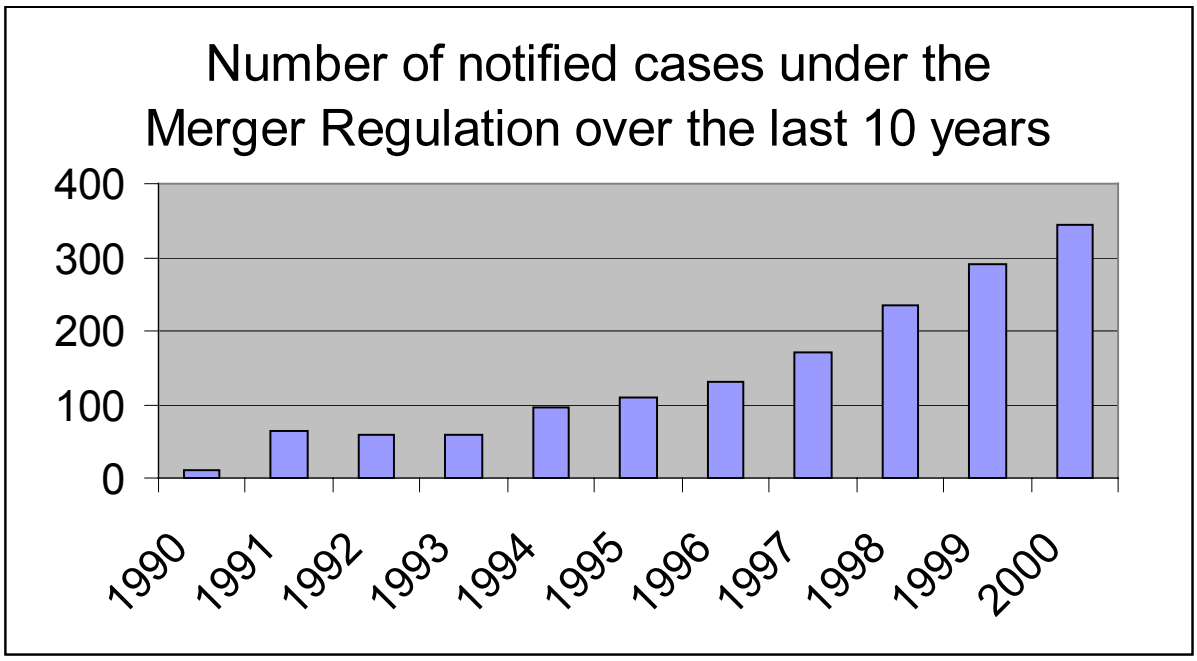
1. Trends on notifications

a) Merger Regulation

2. The tables below illustrates the development in terms of number of cases notified under the Merger Regulation over the last 10 years.

Year	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Notifications	12	63	60	58	95	110	131	172	235	292	345

[1] COM(2000) 399 final - 28.06.2000



3. The above statistics illustrate the "merger-wave" and show that the increase in notified cases is unrelated to the 1998 amendments to the Regulation[2]. This is illustrated by the unbroken trends in 1998-1999 and 1999-2000. The available statistics for the first months of 2001 indicates that 125 cases were notified between 1st January and 30th April 2001. In the same period of the year 2000, the Merger Task Force received 99 notifications. This reflects an increase in number of notifications by 26% when comparing the same period of the years 2000 and 2001.

b) At Member State level (multiple filings)

4. The 2000 Report compared the prevalence of multiple filings to the number of concentrations notified to the Commission. For the 2000 Report, Member States had identified 364 cases of multiple filings over the investigated period. However in contacting the companies involved in those cases, the Commission found that a significant number of the identified multiple filing cases (22% of responses) were in fact only notified in one Member State. Excluding such reporting errors, it appears that multiple filings in 1998-99 represented some 57% of the total number of notifications to the Commission.

5. For the year 2000, 217 multiple filings were identified. A comparison with the 345 cases notified to the Commission during that year provides a ratio between multiple filings and EU notifications of about 62%.

6. It is notable that the trend in multiple filings appears to indicate that such filings to three or more Member States are getting more common. Thus, in 1998, some 22% of all multiple filings were made to three or more Member States, whereas the corresponding figures for 1999 and 2000 were 32% and 35%, respectively[3].

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2 Introduction of the Article 1(3) thresholds and expansion of the concept of a concentration to cover all full-function joint ventures.

3 In 2000, a total of 3021 filings were made at to the NCAs in the EU. It may be noted that, while the proportion of multiple filings to three or more NCA's increased in that year, notification to two NCA's actually decreased.

7. Several elements indicate that the number of multiple filings to Member States will continue to grow at a faster rate than the number of notifications under the Merger Regulation. This trend is partly driven by the introduction of new mandatory notification requirements in the Member States. Denmark implemented its new rules in the fourth quarter of 2000. Also Spain, the United Kingdom and France are currently revising their merger control regimes and as a result the number of notifications is likely to increase in these countries, in particular in France[4]. These changes can be expected to further increase the prevalence of multiple filing.

8. The EU enlargement will also have an important impact on multiple filings. No transition periods will apply in the field of competition rules. Most of the Candidate countries have already introduced mandatory notification systems for merger control[5]. Other countries are in the process of introducing such rules[6]. Prior to accession, the Commission obviously has no jurisdiction over effects on competition in the Candidate countries. However, as from accession, the one-stop shop principle laid down in the Merger Regulation will apply. One, in this respect, particularly relevant finding of this review, which will be set out in more detail below, is that a significant proportion of all multiple filing cases fail to meet the worldwide turnover thresholds in Article 1. This is relevant in relation to enlargement as such cases following accession will be likely to meet the notification requirements in a higher number of Member States, implying up to 20-25 notifications to Member States. Such a development would clearly be contrary to the principle of subsidiarity.

9. As a point of reference, the table below indicates the current situation as regards the geographic aspect of the multiple-filing cases. The first column indicates for each Member State the absolute number of multiple filing cases reported in the year 2000. The second column indicates the proportion of all observed multiple filings in that year that was filed in each Member State. The third column indicates the percentage of all notifications in each Member State that were multiple filings[7].

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4 In France, the currently existing criteria triggering notification will be fundamentally changed and it is expected that this will result in a four or five-fold increase in notifications.

5 Hungary, Poland, Latvia, Lithuania, Bulgaria, Romania, Slovakia, Slovenia, Cyprus and the Czech Republic

6 Estonia, entry into force was expected in 2001

7 This table relies on the data reported by each Member State for the year 2000, when overall 217 filings were found notified to more than one Member State. The results appear largely similar to those for the periods March 1998-December 1999 reported elsewhere in this paper.

Description	Multiples notified in	% of multiple filings	% of total national filings
Austria	60	28%	26%
Belgium	12	6%	32%
Denmark	6	3%	14%
Germany	161	74%	13%
Greece	10	5%	7%
United Kingdom	27	12%	15%
Spain	30	14%	32%
Finland	47	22%	44%
France	11	5%	46%
Ireland	35	16%	32%
Italy	70	32%	14%
Luxembourg	0	0%	0%
The Netherlands	37	17%	19%
Portugal	17	8%	33%
Sweden	37	17%	30%

10. The table shows that a significant proportion of the merger filings in each Member State is also notified to one or more other Member States. There would be no reason to assume that the general situation will be significantly different among the Candidate countries. Moreover, the increased number of Member States will necessarily make multiple filings more unpredictable, as they, given the higher number of possible combinations, will require detailed knowledge of a larger number of Member States systems.

11. As a background to the Green Paper's discussion of how amend the principles for allocation of competencies between the Commission and the Member States, this section will be devoted to a presentation and analysis of the current system for competence division.

2. The Current System under Article 1

12. Presently, Article 1(2) lays down the following thresholds:

> For the purposes of this Regulation, a concentration has a Community dimension where:
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> (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

13. In addition to the original thresholds, Article 1(3), which entered into force in 1998, was intended to extended the Commission's competence to assess certain mergers that have an effect in three or more Member States. Thus, Article 1(3) was introduced as a system intended to target transactions involving less turnover, but still requiring notification in several Member States ("multiple filings"). Article 1(3) provides:

For the purposes of this Regulation, a concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 2 500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million;

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

14. Any concentration that fails to meet the criteria of Article 1(2) or 1(3) is outside the scope of the Commission's exclusive jurisdiction (see Article 21(2)), and therefore subject to control under the rules applicable within each Member State.

15. The lower level of turnover indicated in Article 1 will, in effect, equal the upper limits of the national merger control systems within the EEA. This is a unique feature for the division of competencies between the Commission and national authorities. In other merger control systems (at Member State level and outside the EU), the lower threshold level will generally indicate the limit below which no control will be required.

3. Turnover as an Indicator of Community Interest

16. Turnover thresholds constitute a form-based test of jurisdiction. They have the general advantage of being objectively verifiable and of allowing a relatively easy method for measuring the cross-border character of a transaction. In their competence dividing function, turnover thresholds do not, in principle, require any complex assessment for the purposes of concluding whether a concentration should be notified at Community or national level. Other criteria that could in principle also provide thresholds that can easily be verified by the involved companies would include concepts such as the value of transferred assets or the value of the transaction.

17. In contrast to the advantages related to the facility of the test, other possible criteria, such as market shares, might appear better suited to indicate the market impact of a concentration, and indeed whether this impact is likely to be a cross-border one. Such criteria can be characterised as effects-based. Market share thresholds, on the other hand, suffer from the general drawback that potentially complex economic issues need to be assessed even before it can be decided where the concentration should be assessed.

a) The Use of Other Form-based Criteria in other Jurisdictions

18. A jurisdictional test based on the value of transferred assets is used in, for example, the US and in Canada. In the Community, Ireland employs an asset test as an alternative to the turnover-based thresholds. No jurisdiction employs a test that is based uniquely on the value of the transaction.

19. In assessing the practicability of alternative criteria, due consideration must be given to the special feature of the Merger Regulation as applicable to the exclusion of Member State rules. As any concentration that fails to reach the applicable Community thresholds is subject to national rules (including mandatory notification deadlines), it is important to ensure that the rules dividing competencies are clear and predictable. Against this background, the discussion has to consider the fact that Member States have not yet harmonised their respective accountancy rules and standards.

20. This means, for example, that there are no common rules on the valuation and amortisation of tangible and intangible assets. It also means that there are no fixed rules on how to attribute the value of the assets of an internationally active company to different countries. In addition to the significant discrepancies that this lack of harmonisation can produce, the value of assets will also vary significantly between business sectors, with companies in the service sector often having limited tangible assets[8]. For these reasons alone, an asset value test would appear likely to provide both a less accurate indication of the cross-border character of a transaction and a lower degree of legal certainty for the companies on where to notify. Consequently, it does not appear appropriate to replace the turnover thresholds of the Merger Regulation with a value of assets test.

21. A jurisdictional test based on the value of the transaction could, in principle, be an attractive complement to the Merger Regulation's turnover thresholds. This would apply, in particular, for certain industries that owing to the limited turnover of the whole sector may not be subject to effective merger control (unless companies are part of bigger groups). It has been suggested that this can apply to mergers between companies in the "new economy" sectors. In these sectors, calculating the necessary turnover figures can also be particularly difficult (e.g. allocating geographically the turnover from intangible products sold in virtual environments). In addition, the rapid business cycles in these sectors tend to make the last available audited turnover figures a less reliable measure of Community interest.

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[8] Although a bias for traditional manufacturing companies may exist also under the current turnover-based thresholds, the available information indicates that this bias would be greater if a "value of assets-test" were to be used.

22. A jurisdictional test based on transaction value could in principle have the opposite bias to that of turnover and asset value. However for the purposes of the Merger Regulation, a major inconvenience with a test based on the value of transaction would be that such values are difficult, if not impossible, to allocate to different geographic regions. It therefore appears that transaction value would not be a particularly suitable test for the Merger Regulation, as it would be unlikely to provide reliable information about the cross-border effects of a transaction.

23. As part its investigations, the Commission has invited parties to multiple filing notifications to express their views on the desirability of introducing alternative form-based threshold criteria. From the replies, it appears that the current turnover-based test is in clear favour over other tests[9]. The main advantage of the turnover-based test was reported as being that such data are the most readily available or can be compiled with reasonable effort from accounting material. It was also felt that other tests would be more complicated in their application.

b) The Use of Effect-based Criteria in other Jurisdictions

24. Market shares or similar criteria are, in principle, better suited to indicate the market impact of a concentration than any of the above-mentioned form-based criteria. If the affected relevant markets are wider than national, this in itself indicates the presence of cross-border effects. In cases where markets remain national in scope, market shares and their distribution in several countries, will normally provide a good indication on the cross-border effect of a concentration. These qualifications, however, indicate the weakness of market share based thresholds for the purposes of delimiting jurisdiction; the proper definition of relevant markets requires detailed economic assessments. As time is invariably of essence in merger cases, hence the need for short and definitive deadlines in these procedures, market share thresholds or other similar criteria do not appear well suited to the Merger Regulation.

25. Market share-based thresholds are used for jurisdictional purposes in a number of Member States (France, Portugal, Spain and the United Kingdom), as well as in other jurisdictions outside the Community (e.g. Norway, Poland and Turkey). Some industry respondents have stated that the costs of assessing whether to notify in such jurisdictions can be similar to those of making a notification in jurisdictions that apply form based criteria. It thus appears that market share thresholds can cause some uncertainty as to whether a specific concentration has to be notified in these jurisdictions. This uncertainty, however, appears more manageable than that which would follow if the Merger Regulation were to include market share thresholds. The reason for this is two-fold. First, given the Merger Regulation's specific feature as applicable in the place of Member State rules, an error in judgement (i.e. assuming that the case should be notified to the Commission), may expose the companies to sanctions provided under several national laws for failure to notify or for late notification. Second, in cases where doubts exist as to the definition of relevant markets, companies would potentially need to engage in parallel clarification discussions with the Commission as well as with a number of national authorities. Any such multilateral relationship is not only by definition more costly, but also

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[9] Less than 10% of respondents would favour an alternative threshold basis, namely asset value or a transaction based test.

inherently more likely to cause delays than the bilateral discussions between the notifying party and a single competition authority.

26. It should also be mentioned that market share thresholds are used in other Community legislation, in particular in the block exemption regulations that implement Article 81. However, compared to the Merger Regulation, transactions subject to these rules generally do not present the same needs for prior authorisation as they neither lead to a permanent change in the structure of the market, nor do they usually involve the large investments involved in concentrations.

27. The Commission also invited parties to multiple filing notifications to express their views on the desirability of introducing alternative effects-based threshold criteria. From the replies, there appears to be little or no support for the introduction of an effects-based test for jurisdictional purposes. The main negative views relate to decreased predictability, increased costs and risks for longer delays.

4. Appropriateness of Current Threshold Levels

28. In the 2000 Report, the Commission set out the historic background to the current thresholds. It concluded that there were several indications that the current thresholds have as an effect that an important number of cases that have a significant cross-border impact fall outside the Community rules. Moreover, it set out that a majority of European industry representatives would favour amending the Regulation to offer the advantages of a one-stop shop treatment to all concentrations with significant cross-border effects.

29. The 2000 Report, however, also concluded that a more in-depth investigation into the functioning and effects of the current thresholds would be necessary prior to making any concrete proposals. Since the adoption of the 2000 Report, the Commission has, in conjunction with the Member States, made an effort to collect detailed information on the identified multiple filing cases. Further information has been sought both as regard the turnover distribution and activities of the involved companies and of the effects that multiple filings had on them.

30. It should however be stated from the outset that the result of this further data collection in many respects is such that it does not allow firm conclusions to be drawn on all questions that were posed. This relates in particular to issues where the number of observations was very limited. This, for example, necessarily applies to the data on the turnover distribution of involved companies, compared to the various criteria in Article 1(3). Within these constraints, the Commission however believes that the results of the investigation constitute a useful background, which can be factored into the discussion on future policy orientations.

31. The analysis below is made separately for the thresholds indicated in Article 1(2) and Article 1(3) of the Regulation. The appropriateness of the so-called 2/3-rule, which applies in relation to both these Articles, is commented upon separately. Furthermore, it sets out the impact of the expiry of the ECSC Treaty in 2002. Finally, a qualitative assessment of the effects of multiple filings is included on the basis of submissions made by companies that have been subject to such filings in the Member States.

a) Article 1(2) Thresholds

32. Article 1(2) contains the original turnover criteria of the Merger Regulation. The 2000 Report concluded that these thresholds have been effective in identifying mergers that have a real Community dimension as opposed to a national dimension. This conclusion was based, *inter alia,* on information from the business community. The Commission has nevertheless conducted further studies to verify this conclusion. This section will firstly assess whether the Merger Regulation currently catches some cases that do not have significant cross-border effects. It will then reverse the question and assess whether there are signs that the construction of Article 1(2) causes certain concentrations with a Community interest to be assessed at the national level.

(1) Does Article 1(2) Catch Mergers without Community Interest?

33. The 2000 Report noted that the absolute levels of the applicable turnover criteria are affected by factors such as inflation and fluctuations in the exchange rates. Further analysis has been made to assess the characteristics of cases that may be considered as falling into the category brought under the Commission's jurisdiction as a result of inflation. For the purposes of this analysis, an average 2% yearly inflation rate since 1990 has been assumed, giving the result that the EUR 5 billion criteria in Article 1(2) corresponded to approximately EUR 6,1 billion in the year 2000. Using the same assumption, the EUR 250 million threshold would to approximately EUR 305 million[10].

34. It results from this analysis that about 9% of all notifications under Article 1(2) may be considered as falling into the category of cases brought under the Commission's jurisdiction as a result of inflation. The proportion was slightly higher in 1999 (9,2%) than in 2000 (8,7%). For both years, it was more common for cases to fall in the band between EUR 250-305 million (15 cases in 1999 and 22 cases in 2000) than to fall in the band between EUR 5-6,1 billion (10 cases in 1999 and 7 cases in 2000). Very few cases fell within both of these bands (2 cases in 1999 and a single case in 2000).

35. From a substantive viewpoint, only a limited proportion of these cases had effects that might be qualified as affecting only one Member State (18% in 1999 and 10% in 2000). The higher proportion in 1999 is partly due to the inclusion of two cases that were subject to full referrals under Article 9. As for the remaining cases, approximately 70-75% involved an assessment on a geographic level that was greater than a single Member State (regional, EEA or global), whereas the remaining cases involved an assessment in several Member States. As will be demonstrated below, these proportions are not dissimilar to those that are found when assessing the total population of cases notified under the Merger Regulation. Thus, there is no indication that inflation has brought cases without a Community interest under the Commission's jurisdiction.

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[10] For the purpose of simplicity these values, which were derived assuming a yearly inflation rate of 2% over 10 years, have been applied to all cases notified in both 1999 and 2000. It is to be noted that notifications are normally based on audited figures dated one or two years back (i.e. dating from 1997-1999). The consistent use of figures based on 10 years of inflation will therefore tend to overstate the real effect of inflation on the sample.

36. In addition to the above, the Commission has conducted a general analysis of the cross-border impact of cases notified under the Merger Regulation from a geographical viewpoint. The methodology employed for this purpose has been to collect statistics on the size of horizontally affected relevant markets involved in all decisions adopted in the years 1999-2000. Cases have been classified according to whether they involved geographic markets that were wider than national (e.g. worldwide, EEA or EU-wide and regional), national or local. Cases that involved geographic markets that were national in scope have furthermore been classified according to the number of Member States in which these markets were identified. It should be noted that this type of data is likely to underestimate the geographic scope of cases. The reason is partly that the study did not attribute any value to non-horizontal effects (such as vertical, conglomerate, foreclosure etc.). Another possible bias is that the decision may not necessarily indicate full information about the parties' width of activities, for example when it is clear that no competition concern would arise despite moderate levels of overlapping sales on a market. On the other hand, the activities mentioned in decisions can normally be considered sufficiently important to qualify as having a significant effect on the market in question. Thus, any case that affected geographic markets in more than one Member State may be considered to have significant cross-border effects.

37. The result of the study was that approximately 73% of all cases notified under Article 1(2) involved horizontal overlaps on geographic markets that were either wider than national (40%), or affected several Member States (33%). It is likely that factors such as the introduction of Euro notes and coins, the continued integration of Member States' economies and the enlargement of the Community will further increase the proportion of cases that display such cross-border effects.

38. The geographic market study was complemented with data on nationality of notifying parties. In about 30% of the cases, the parties involved were from one and the same Member State. This figure, however, does not imply that such concentrations necessarily had a purely national perspective. Instead many of these cases involved concentrations between internationally active groups (e.g. case Comp/M.1672 - Volvo/Scania).

39. It is regrettable in this context and for the purposes of further discussion that the Commission is not able to conduct similar studies of the geographical scope of nationally notified cases that were *not* notified to more than one Member State. Such studies could provide information on the extent to which the competitive effects of cases notified in one single Member State are confined to the territory of that Member State.

40. A second study estimated, on the basis of notifications received by the Commission, the number of notifications that in the absence of the Merger Regulation would have had to be submitted to several Member States. Contrary to the study on geographic markets, this study takes a formalistic view to whether cases produced significant cross-border effects. It relies on the assumption that only cases with, at least, potentially significant effects have to be notified under the national merger control rules.

41. It should again be noted that data available for this study, i.e. the information on national turnover indicated in Form CO, is insufficient for the purposes of providing a fully reliable answer to the question of whether the cases would have required

notification at the national level. There are several reasons for this. First, the data has not been produced for this purpose. Second, waivers might have been given from supplying full information on group turnover at national level. Finally, the jurisdictional test in many national systems is based not only on turnover, but also on additional factors. Within these constraints, however, the study can be seen to provide an indication as to the minimum number of national filings that would have been required in the absence of the Merger Regulation.

42. The study indicated that some 16% of all cases would not have been subject to multiple filing requirements. This relatively low figure indicates that the current thresholds have been quite effective in capturing transactions with a significant cross-border effect. More specifically, it was found that approximately 48% of all EU notifications would have been multiple filings to be notified in at least three Member States. Some 36% of all cases would have had to be notified in at least two Member States. Looking specifically at cases that were notified under Article 1(2), it was found that 46% of such cases would have been notified in at least three Member States, whereas 38% would have been subject to notification in at least two Member States. As will be further indicated below, cases that were notified under Article 1(3) would relatively more often have given rise to multiple filings in at least three Member States.

(2) Does Article 1(2) Fail to Catch Certain Mergers with Community Interest?

43. The 2000 Report described the industry view towards Article 1(2) as positive, in the sense that these thresholds were seen to be set at an appropriate level for conferring jurisdiction to the Commission. The 2000 Report, however, also noted a prevalent feeling that the thresholds should be amended so as to enlarge the Commission's jurisdiction to ensure that all cases with significant cross-border effects are covered[11].

44. The Commission has also conducted a survey of companies that have been subject to multiple filing requirements in Member States. The basis for this survey was the multiple filing cases described in the 2000 Report. In particular those multiple filing cases that concerned notification to two Member States are of interest for the assessment of the appropriateness of the thresholds in Article 1(2). The reasons for this is that these cases were not of a type intended to be caught by Article 1(3), given the latter's requirement of significant activities in *three* Member States. Still, intuitively, a concentration that had to be notified in two Member States must have had a cross-border effect. Therefore, the interesting questions for this analysis are whether this cross-border effect should be qualified as significant, and if so whether the parallel treatment of such cases in two Member States can be considered acceptable under the principle of subsidiarity (despite being contrary to the one-stop shop principle).

45. The Commission's survey of multiple filing cases indicates that that cases notified in two Member States involve less risks of negative effects for the notifying parties (in terms of uncertainty, costs and/or delay) compared to those notified in three or more

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[11] The most common suggestion, however without any "scientific" support, for amendment was to lower the combined worldwide turnover requirement to EUR 2 billion and the Community turnover requirement to EUR 100 million. These levels correspond to the Commission's statement in the notes to the Merger Regulation at the time of its adoption in 1989.

Member States. Still, a significant number of respondents have stated that they would prefer to have the possibility and/or option to notify such concentrations under the Merger Regulation, thereby reducing the costs and uncertainties that are involved.

46. From an objective viewpoint it should be noted that a large number of the cases that were notified in two Member States involved worldwide or Community-wide turnovers well beyond those stipulated in Article 1(2)(a) (35%) and (b) (21%). It is even more striking, however, that only a limited proportion of these cases involved notification to neighbouring Member States. As some 80% of the parties involved in such concentrations stated that they also had sales in four or more Member States where the concentration was *not* notified, this provides a certain indication that many of the multiple filing cases involved cross-border effects that may not have been fully assessed by the involved Member States.

47. It should also be mentioned that the cross-border character of such cases has the potential to raise difficulties from the viewpoint of finding and implementing effective remedies to identified competition concerns. One such difficulty may relate to co-ordination of remedies in several jurisdictions. Another, potentially more disturbing problem, could arise where a national jurisdiction is unable to impose any effective remedy when the involved parties do not have any productive assets within its jurisdiction. Finally, the fact that there has not been any established system for systematic contacts between Member States receiving notifications, could increase the possibility that cross-border effects are not effectively addressed[12].

b) Article 1(3) Thresholds

(1) Background

48. Article 1(3) was introduced through Council Regulation 1310/97 and entered into effect on 1 March 1998. The intention was to provide a means by which concentrations that failed to meet the turnover requirements of Article 1(2) would no longer need to be notified in three or more Member States. For this purpose, Article 1(3) includes four cumulative turnover thresholds (as well as the 2/3 rule). In its 1996 Green Paper, the Commission had originally proposed a provision to remove the problem of multiple filings that would be based, not on turnover thresholds, but on whether a concentration would *de facto* be notified in several Member States.

49. The Commission's proposal was however not taken up. It is notable that some of the arguments that at the time were forwarded against the proposal appear, in principle, less problematic today. Recent amendments to national merger control rules have significantly reduced divergence between national systems. By now all Member States, except Luxembourg, have introduced national merger control rules and after the entry into force of the new French rules, the United Kingdom will be the only Member State that does not operate a system based on mandatory notifications. At the same time there is an ongoing trend amongst the candidate countries to align their national merger control provisions with those employed in the Community.

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[12] According to the survey, the notifying parties were aware of co-ordination between Member States in 2% of all cases where two notifications were made.

50. The 2000 Report already provided strong indications that Article 1(3) has not fulfilled its intended purpose. This is, as will be further elaborated below, confirmed by the additional studies.

51. Furthermore, as already stated, Article 1(3) employs a test of whether significant turnover is achieved in *three* Member States. At the time of its adoption, this qualified cross-border effect, which clearly goes beyond the original one-stop shop principle, was defended by arguing that the Community interest would be more manifest in cases involving three or more Member States. Moreover, it was assumed that, as long as only two Member States were involved, treatment of such cases could be co-ordinated through bilateral contacts. Both these arguments will be analysed below, in the light of the experience gained.

(2) Does Article 1(3) Catch Mergers without a Community Interest?

52. The 2000 Report indicated that the Commission received 45 notifications under Article 1(3) in the period between March 1998 and December 1999. This represented 9% of all notifications received in the period. In the year 2000, only 20 notifications were made under Article 1(3), a significant decrease to approximately 5% of all notifications received.

53. The 2000 Report also provided a comparison showing that Article 1(3) cases are as likely to have cross-border effects and to raise competition concerns as those notified under Article 1(2). Specifically, it was noted that all cases notified under Article 1(3) and involving national geographic markets for all the relevant products, invariably affected more than one such national market. The study of geographic markets involved in EU notifications provided similar indications as to the lack of significant differences between cases notified under Article 1(2) and 1(3) when it comes to the likelihood of affecting cross-border markets. Moreover, the study on notification requirements in the absence of an EU filing indicates that cases that were notified under Article 1(3) would have lead, to a higher extent, to multiple notifications in at least three Member States (64% vs. 46% for notification under Article 1(2)). The accumulated experience therefore supports the indications set out in the 2000 Report, namely that Article 1(3) cases generally are of Community interest.

(3) Does Article 1(3) Fail to Catch Certain Mergers with a Community Interest?

54. The 2000 Report analysed the number of cases, which, despite the introduction of Article 1(3) had to be notified in three or more Member States. As noted above, the further data collection has shown that multiple filings are increasing faster than notifications under the Merger Regulation. For the year 2000, a total of 75 multiple filings were of the type for which Article 1(3) is intended (47 cases were notified in three Member States and 28 in more than three Member States). Compared to the total number of multiple filings in 2000, which was 217, it appears that about 35% involved three or more national filings.

55. The Commission's survey of multiple filing cases conveys a number of interesting facts about cases that involved notification to three or more Member States. Arguably, these cases were all of the type intended to be caught by Article 1(3), i.e. of the type which, at the time of the adoption of the amendments to the Merger Regulation in 1997, it was generally agreed that cross-border effects typically were present. Information received from the Member States would tend to support that

such effects normally are present in these cases. As is set out in Table 2-10 in Section B below, a majority of these cases involved an assessment of markets that were greater than national.

56. Second, looking at the number of Member States in which filings were submitted, it is striking that 22 of the 97 received replies indicated that notification had been made in three Member States, whereas 28 cases had been notified in between four and seven Member States. Two extreme cases were found that had been filed in nine and fourteen Member States (all except Luxembourg), respectively. This means that some 53% of all responses came from companies that had been subject to multiple filings in three or more Member States. The fact that companies with such experience are over-represented among those who replied provides additional support for the assumption that filing the same concentration under a large number of national systems is seen as problematic.

57. The above figures also demonstrate that Article 1(3) has not reached its purpose, and that the risk of having to notify in a large number of Member States continues to exist, and that this risk is even growing. As has already been discusses above, the enlargement of the Community will further increase this risk. In a worst-case scenario, companies that do not reach the worldwide criterion in Article 1 may, as of 2004, have to prepare more than 20 notifications within the Community.

58. The survey indicates that cases notified in three or more Member States involve significantly higher risks of negative effects for the notifying parties. As is shown by the statistics in Section B below, such cases involve significantly higher costs for notifying parties and produce a delay which is up to twice as long as when two Member States are involved. In addition the proportion of cases that are subject to some form of restrictions or conditions is significantly higher in this category (12% versus 2% among cases notified in two Member States)[13]. It may also be noted that companies in this category more frequently indicated that multiple filings led to decreased legal certainty and that many would prefer to have the possibility or option to notify such concentrations under the Merger Regulation.

59. It is notable that only a limited proportion (29%) of the cases notified in three or more Member States fulfilled the EUR 2.5 billion worldwide turnover, but that quite a large proportion 60% satisfied the aggregate EUR 100 million turnover requirement in at least three Member States. This provides a certain indication that the companies involved in this category of cases could be characterised as medium sized companies whose cross-border business activities are relatively important, compared to their overall size. It also shows that a significant number of the multiple filing cases will continue to fail to qualify for treatment under the Merger Regulation after the enlargement of the Community. Cases that fail to meet the current definition of Community dimension on the basis of the EUR 2,5 billion worldwide requirement (71%) would remain unaffected by the fact that enlargement will facilitate meeting the Community-wide thresholds.

60. In the same way as indicated above in relation to Article 1(2), it is noteworthy that a limited proportion of these cases involved notification to neighbouring Member States and that the parties involved in almost all (94%) of such concentrations also

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13 The Commission is not in possession of any statistics showing the frequency with which cases notified within only one single Member State are subject to restrictions or conditions.

had sales in four or more Member States where the concentration was *not* notified. This appears to confirm the assumption that cases that are notified in three or more Member States normally involve cross-border effects and that these effects may not have been fully assessed by any of the intervening Member States. Also the fact that there is no established system for systematic contacts between Member States receiving a notification, increases the risk that cross-border effects are not effectively addressed[14].

61. As already set out in the 2000 Report, it is striking that the number of transactions that were notified to three or more NCA's (70 cases) clearly exceeded the number of cases notified to the Commission in accordance with Article 1(3) under the same period (45 cases). The above-indicated data for 2000, shows a further significant decrease in the "capture-rate" of Article 1(3), which in that year only lead to 20 notifications to the Commission, compared to the 75 cases involving three or more Member States. This emphasises the conclusion that Article 1(3) in its current form has not been effective in removing the multiple filing problem.

62. Based, *inter alia,* on comments submitted by industry representatives, the 2000 Report proposed that the three-country requirement and the 2/3-rule were the two main reasons why multiple filing cases fail to meet the Article 1(3) thresholds. Although the limited number of observations call for some caution in interpretation, the further investigations have not confirmed the proposition in the 2000 Report. Instead it appears that the reasons why companies fail to meet the Article 1(3) criteria are much more diverse. An attempt to quantify the exclusionary effect of each of the individual criteria in Article 1 is set out in tables 2-2 and 2-4 of Section B below.

63. These tables indicate that, out of the cases notified in three or more Member States, only about 17% had a combined worldwide turnover in excess of the EUR 5 billion set out in paragraph 1(2)(a). Some 71% of cases did not, however, meet the criteria of paragraph 1(2)(b), i.e. the aggregate Community-wide turnover of one of the undertakings concerned was below the threshold of EUR 250 million. Notably, in approximately 30% of these cases the Community-wide turnover of the target company was less than EUR 150 million. Only 5% of the cases fell outside the Merger Regulation by application of the 2/3 rule.

64. With regard to the thresholds set out in Article 1(3) of the Merger Regulation, 29% of the notified transactions exceeded the combined worldwide turnover of EUR 2.5 billion set out in Article 1(3)(a).

65. The three-country requirements set out in paragraphs (b) and (c) of Article 1(3) were met in 60% and 32% of cases, respectively. If instead these Articles had been based on a two-country requirement, 68% and 34% respectively of them would have met these requirements. The small increase is explained by the fact that the criterion of Article 1(3)(b) and that of Article 1(3)(c) are linked, i.e. the same Member States are considered. The figures show that roughly half of the cases satisfying Article 1(3)(b) fall away as an effect of Article 1(3)(c). One could also look at Article 1(3)(c) in isolation, i.e. by disregarding the link to Article 1(3)(b). Under that assumption, the capture rate of Article 1(3)(c) would increase to 65% based on a two-country

[14] According to the survey, the notifying parties were aware of some co-ordination between Member States in 8% of all cases where three or more notifications were made.

requirement. This figure is indicative of how Article 1(3) could apply if subparagraph (b) and (c) were applied as *alternatives*, rather than, as now, in a cumulative manner.

66. Furthermore, 35% of the transactions did not meet the individual Community-wide turnover requirement of EUR 100 million, as set out in paragraph (d) of Article 1(3). Finally, the two-thirds rule applied in about 5% of the transactions that met the EUR 2.5 billion threshold (i.e. between EUR 2.5 and 5 billion).

67. Among the clearest results is that less than 30% of all cases notified to three or more Member States would be candidates for the Merger Regulation unless the worldwide threshold of EUR 2,5 billion were to be lowered. However, in order to have a significant impact, such an amendment would need to be significant. For example, if it were replaced by an EUR 2 billion threshold, this percentage would only increase to approximately 37%. The two EUR 100 million requirements (in Article 1(3)(b) and (d)) were fulfilled in a comparatively greater proportion of cases. Finally, the EUR 25 million requirement is satisfied in just over 30% of all cases. It appears that the relatively low figure for Article 1(3)(c) is largely caused by the obligatory link to the same Member States as considered for Article 1(3)(b). Thus, seen in isolation, it is notable that the parties' sales exceeded EUR 25 million in three Member States in 54% of the observed cases.

68. The investigation has not provided any support for a finding that factors such as inflation or enlargement of the Community would be likely to reduce significantly the number of multiple filings. It is obviously true that inflation, over time, will have the effect of a de facto lowering of the values. For this effect to reduce the risk of multiple filings, it would however need to be assumed that the turnover of the companies involved is symmetric in relation to each subparagraph of Article 1(3). In addition, given the emphasis on Member State turnover in this Article, differences in inflation rate between existing and future Member States would also need to be considered. Moreover, inflation will obviously have as much of a *de facto* lowering effect on Member State notification thresholds, and consequently increase the risk of multiple filing. As regards the effects of enlargement, this is likely to have positive effects only on Article 1(3)(d) and possibly through reducing the applicability of the 2/3 rule. On the other hand, as mentioned above, the main impact of enlargement is likely to be the addition in number of national merger control systems that will apply in cases when the Merger Regulation is not applicable.

69. Since the introduction of Article 1(3), the Commission has also monitored pre-notifications that failed filing under the Merger Regulation[15]. In broad terms, the reason that these cases failed to meet the Merger Regulation thresholds was similar to those described above, for example, in 16% of these pre-notified transactions, the criteria of Article 1(2) was not met due to a combined worldwide turnover of less than EUR 5 billion but higher than EUR 2.5 billion. A second category of pre-notifications (48%) failed to meet the criteria of Article 1(3), more precisely the criterion of Article 1(3)(c). In these transactions, the required national turnover of EUR 25 million was met in two Member States but not in a third Member State. Except for two transactions, the criterion of Article 1(3)(b) and that of Article 1(3)(d)

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15 The Commission is only aware of such transactions in which the parties took the initiative to take pre-notification contact for the discussion of filing requirements.

would have been met for the second category. In 8% of the pre-notifications, the 2/3 rule applied.

5. The 2/3 Rule as an Indication of National Impact of Concentrations

70. The 2000 Report provided indications that the 2/3-rule excluded certain transactions with clear cross-border effects from the scope of the Merger Regulation and that it was one of the main reasons behind multiple filings. It furthermore noted that a significant proportion (35%) of the European business community representatives indicated that this rule does not distinguish "national transactions" in a satisfactory manner. The replies received from companies with multiple filing experience tend to confirm the conclusions in the 2000 Report. A majority of respondents still find the 2/3 rule as being set at correct level to determine transactions of national character. This view, however, is not unanimous, and a strong minority expressed some dissatisfaction. Within this latter group, however, views were divided as to whether a national centre of gravity ought to require having more or less than 2/3 of all turnover in one Member State.

71. As already indicated in the 2000 Report, it is difficult to quantify the frequency by which the 2/3 rule excludes cases from meeting the turnover thresholds in Article 1. The reason for this is that the national notification requirements applicable in most Member States do not oblige parties to specify their EU turnover and their turnover at Member State level.

72. The Commission would encourage Member States to adopt the necessary measures to ensure that this type of information is available to them. This applies in particular for all concentrations where the thresholds in Article 1 are met, but which are notified at the national level owing to the application of the 2/3-rule. Unless such provisions exist under national laws, the competent authorities will have no effective means to ensure that a case notified to them falls within the 2/3-exception. As will be explained below, under the current system this does not relate solely to the Member States where 2/3 of the turnover is achieved.

73. It is furthermore likely that more systematic information about the geographic attribution of the parties' turnover would facilitate contacts between those Member States that are most affected by a concentration. According to companies with multiple notification experience, co-ordination between Member States currently takes place in very few cases.

74. Despite this lack of fully reliable information, the Commission has some knowledge of specific cases that failed to meet the requirements in Article 1 owing to the 2/3 rule[16]. As part of the data collection for this review, the Commission has learned that the 2/3 rule has applied in about 9% of the multiple filings. A closer study of these cases indicates that the geographical area affected by these cases tends to involve two neighbouring Member States, such as Germany/France, Germany/the Netherlands,

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[16] As an example, the 2000 Report referred to the concentration between the Chase Manhattan Corporation and Robert Flemmings Holdings Limited. Both of these international financial companies manage assets that are measured in hundreds of billions USD and are active in 40-50 countries worldwide. Still, for both companies more than 2/3 of their combined turnover is attributable to the United Kingdom.

and France/Spain. In one case notification was made in three Member States (Germany/the Netherlands/Austria).

75. It thus appears that the 2/3-rule in certain cases may exclude cases with cross-border effects from Community jurisdiction. Moreover, as stated in the 2000 Report, the 2/3-rule may be more likely to apply to firms that have their core businesses in larger Member States. Despite these weaknesses, it must be acknowledged that the 2/3-rule has one major strength, which makes it less of a concern that cases fail to reach Community jurisdiction under this provision compared to those expressed above in relation to Article 1(3). The major strength of the 2/3-rule is that it expresses a "centre of gravity principle", and as such is close to the principle of subsidiarity.

76. The investigation of multiple filing cases has however revealed that the 2/3-rule in its current format can produce effects that may be questionable from the efficiency aspect inherent in the one-stop shop principle. The 2/3-rule can be regarded as an exemption from the Commission's exclusive jurisdiction to deal with concentrations exceeding the established thresholds. It should, however, be noted the one-stop shop principle ceases to apply when a concentration meets the 2/3-test. Thus, a case where the parties meet the turnover thresholds in Article 1, but have 2/3 of their combined turnover in one Member State, could be notified to, in principle, any number of other Member States.

77. Thus, while the primary intention of the 2/3-rule is to assure that a concentration which has its centre of gravity in one Member State will be assessed at that level, its current effect can be to transfer the assessment from the Commission to any number of national authorities. The justification for allowing *other* Member States to assume competence over a case which is excluded from the Merger Regulation only by the effect of the 2/3-rule is of course that the Member State where 2/3 of the turnover is achieved, unlike the Commission, is unable to deal with any effects on competition outside this Member State.

78. Some industry representatives have however raised a question as to the legitimacy of the current system that is felt to create significant uncertainty owing to notification requirements outside the centre of gravity of the transaction. The Commission is also unaware of any example of a "2/3-case" where a Member State (other than that where the 2/3-rule is satisfied), has found reasons to challenge a notified concentration or any aspects thereof. In addition, the protective mechanism in Article 22 would in principle enable Member States to refer such cases to the Commission in the unlikely scenario where a concentration would have negative effects on competition outside the country where it has its centre of gravity.

79. On balance, the 2/3-rule seems to apply to less than 10% of all multiple filings and only rarely to those undergoing notification in three or more Member States. It can therefore be seen as a reasonable expression of the principle of subsidiarity and can be retained unchanged.

6. Impact of the Expiry in 2002 of the ECSC Treaty

80. In addition to the generally applicable rules in the Merger Regulation, Article 66 of the European Coal and Steel Treaty (ECSC) also contains rules on merger control. The ECSC Treaty provides exclusive jurisdiction for the Commission to assess all concentrations involving at least one undertaking engaged in the production or

distribution of coal or steel and established in the Community. Such concentrations are subject to a system of prior authorisation. In 1998, the Commission adopted a Notice on the alignment of procedures for processing mergers under the ECSC and EC Treaties[17]. With the assent of the Council, the Commission has set minimum levels, based on the companies' volumes of production. Below these levels concentrations are exempted from the requirement of prior notification. A concentration that satisfies such an exemption is currently not subject to any notification requirement within the Community. However, when the ECSC Treaty expires in 2002, concentrations in the coal and steel sector will no longer be under the exclusive jurisdiction of the Commission. Instead they will become subject to normal rules on allocation of competencies between the Commission and Member States (i.e. Merger Regulation vs. national rules).

81. The table below gives the number of filings notified under the ECSC Treaty provisions.

Description	1997	1998	1999	2000
ECSC notifications	15	9	12	12

82. Further analysis of the transactions showed that, in absence of the ECSC treaty provisions, almost all cases would have been notified under the Merger Regulation, i.e. their involved turnover satisfied the criteria of Article 1(2) or Article 1(3) of the Merger Regulation. These notifications contributed with approximately 4% to the total of notifications received in the year 2000.

83. Another effect of the expiry of the ECSC Treaty is likely to increase the number of concentrations subject to merger control at the Member State level and potentially to more multiple filings. The ECSC rules provide the Commission with exclusive jurisdiction over all ECSC concentrations. Notification is, however, only required when certain minimum volumes are exceeded. For concentrations below these volumes, the abolition of the ECSC rules will necessitate either a notification under the Merger Regulation or, perhaps more likely, under the national rules of one or more Member States.

7. Effects of Multiple Filings upon Companies

84. The 2000 Report indicated that industry is critical of the fact that the current thresholds, and in particular Article 1(3) still excludes a significant number of transactions from the advantages of the one-stop shop principle. Respondents indicated both that the current thresholds are generally too high and that the three-country requirement in Article 1(3) considerably reduces its applicability to transactions with significant cross-border effects. The main reasons why industry wants the one-stop-shop principle to apply also to smaller cross-border operations were related to costs, efficiency and legal certainty.

85. As has already been indicated above, the Commission's study of multiple filing cases has provided further knowledge about the effects of multiple notifications on the companies involved. The study supports a finding that multiple filings often increase

[17] Commission Notice concerning the alignment of procedures for processing mergers under the ECSC and EC Treaties (OJ C 66,2.3.98, p. 36)

the costs for the notifying parties and requires a longer and less foreseeable regulatory procedure. The effects are more significant the higher the number of involved Member States. In particular, multiple filings involving three or more Member States appear especially likely to produce such effects. The study also provides indications that the disadvantages of multiple filings are particularly noticeable in relation to concentrations with little or no competitive impact. Following the introduction by the Commission of the simplified procedure in such cases, it can be assumed that the perceived disadvantage is now even greater for simple cases.

86. The effect of multiple notification on legal certainty has been indicated from several different perspectives. It is clear that the simple fact that one Member State imposes restrictions is not necessarily a sign that its decision is incompatible with those of other Member States that approved the concentration without restrictions. Nevertheless, it appears significant that the study found that concentrations notified in three or more Member States were six times as likely to be subject to some restrictions than cases that were notified to two Member States. Unfortunately, the data does not provide any information as to whether the same conclusion would be reached also in a comparison between cases notified in one or two Member States.

87. The study has also provided an indication that the procedural differences among Member States is a cause of concern for companies. This relates to a number of procedural issues, including the trigger date for notification and the information requirements for notification, the length of the procedure and varying possibilities for Member States to interrupt the deadlines. Another type of concern is that Member States, in their investigation, are seen to have a tendency to mechanically apply national market assessment even if markets are wider from an economic viewpoint.

8. Complexity of Turnover Thresholds

88. The 2000 Report indicated that the European industry saw the five-step criteria in Article 1(3) as overly complex (compared to the three-step criteria in Article 1(2)). Article 1(3)(a) and (d) include the worldwide and Community-wide criteria of Article 1(2), as well as the 2/3 exemption. The additional criteria of Article 1(3)(b) and (c) necessitate the identification of turnover figures for each undertaking concerned on a Member State level.

89. It is thus clear that the criteria of Article 1(3) objectively are more complex in application than those of Article 1(2). This, however, does not automatically mean that the industry objection that Article 1(3) is more costly and time consuming is a valid one. The reason for this is that the turnover figures at Member State level normally have to be identified also for cases falling under Article 1(2) (see Section 2.3.4 of the Form CO)[18].

90. There is, however, one part of the industry argument that appears to be valid and that relates to the costs associated with assembling the information under Article 1(3) to *exclude* that a particular transaction is candidate for notification under the Merger Regulation. At this stage, the Commission has no information about the frequency by

[18] Where appropriate, the parties may be given a waiver from supplying information requested by Form CO. This, however, applies regardless of whether the concentration is notified under Article 1(2) or 1(3).

which companies are forced to collect turnover data for all Member States simply to exclude the application of Article 1(3). However, given the fact that the number of national merger notification exceed, by far, the number of cases notified under the Merger Regulation and that many of these national notifications involve turnovers exceeding the worldwide criterion in Article 1(3), a simplification appears preferable. This conclusion is further strengthened by the fact that Article 1(3) does not have its principle field of application among the largest companies (who normally satisfy the Article 1(2) thresholds). Instead, Article 1(3) mainly applies to medium sized companies, whose worldwide turnovers can be as low as between EUR 100 to 2.500 million.

9. Conclusion

91. The available information generally does not indicate that there is any urgent need to amend Article 1(2), or to modify the level of the 2/3-rule. Neither does it appear to put into question the main principle of Article 1(3), namely that the Commission should deal with cases that affect three or more Member States.

92. However, it appears clearly that the actual effectiveness of Article 1(3) is unacceptable. This provision has simply not lived up to the expectations from the time of its adoption in 1997, and as a result a significant number of concentrations affecting three or more Member States continue to fall outside the Merger Regulation. Moreover, as has been described in some detail above, such multiple filings involve a number of difficulties for the companies involved.

93. From a Community viewpoint it is also significant that the study has provided a number of indications that many of those multiple filing cases had, at least, a potential cross-border dimension. This is indicated by the fact that the majority of these cases, according to the assessment of the investigating authorities, involved an assessment on the basis of a geographic market that was wider than national. Another similar indication is that cases notified in three or more Member States satisfied the Community-wide turnover requirements in Article 1, while remaining far from being subject to the 2/3-rule. The fact that many of these concentrations involved cross-border interests is also strongly indicated by the fact that the vast majority of cases involved business activities in several Member States where the concentration was not notified. Overall, the survey supports the operational reason behind the introduction of Article 1(3), namely that concentrations which require filing in three or more Member States generally are of Community interest.

94. Finally, as explained above, enlargement of the Community has a potential to further increase the risk of multiple filings involving a significant number of Member States, as well as the risk of negative effects thereof.

B. RESULTS OF THE COMMISSION'S INVESTIGATIONS

1. Technical evaluation of the “multiple filings survey”

a) General statistics

95. For the purpose of the 2000 Report, a consolidated list of multiple filings was prepared covering the period March 1998 to December 1999. This list contains 364 multiple filings. The Commission addressed a questionnaire to those companies

appearing as the acquirer(s), i.e. the parent company/-ies, in the relevant concentration.

Table 1-1: General statistics

Description	Multiple filings	In %
Multiple notifications as found for the 2000 Report	364	n/a
Replies received from industry	158	Reply rate: 43%
Replies with no input to analyse	26	n/a
Number of "no multiples" found	35	n/a
Number of multiple filings evaluated for the technical analysis	97	Evaluation rate: 27%

96. The number of replies received from industry amounted to 158, which represents a reply rate of 43%. It is worth mentioning the higher reply rate of companies that were involved in a multiple filing in 1999 comparing to companies involved in a multiple filing in 1998, i.e., 50% and 31% respectively.

97. In some replies (26), the companies apologised for being unable to provide the requested data at all, due, for example, to subsequent re-organisations in which the person(s) with the relevant knowledge had left the company.

98. The questionnaire requested indication of all Member States where a filing of a particular concentration had been made. A number of companies (35) replied that, in fact, the case was notified only to one Member State. One frequent explanation for why these cases may have appeared on the Commission's list was that informal contacts had indeed taken place with additional NCAs but, finally, no other filing was considered necessary. As the evaluation focuses on concentrations notified in at least two Member States, these replies were excluded from the further evaluation.

99. In summary, the evaluation of the results from the survey among companies involved in multiple filings is based on 97 replies.

2. Evaluation of the industry replies

a) Multiple filings in the Member States

100. The 2000 Report outlined that the majority of these 364 multiple filings were notified in two Member States (294 transactions; 80%), while 31 concentrations (9%) were notified in three Member States and 39 transactions (11%) in more than three Member States.

101. However, the replies received from industry indicate a different situation, which is based on the number of replies analysed (97).

Table 2-1: Multiple filings in Member States

Concentrations notified in	Multiple filings
2 Member States	46%
3 Member States	23%
More than 3 Member States	31%

102. Accordingly, 46% of the evaluated replies referred to transactions that were notified in two Member States, 23% in three Member States and 31% in more than three Member States, i.e. more transactions were notified in three or even more Member States than indicated in the 2000 Report. In fact, the replies showed that a significant number of transactions were notified in more than two Member States, despite being indicated previously as "two Member State filings" for the purposes of the 2000 Report. Furthermore, the replies indicated additional multiple filings not included in the 2000 Report. One possible reason for the latter is that these filings were made at the end of the data collection period of 1999, i.e. it may have been more difficult to include them in the statistics of the Member States.

b) Analysis of the turnover levels in multiple filings

103. A qualified answer on the cause of multiple filings made to numerous NCAs may be obtained by comparing the turnover involved with the threshold levels outlined in the Merger Regulation. The relevant turnover figures of the companies involved were, for this purpose, categorised according to the provisions of Article 1(2) and Article 1(3).

(1) Article 1(2)

104. As a first step, the threshold criteria of Article 1(2) were tested in relation to the turnover achieved by the companies involved in multiple filings.

Table 2-2: Detailed turnover criteria analysis applying threshold criteria of Article 1(2)

Criteria	Percentage of multiple filings satisfying the criterion	
	Notified in 2 MS	**Notified in 3 or more MS**
Article 1(2)(a)		
Combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 billion	35%	17%
Combined aggregate worldwide turnover of all the undertakings concerned is less than EUR 5 billion	65%	83%
Article 1(2)(b)		
Aggregate Community-wide turnover of – parent company/-ies is more than EUR 250 million – target company/-ies is more than EUR 250 million	21%	29%
Aggregate Community-wide turnover of – parent company/-ies is more than EUR 250 million – target company/-ies is less than EUR 250 million	71%	49%
Aggregate Community-wide turnover of – parent company/-ies is less than EUR 250 million – target company/-ies is more than EUR 250 million	0%	5%
Aggregate Community-wide turnover of – parent company/-ies is less than EUR 250 million – target company/-ies is less than EUR 250 million	9%	17%
Application of 2/3 rule	9%	5%

105. All multiple filings were selected and categorised, firstly, according to whether the combined aggregate worldwide turnover of all the undertakings concerned in the relevant transaction was more or less than EUR 5 billion (see table 2-2). In a second step, multiple filings were analysed according to the criterion of Article 1(2)(b). A distinction was made into four different categories, according to whether or not the turnover of the parent company/-ies and target company/-ies would reach the threshold of EUR 250 million. Finally, the multiple filings were verified against the 2/3 rule.

106. The results of this exercise are shown in table 2-2. Some of the figures provided in table 2-2 required further analysis.

107. In some multiple filings, both the criterion of the Article 1(2)(a) and Article 1(2)(b) were satisfied, however, the 2/3 rule applied and, therefore, the transaction was subject to national filings. In these cases it was found that the Community-wide turnover of the companies involved, i.e. that of both the parent and the target companies, was more than EUR 250 million.

108. The cases in which the criterion of Article 1(2)(a) was satisfied normally failed notification under the Merger Regulation because the Community-wide turnover was

satisfied only by one undertaking, namely the acquiring party, but not by the target undertaking(s).

109. The assumption could be made that larger enterprises are more likely to be subject to multiple filings in numerous Member States due to their greater scope of business operations. It can however be seen from table 2-2 that the combined worldwide turnover more commonly was above the EUR 5 billion threshold in multiple filings made in two Member States compared to cases notified in three or more Member States.

110. A closer examination of the relevant operations showed that, apart from those multiple filings where the 2/3 rule applied, some multiple filings involved two larger enterprises, one of which had substantial activities focussed in one Member State, whereas the acquired businesses achieved significant turnover in just one or two Member States, but still failed to meet the Community-wide threshold of EUR 250 million. Typical cases included either "national champions" or non-EU multinationals buying smaller European-based businesses, as well as acquisitions within the infrastructure sectors, enlarging existing activities in the same Member State.

111. A further step in the analysis of the results presented in table 2-2, involved defining the average turnover and the range of turnover[19] in relation to the worldwide and Community-wide turnovers, separately for parents and target companies.

Table 2-3: Average/Range of involved turnover in multiple filings applying threshold criteria of Article 1(2)

[19] A confidence interval of 95% confidence level was used for the calculation of the range of turnover on either side of the average turnover. Input was the sample standard deviation.

Criteria	Multiple filings (turnover involved in MEUR)			
	Notified in 2 MS		Notified in 3 or more MS	
	Average turnover	Turnover range	Average turnover	Turnover range
Article 1(2)(a)				
Combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 billion	14625	[8194-21056]	14503	[6433-22573
Combined aggregate worldwide turnover of all the undertakings concerned is less than EUR 5 billion	1153	[725-1581]	1441	[1022-1860]
Article 1(2)(b)				
Aggregate Community-wide turnover of – parent company/-ies is more than EUR 250 million – target company/-ies is more than EUR 250 million	p:1843 t: 692	p: [386-3300] t: [459-925]	p: 3096 t: 3950	p: [257-5935] t: [251-7649]
Aggregate Community-wide turnover of – parent company/-ies is more than EUR 250 million – target company/-ies is less than EUR 250 million	p: 7348 t: 92	p: [3188-11508] t: [57-127]	p: 2953 t: 78	p:[1452-4452 t: [49-107]
Aggregate Community-wide turnover of – parent company/-ies is less than EUR 250 million – target company/-ies is more than EUR 250 million	n/a[1]	n/a	p: 233 t: 712	p: [227-239] t: [499-925]
Aggregate Community-wide turnover of – parent company/-ies is less than EUR 250 million – target company/-ies is less than EUR 250 million	p: 44 t: 75	p: [8-80] t: [10-140]	p: 155 t: 137	t: [103-207] t: [90-185]

[1] N/a was used when 0% was the result at the appropriate row/column of table 2-2.

112. A number of interpretations can be made on the basis of the results presented in table 2-3.

113. For multiple filings notified in two Member States, the average turnover was approximately EUR 14.6 billion, with a range between EUR 8.1 billion to EUR 21 billion. The respective figures for multiple filings notified in three or more Member States were approximately EUR 14.6 billion average turnover, ranging between EUR 6.4 billion and EUR 22.6 billion. Concerning multiple filings in which the combined aggregate worldwide turnover was tested against the criterion of Article 1(2)(a), the average turnover was found to be approximately EUR 1.2 billion, with a turnover range between approximately EUR 0.7 billion and EUR 1.6 billion, for those notified in two Member States. The figures for multiple filings notified in three or more Member States were found to be approximately EUR 1.4 billion average turnover, with a turnover range between approximately EUR 1.1 billion to EUR 1.8 billion.

114. As to the Community-wide turnover, table 2-3 demonstrates that for the majority of the multiple filings, the average turnover of the parent company/-ies or that of the target company/-ies, or of even both taken together, is below the criterion of Article 1(2)(b). For the multiple filings in which the average turnover of the parent and the target company/-ies did satisfy the criterion of Article 1(2)(b), they either missed the criterion of Article 1(2)(a) or, the 2/3 rule triggered national filings.

115. In addition to the findings as presented in table 2-2 and table 2-3, all multiple filings in which the 2/3 rule would have been applicable were analysed in relation to where the transaction was subject to notification. In the majority of these transactions, filings were made in Member States, neighbouring to the Member State in which more than 2/3 of the turnover was achieved by the undertakings concerned. These were *inter alia* the neighbouring Member States Germany and France, Germany and the Netherlands, and France and Spain. There has been only one exception to this pattern, where no filing was made in a neighbouring Member State. In that case, the filing was triggered by the relatively low threshold criteria applicable in this Member State.

Summary of conclusions on multiple filings checked in relation to Article 1(2)

116. Multiple filings failed notification under the Merger Regulation when applying Article 1(2), mainly due to the Community-turnover of the acquired business, which was less than EUR 250 million. Furthermore, in some multiple filings the 2/3 rule has applied. Another category of multiple filings involve turnover levels satisfying the criterion of Article 1(2)(b) but failing to meet the worldwide threshold in Article 1(2)(a). This finding applies to multiple filings made in two Member States as well as to those made in three or more Member States.

117. It can further be said that hardly any multiple filing was a borderline case. The involved turnover levels had clearly some distance to meet the criteria of Article 1(2), i.e. the turnover ranges showed that the involved turnover were either clearly above the appropriate threshold criterion or much below and thereby failed coming close being notified under the Merger Regulation.

(2) Article 1(3)

118. In the 2000 Report, particular focus was given on the Article 1(3) criteria, as they were introduced in March 1998. All multiple filings, therefore, were analysed in relation to the various criteria of Article 1(3).

Table 2-4: Detailed turnover criteria analysis applying threshold of Article 1(3)

Criteria	Percentage of multiple filings satisfying the criterion	
	Notified in 2 MS	**Notified in 3 or more MS**
Article 1(3)(a)		
Combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2.5 billion	41%	29%
Combined aggregate worldwide turnover of all the undertakings concerned is less than EUR 2.5 billion	59%	71%
Article 1(3)(b)		
In each of least 3 Member States the aggregate turnover of all the undertakings concerned is	----------	----------
- more than EUR 100 million achieved in two / three Member States	32% / 33%	68% / 60%
- less than EUR 100 million achieved in two / three Member States	68% / 67%	32% / 40%
Article 1(3)(c)		
In each of least 3 Member States the aggregate turnover of each of the undertakings concerned is	----------	----------
- parent company/-ies is more than EUR 25 million and target company/-ies is more than EUR 25 m.; achieved in two / three or more Member States	14% / 0%	34% / 32%
- parent company/-ies is more than EUR 25 million and target company/-ies is less than EUR 25 m. ; achieved in two / three or more Member States	69% / 63%	43% / 43%
- parent company/-ies is less than EUR 25 million and target company/-ies is more than EUR 25 m.; achieved in two / three or more Member States	3% / 12%	19% / 16%
- parent company/-ies is less than EUR 25 million and target company/-ies is less than EUR 25 m; achieved in two / three or more Member States	14% / 25%	4% / 9%
Article 1(3)(d)		
Aggregate Community-wide turnover is	----------	----------
- parent company/-ies is more than EUR 100 m and target company/-ies is more than EUR 100 m	33%	64%
- parent company/-ies is more than EUR 100 m and target company/-ies is less than EUR 100 m	52%	33%

119. All multiple filings were again selected for the exercise in relation to Article 1(3). Firstly, they were categorised according to whether the combined aggregate worldwide turnover of all the undertakings concerned in the relevant transaction was more or less than EUR 2.5 billion (see table 2-4). In a second step, the multiple filings were analysed according to the criteria of Article 1(3)(b)-(d). For the criterion of Article 1(3)(b), a distinction was made whether or not the threshold of EUR 100 million was reached and, furthermore, whether this threshold criterion applied in two or three Member States. The analysis of the criterion of Article 1(3)(c) was pursued in four categories, namely whether or not the turnover of at least two of the companies, i.e. parent company/-ies and target company/-ies, would each reach the threshold of EUR 25 million, separately, in two or three Member States. Finally, a distinction of the application of the criterion of Article 1(3)(d) was made into four categories, according to whether or not the threshold of EUR 100 million was reached at Community-level by at least two of the companies involved, i.e. parent company/-ies and target company/-ies. In addition, the multiple filings were verified against the 2/3 rule.

120. The results of this exercise are shown in table 2-4. Some of the figures provided in table 2-4 required further analysis.

121. In some multiple filings, the criteria of Article 1(3)(a) and Articles 1(3)(b)-(d) were satisfied, however, the 2/3 rule applied and, therefore, the transaction was subject to national filings.

122. Multiple filings satisfying the criterion of Article 1(3)(a) failed notification under the Merger Regulation because one of the criteria of the Articles 1(3)(b)-(d) was not satisfied. Here, it was found that a distinction has to be made between multiple filings notified in two Member States or in three or more Member States.

123. Concerning the multiple filings that were notified in two Member States, the threshold level of the criterion of Article 1(3)(b) was not reached by the majority of multiple filings, independently of the consideration whether the turnover was achieved in two or three Member States. In combination with the criterion of Article 1(3)(c), the concentrations failed to meet the threshold criterion in the same Member States considered. Within this sample, however, the Community-wide turnover level did reach the required threshold level of the criterion of Article 1(3)(d) in approximately 40% of the multiple filings considered.

124. As far as the multiple filings that were notified in three or more Member States are concerned, the most decisive element was the criterion of Article 1(3)(c), i.e. the parties' turnover failed to reach EUR 25 million in three (or more) Member States, which were also considered for the criterion of Article 1(3)(b). In particular, the turnover level of the target company was below the required threshold level. In a majority of multiple filings of this sample, the criterion of Article 1(3)(d) has been fulfilled.

125. As already indicated in relation to Article 1(2), the assumption could be made that larger enterprises would be more likely to be subject to multiple filings in numerous Member States. It can however be seen also from table 2-4 that the combined aggregate worldwide turnover more often exceeded EUR 2.5 billion in multiple filings made in two Member States rather than in those made in three or more Member States.

126. A further step in the analysis of the results presented in table 2-4, involved defining the average turnover and the range of turnover[20] in relation to the worldwide, Community-wide and Member State turnovers, separately for parent and target companies.

Table 2-5: Average/Range of turnover involved in multiple filings applying threshold criteria of Article 1(3)

[20] A confidence interval of 95% confidence level was used for the calculation of the range of turnover on either side of the average turnover. Input was the sample standard deviation.

Criteria	Multiple filings			
	Notified in 2 MS		Notified in 3 or more MS	
	Average turnover	Turnover range	Average turnover	Turnover range
Article 1(3)(a)				
Comb. aggregate worldwide turnover of all the undertakings concerned is more than EUR 2.5 bn	13064	[7198-18930]	10086	[4520-15652]
Comb. aggregate worldwide turnover of all the undertakings concerned is less than EUR 2.5 bn	964	[655-1273]	914	[673-1155]
Article 1(3)(b)				
In each of least 3 Member States the aggregate turnover of all the undertakings concerned is	----------	---------	----------	----------
more than EUR 100 million achieved in two / three Member States	889 / 254	[441-1337] / [253-254]	1214 / 506	[769-1659] / [112-900]
less than EUR 100 million achieved in two / three Member States	89 / 81	[83-95] / [62-100]	93 / 95	[86-100] / [91-99]
Article 1(3)(c)				
In each of least 3 Member States[1] the aggregate turnover of each of the undertakings concerned is	----------	---------	----------	----------
parent company(s) is more than EUR 25 m and target company(s) is more than EUR 25 m achieved in two / three or more MS	p:2097; t:171 / n/a[2]	p:[274-3920]; t:[26-316] / n/a	p:415; t:108 / p:1214; t:328	p:[102-728]; t:[27-189] / p:[699-1729]; t:[87-569]
parent company(s) is more than EUR 25 m and target company(s) is less than EUR 25 m achieved in two / three or more MS	p:1466; t:21 / p:438; t:8	p:[460-2472]; t:[18-24] / p:[131-745]; t:[7-9]	p:527; t:23 / p:143; t:8	p:[201-853]; t:[22-24] / p:[50-236]; t:[7-9]

[1] For this calculation, the turnover figures of the same Member States was used as determined in the previous calculation of the aggregate turnover (Article 1(3)(b)).

[2] N/a was used when 0% was the result at the appropriate row/column of table **Error! Reference source not found.**.

127. A number of indicative conclusions can be made on the basis of the results presented in table 2-5.

128. When considering the threshold level of the criterion of Article 1(3)(a), the combined aggregate worldwide turnover of all the companies concerned differs on the basis of whether filings were made in two Member States or in three or more Member States. The average combined aggregate worldwide turnover of multiple filings was in the level of approximately EUR 13 billion, with a range between approximately EUR 7.2 billion and EUR 18.9 billion, when notified in two Member States. With filings in three or more Member States, the average combined aggregate worldwide turnover reaches approximately EUR 9.8 billion, with a range between approximately EUR 4.5 billion and EUR 15.6 billion. For multiple filings in which the turnover was found to be lower than the EUR 2.5 billion criterion, an average level of turnover was determined of approximately EUR 0.9 billion irrespectively of the number of filings made, with a range between approximately EUR 0.7 billion and EUR 1.2 billion.

129. With regard to the criterion of Article 1(3)(b) on the combined aggregate turnover, table 2-5 demonstrates that for the majority of multiple filings the combined aggregate turnover involved in each of at least three Member States would satisfy the threshold level, if considered in isolation. However, the turnover figures typically reflect the high turnover achieved by the parent company/-ies in the relevant Member States, whilst the target company/-ies contributed significantly to the aggregated turnover.

130. The figures provided for the analysis of the criterion of Article 1(3)(c) indicate the level of turnover achieved in at least 3 Member States by each of at least two companies, i.e. the parent and the target company as in most multiple filings. It was found that when both companies reached the turnover level of EUR 25 million in three Member States, the average turnover is higher than this threshold level. The average turnover is also above this threshold level due to the fact that the parent company contributed with its higher turnover.

131. As far as the Community-wide turnover of each of at least two companies is concerned, it was found that the average turnover level was achieved in approximately 50% of the multiple filings. The fact that mainly the low turnover levels of the target company determined where to notify, is also confirmed by the figures prepared to analyse the Community-wide turnover. In relatively few multiple filings the involved Community-wide turnover was below the threshold criteria for both parent and target companies.

132. For the multiple filings, in which the 2/3 rule applied, all criteria of Article 1(3) except that criterion of Article 1(3)(c) was fulfilled.

133. In addition to the findings as presented in table 2-4 and table 2-5, all multiple filings in which the 2/3 rule was applicable were analysed in relation to where the transaction was subject to notification. In the majority of these transactions, filings were made in neighbouring Member States to the Member State in which more than 2/3 of the turnover was achieved by the undertakings concerned, such as Germany and France or Germany and the Netherlands. There were two multiple filings, where no filing was made in a Member State neighbouring that in which 2/3 was achieved.

In these cases, the filing was triggered by the relatively low threshold criteria applicable in this Member State, here the Netherlands.

Summary of conclusions on multiple filings checked in relation to Article 1(3)

134. There is great diversity in the reasons why the studies multiple filings failed to meet the criteria of Article 1(3) of the Merger Regulation. Notably, some 71% failed to meet the worldwide threshold in Article 1(3)(a). Some of these cases satisfied the criteria of Article 1(3)(b) and (c). Many cases also failed to satisfy the criterion of paragraph (b). The required link to the Member States included for paragraph (b), was often the cause for failures to satisfy the criterion of paragraph (c). Relatively few multiple filings met the 2/3 rule. In the studied sample, a failure to meet the criterion of Article 1(3)(b) more often triggered multiple filings in two Member States, whereas cases failing to meet the criterion of Article 1(3)(c) were more often triggered notifications in three or more Member States.

135. Since its conception, Article 1 has assumed that transactions are considered to be of Community dimension if, *inter alia,* a certain level of turnover is achieved in the Community. A point of reference to determine Community interest could therefore be the turnover level of EUR 250 million, which derives from the criterion of Article 1(2)(b). The level of the average Community-wide turnover, as outlined in table 2-5, suggested to look particularly into these multiple filings as the average exceeds significantly the level of EUR 250 million.

136. It was found for this category of multiple filings that, when notified in two Member States, that the business activities of the companies involved generated substantial turnover mainly in one or two Member States but small turnover or even no turnover in further Member States. In such multiple filings, the criterion of Article 1(3)(a) would have been met by many transactions. Here, the decisive element to fail notification under the Merger Regulation was often the 3rd Member State criterion.

137. As far as the multiple filings made in three or more Member States are concerned, the involved companies normally generated significant turnover in one or two Member States and moderate turnover in other Member States. However, the criterion of Article 1(3)(a) was not met in many of these transactions. Moreover, the criterion of Article 1(3)(c), i.e. the EUR 25 million threshold, was frequently not met in the 3rd Member State, mainly by the target company (even where the other criteria, namely those of Article 1(3)(b) and Article 1(3)(d) would have been satisfied). The latter could suggest that, although the turnover in the 3rd Member State was below EUR 25 million, the relevant transaction would have had cross-border activities. For this purpose, a brief analysis was made to find in which Member State filings were made. In the majority of these cases, neighbouring Member States were involved, such as Germany and France, Germany and the Netherlands, Spain and Portugal, the United Kingdom and Ireland, Sweden and Finland.

138. It, therefore, appears that the current design of the criteria of Article 1(3) function in a way that cases with potential Community interest might not be caught under the Merger Regulation, and that, instead, individual filings are necessary in a number of Member States.

139. The conducted study has provided a better insight into the possible reasons behind multiple filing and the complex relationship between Article 1(3) and national

merger control rules. It has, however, not provided any clear answer to the question of which of the criteria in Article 1(3)(a)-(d) that could be revised in order to reduce significantly the prevalence of multiple filings. The results of this study may be taken as indications that Article 1(3)(a) would appear to be most obvious candidate for an amendment, followed by the combined criteria of paragraphs (b) and (c). A discussion on the prospects of such measures has therefore been included in the Green Paper.

c) Costs of multiple filings

140. In the questionnaire to industry, the acquiring company was asked to provide details on costs of multiple filings. The level of detail separated the costs into administrative fees imposed by Member State competition authorities, additional fees for legal advice and services, such as translations and co-ordination of multiple filings, and other costs. Furthermore, details were requested on the costs that occurred when notifying outside the EEA.

Table 2-5: Total costs of multiple filings (including fees to Member States and fees to obtain legal advice)

Total costs	**< EUR 10000**	**EUR 10000 – 50000**	**> EUR 50000**
In % of multiple filings	11%	41%	49%

141. Most costs of multiple filings range either between EUR 10000 to EUR 50000 or are higher than EUR 50000, as outlined in table 2-5.

142. In a next step, the costs were put into relation with the number of Member States involved in a multiple filing.

Table 2-6: Relation between costs and number of Member States involved in a multiple filing

Number of Member States involved	**Costs**		
	< EUR 10000	**EUR 10000 – EUR 50000**	**> EUR 50000**
2	24%	56%	20%
3	0%	39%	61%
4	0%	18%	82%
5	0%	17%	83%
6	0%	33%	67%
7	0%	50%	50%
> 7	0%	0%	100%

143. The cost of multiple filings appears to depend largely on the number of Member States to which notification is to be made. If the transaction is subject to notification in two Member States, the costs remain mostly below EUR 50000, sometimes below EUR 10000. From the moment, notification is required in three or more Member States any multiple filing produces costs above EUR 10000, and, more often, above EUR 50000.

144. Thus, the figures further demonstrate that costs for multiple filings increase significantly when filing is required to three or more Member States. It appears that, when evaluating the replies from industry, the cost of co-ordination of multiple filings is relatively high with three different filings to manage, but does not increase proportionally if more than three notifications are required. Nevertheless, where applicable, the part of the cost generated by translation increases proportionally to the number of filings.

145. In the questionnaire, industry was asked to provide cost figures on administrative fees that were payable when filing a notification to certain NCAs.

Table 2-7: Notification fees charged by NCAs

Notification fees	**< EUR 5000**	**EUR 5000 – 10000**	**> EUR 10000**
Member States (selection)	Ireland, Austria	Greece	Germany, United Kingdom, Spain

146. The figures provided in table 2-7 were produced on the basis of the average administrative fee of a multiple filing charged by the individual NCA. In some Member States, the filing fee can depend on the size or value of the transaction, making the importance of administrative fees as a proportion of overall costs dependent on the transaction's value. There is no harmonisation of filing fees in the Member States.

147. Related with the costs of multiple filings, industry replies indicated that legal fees range between EUR 20000 and EUR 100000 in average. In most multiple filing cases, the legal fees occurred from obtaining advice on competition jurisdiction in the Member States. This is often necessary when the acquiring party has limited in-house familiarity with the various national competition jurisdictions. Moreover, additional legal fees occurred when notification was potentially necessary in Member States in which no filings were made before, i.e. no previous experience was available.

148. In this context, respondents mentioned that a significant part of the additional legal fees occurred by the fact that prior to a multiple filing all possible national jurisdictions needed to be checked as to the necessity of notification. On the basis of the figures provided, the additional costs amounted to EUR 7000 in average. Examples were given where, in Member states with voluntary systems, the costs for preparing an informal filing (for the discussion with the relevant national competition authority in order to clarify whether to notify) can be as high as he cost of a full notification procedure.

d) Outcome in multiple filings

(1) Average duration of multiple filing procedures

149. Multiple filings mean for notifying parties that the proposed transaction can be implemented when clearance was received from all NCAs involved. In the questionnaire to the industry, it was asked to provide the dates of the filings and the clearances received.

Table 2-8: Time spent in multiple filings[21]

[21] For the calculation of this table, the sample has received approximation in some multiple filings due to missing data from Austria and the United Kingdom.

Time spent	Number of days	
Clearance received within	**short procedure**	**extended procedure**
Average / [Range[1]]	76 / [61-91]	121 / [106-136]
Average when filed to 2 Member States / [Range]	52 / [37-68]	88 / [67-109]
Average when filed to 3 Member States / [Range]	100 / [54-147]	99 / [51-148]
Average when filed to more than 3 Member States / [Range]	98 / [61-135]	143 / [85-201]

[1] A confidence interval of 95% confidence level was used for the calculation of the range of time on either side of the average time. Input was the sample standard deviation.

150. It can be seen from table 2-8 that for multiple filings cleared within short procedure the average time between the first notification and the last clearance received amounts to 76 days, with a range of 61-91 days. For multiple filings cleared within extended procedure amounts to 121 days, with a range of 106-136 days.

151. In a further calculation, the average duration of multiple filings was based on the number of Member States involved. It can be concluded from the figures provided in table 2-8 that the average duration for obtaining a clearance increases significantly when three or more NCAs are involved. Respondents gave a number of reasons in their replies for the longer time span when filing to three or even more Member States. In the first place, time is spent due to the varying rules in national jurisdictions and to the length of the relevant proceedings. It is a fact relating to this, that the event triggering notification differs among Member States. In the second place, suspension after declaration of incompleteness or requests for supplementary information, based on differing rules, consume additional time before clearance can be obtained.

Comparison with EU merger filings

152. For reason of comparison with the multiple, the time spent in EU merger proceedings was calculated for the period 1999 and 2000.

Table 2-8a: Time spent in EU merger proceedings

Time spent	Number of days	
Clearance received within	**short procedure**	**extended procedure**
1999		
Average / [Range[1]]	34 / [34-35]	146 / [133-158]
2000		
Average / [Range]	35 / [34-35]	161 / [157-167]

[1] A confidence interval of 95% confidence level was used for the calculation of the range of time on either side of the average time. Input was the sample standard deviation.

(2) Outcome of the NCAs' investigations

153. Industry was asked on the outcome of the NCAs investigations.

Table 2-9: Outcome of the investigations

Outcome of the investigations	**Multiple filings**	
	Notified in 2 MS	**Notified in 3 or more MS**
All NCAs cleared without restrictions	98%	88%
Different investigation results, e.g. conditions imposed, namely re-structuring of the transaction or divestiture condition	2%	12%

154. From the figures provided in table 2-9, it can be concluded that most multiple filings were cleared by all NCAs without imposing restrictions or conditions. However, a difference can be observed between multiple filings made in two or in three or more Member States. In the latter case, investigations conducted by different NCAs produced differing results more frequently[22]. However, such differing results did not include a prohibition. The main reason given by industry on such different outcomes was that NCAs had investigated product markets from their national perspective, which may differ among the NCAs. From this point of view, a transaction could therefore be subject to restrictions when competition concerns arise on a national level. In one case, restructuring the transaction on the particular national market had solved the competition concern. In one multiple filing involving six Member State notifications, conditions were imposed by two Member States, whereas the other four Member States cleared the transaction without reservations[23].

155. In conclusion, it appears that filings in three or more Member States generates a higher potential for different outcomes as, naturally, more NCAs are involved applying their own national perspective as regards market definitions. This result is consistent with the general feeling among industry respondents that multiple filings create additional legal uncertainty and risk of inconsistent results.

(3) Co-ordination among NCAs

156. Industry was asked to provide information on whether they were made aware of co-ordination between the NCAs to which they had submitted notifications, also including requests to discuss confidential information between Member States. The question embraced details on whether a joint request according to Article 22 was considered by NCAs.

Table 2-10: Co-ordination among NCAs

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22 It is to be noted that different results need not be incompatible, as they may simply indicate that market conditions were different.

23 This multiple filing was notified in France, Germany, Spain, Portugal, Finland and Sweden. France and Finland imposed conditions.

Co-ordination among NCAs	Multiple filings	
	Notified in 2 MS	**Notified in 3 or more MS**
No, the notifying parties were not aware	98%	92%
Yes, the notifying parties were made aware	2%	8%
Joint request, according to Article 22 ECMR, considered by NCAs	0%	6%[1]

[1] The cases considered for joint requests are also included in the calculation of the co-ordination among NCAs.

157. The figures as provided in table 2-10 indicate that co-ordination rarely takes place among NCAs, (or at least the notifying parties were not made aware of such co-ordination). This finding can be seen in line with the figures provided in table 2-9 in which the vast majority of multiple filings resulted in clearances without any restrictions. To a certain extent it can be assumed that co-ordination was less of a necessity in such cases for each Member State involved. This, however, does not necessarily imply that potential cross-border effects of such cases could not have been more effectively identified or addressed had co-ordination taken place.

158. As far as multiple filings are concerned, in which restrictions or modifications were imposed, co-ordination took place in one multiple filing, whereas the remaining multiple filings were subject to restrictions without prior co-ordination among the NCAs concerned, to the knowledge of the notifying parties.

159. Concerning the possibility of the application of Article 22 ECMR, in 6% of the cases the notifying parties were made aware of the fact that the NCAs concerned were considering a joint request. However, the replies from industry stated that contacts between the relevant NCAs were of informal nature. No formal joint request was finally made according to Article 22 ECMR.

(4) Geographic scope in multiple filing cases

160. In one further exercise, Member States were asked to provided additional data on the geographic market definition in their multiple filing cases.

Table 2-11: Geographic scope in multiple filing cases[24]

Geographic scope	Notified in 2 MS	Notified in 3 or more MS
National	23%	21%
Wider than national	32%	34%
Geographic market definition left open	45%	45%

161. Table 2-11 shows that in approximately one-fifth of multiple filing cases the national competition authorities considered the geographic scope being national. For the majority of multiple filings, the geographic market definition was either wider than national or left open.

e) Activities of companies involved in multiple filings

162. Companies involved in multiple filings were asked in which Member States other than those where notification was made, they are actively selling products and/or providing services.

Table 2-12: Activities of companies involved in multiple filings

[24] For the calculation of this table, the sample has received approximation in some multiple filings due to missing data from Austria and the United Kingdom.

Description		Multiple filings	
Indication on whether the companies are actively selling products and/or providing services in		**Notified in 2 MS**	**Notified in 3 or more MS**
	only those Member States where the transaction was notified	0%	0%
	also in one other Member State	9%	0%
	also in two or three other Member States	11%	6%
	also in four or more other Member States	80%	94%

163. According to table 2-12, the majority of companies had activities in four or more Member States other than in those where the notification was made. The percentage of these cases is particularly high in multiple filings made to three or more Member States.

f) Experience with multiple filings and ECMR notifications

164. A further series of questions were addressed to industry investigating their experience, from multiple filings and filing under the Merger Regulation.

(1) Legal uncertainty in multiple filings

165. In contrast to the "one-stop shop" principle applied under the ECMR, in which one competition authority is competent to assess the proposed transaction, multiple filing involves two or more Member State competition authorities. Industry was asked to express their views on differences between legal uncertainties pending multiple filings compared to the situation when the Merger Regulation is applicable.

Table 2-13: Legal uncertainties in multiple filings compared with ECMR filings

Legal uncertainties	Frequency of naming	
	Notified in 2 MS	**Notified in 3 or more MS**
Differences in the national merger regimes, e.g. different rules, differences in filing requirements, time tables, triggering event of notification, lessens predictability of outcome	17	29
NCAs considers markets from a national viewpoint, market definitions can vary in the various NCAs possibly leading to different outcome of the investigation; risk of contradictory decisions,	5	16
Increase of uncertainty with increase of number of national filings	1	4
Uncertainty diminished when one NCA has already approved the transaction, other NCAs will follow	0	1
No issue of legal uncertainty with multiple filing	7	5
No experience in ECMR filings / no input provided in the reply	18	18

166. In table 2-13, the industry replies are presented according to how frequently they have been referred to and this has been done separately for multiple filings notified in two and in three or more Member States.

167. It was found that most companies voiced concerns about matters related to legal certainty of multiple filings, stemming from the fact that national merger regimes in the EU differ and therefore lessen the predictability of the outcome. Such concerns were raised more frequently when three or more filings were involved.

168. A further category of replies summarised the concerns of industry in relation to the definition of the relevant product and geographic markets as well as to possible differences in assessment. Such differences imply the risk of receiving an outcome of the investigation that would urge the notifying parties to at least restructure the transaction or to divest businesses in certain Member States, with possible effects on their activities in other Member States. Also this type of concerns were more frequent among companies with experience from notifying three or more Member States.

169. Relatively few companies stated directly that legal uncertainty increases with the number of national filings required, however, also here this comment was more frequent among those who had notified in three or more Member States.

170. Many companies indicated that legal uncertainty remained during the whole duration of multiple filing proceedings, whereas some stated that the uncertainty applied to a higher degree in those Member States in which the most important part of the transaction occurred and/or where it had a greater competition impact. In one reply, a company outlined its experience that other NCAs gave clearance quickly when one

NCA approved the transaction. This reply involved a multiple filing in more than three Member States.

(2) Costs of multiple filings in comparison with that of ECMR notification

171. A further element when discussing multiple filings is to compare the costs involved with that of one single filing under the Merger Regulation[25].

Table 2-14: Cost comparison multiple filings versus ECMR filing

Cost comparison	**Number of references**	
	Notified in 2 MS	**Notified in 3 or more MS**
Costs of multiple filings are higher than with one ECMR filing due to meet the different national information requirements and the involved co-ordination effort	13	13
In "easy transactions" multiple filings are more expensive, whereas "more complex transactions" require less costs in multiple filings than with one ECMR filing	1	6
Costs of ECMR filing is higher than with multiple filings	1	2
Costs of one ECMR filing appears to be in balance with two to three national filings	3	2

172. It can be seen from table 2-14 that respondents in general experienced higher costs as a result of multiple filings. It, moreover, appears that the costs of multiple filings need to be seen in relation with the level of complexity of the transaction, with the cost disadvantage being more notable for "easy transactions".

173. No industry respondents were able to submit a real cost comparison, and this was often attributed to difficulty in comparing cases with different degrees of complexity.

(3) Application of the 2/3 rule

174. In the context of questions related to experience gained with multiple and ECMR filings, industry was asked to provide their views on the 2/3 rule. Notification under the Merger Regulation is exempted if more than two-thirds of the aggregate Community-wide turnover is achieved in one and the same Member State by each undertaking concerned.

Table 2-15: Application of the 2/3 rule

[25] As the multiple filing cases related to the period of 1998-1999, the result does not reflect cases that were notified to the Commission under the simplified treatment procedure introduced in September 2000.

Application of the 2/3 rule	Number of references	
	Notified in 2 MS	**Notified in 3 or more MS**
2/3 rule is set at appropriate level	14	10
2/3 rule is set at inappropriate level	2	6
No relevance, no experience with this rule	6	12

175. Apart from the replies that considered the application of the 2/3 rule as not relevant for their companies and therefore lacked own experience, the respondents considered, by majority, the 2/3 rule as being set at correct level to determine transactions of national character. However, a number of replies expressed opposite views. Some replies gave indications of what level of turnover would determine a transaction being of national character. One reply expressed that a 3/4 rule would be more appropriate. Two replies were in favour of lowering the current 2/3 rule towards a 1/2 rule.

(4) Experience with notification outside the EEA

176. Multiple filings could also be subject to notification requirements outside the EEA. In this context, industry was asked to provide certain notification details, e.g. countries, costs, administrative fees, experiences.

Table 2-16: Notifications outside the EEA

Notifications outside the EEA	Number of references
Applicant countries, namely Poland, Czech Republic, Cyprus, Slovak Republic	9
North America, namely USA and Canada	26
South America, e.g. Brazil, Argentina	12
Australia and New Zealand	6
Asia, e.g. South Korea, Hong Kong	3
Other countries, e.g. South Africa, Croatia	4

177. As can be seen from table 2-16, a high proportion of multiple filings required notification outside the EEA. Transactions were most frequently subject to merger control in North America as well as South America, in particular in Brazil, where some respondents indicated that notification requirements at very low levels trigger mandatory filing even if business activities achieve minimal turnover.

178. Additionally, some companies provided figures on costs incurred by their notifications made outside the EEA.

Table 2-17: Notification costs outside the EEA

Notification costs	**< EUR 5000**	**EUR 5000 – 10000**	**> EUR 10000**
States (select. of countries)	Australia, New Zealand	Canada, South Korea, Poland	USA, Brazil

179. Moreover, a number of companies outlined their experiences with notifications outside the EEA.

Table 2-18: Comments on notifications made outside the EEA

Comments on notifications made outside the EEA	**Number of references**
Outcome is less predictable due to substantial differences in merger regimes	15
Substantial differences in information requirements	9
In favour of harmonised merger rules on a global scale	2

180. Undertakings involved in acquisitions of global scale expressed their concern of being exposed to significant legal uncertainties with notifications in particular outside the EEA. The main comment was that since other merger regimes differ in substantial aspects, preparing a notification and predictability of the outcome generates a high level of uncertainty. Furthermore, differing filing requirements result in higher costs for the notifying parties preparing the filings.

181. In a number of multiple filings, the transaction was subject to notification in several countries. The companies concerned expressed that they would favour more harmonised rules on merger regimes on a global scale.

(5) Candidate countries

182. Relatively few respondents indicated experience from notifications made in candidate countries (see table 2-16), and no particular comments or experience were reported from industry in the context of multiple filings[26].

g) Other comments on multiple filings

183. In a last question, industry was asked to provide their views on any other aspect in relation to multiple filings.

Table 2-19: Other comments on multiple filings

[26] A survey was conducted among candidate countries in respect with the efforts in harmonising their relevant merger regimes. It was found that many candidate countries are in a process of adapting their legislation on merger control to EU-style merger rules.

Other comments on multiple filings	Number of references (reference)
Turnover-based test appears the best instrument to establish Community-dimension	19
In favour of option to notify under ECMR when three or more national filings are required	14
Other tests, namely asset or transaction value tests, appear more difficult to apply, however, to some extent better suited to establish Community-dimension; to be used as alternative to turnover-based test	7
Preference to have harmonised filing requirements in the EU, also applicable when national filing is required; one single language in notifications	4
Introduction of a "de-minimis" rule in the Merger Regulation	3

184. Many companies submitted their views on various aspects relating to multiple filings as well as to filing under the Merger Regulation. For the purposes of a better overview, these comments were integrated into categories of replies as done in table 2-19.

(1) Test to establish Community-dimension under ECMR

185. From the number of replies, it appears that the current turnover-based test establishing Community-dimension under the Merger Regulation is in favour over other tests, namely asset-based, market share or transaction value tests. Advantage of the turnover-based test was seen in the fact that turnover figures are mostly readily available or can be compiled with reasonable effort from accounting material.

186. Any other test is seen as more complicated to apply by the notifying parties. In particular, the preparatory work to accurately compile data for these tests involves a high amount of effort, as most standard data would need to be adjusted to fit any of the possible alternative tests. However, some replies indicate that other tests establishing Community-dimension should become part of threshold criteria but possibly applicable as an alternative when the turnover-based test would fail to trigger notification under the Merger Regulation.

(2) Option in multiple filings under which merger regime to notify

187. In relation to the apparently high costs of multiple filings, many respondents would appreciate receiving the choice under which merger regime to notify when a certain number of national filings are to be made. With reference to table 2-14 and table 2-19, it appears that a preference for filing under the Merger Regulation exist when at least three Member States would be involved in a national filing.

(3) Harmonised filing requirements

188. Despite the fact that over past years some *de facto* harmonisation took place, causing national merger regimes to be more in line with the Merger Regulation, some

respondents expressed their concern that the filing requirements, in particular the information requested as far as the level of detail and the type of information are concerned, have experienced no substantial change towards EU-wide common standards. According to some replies, companies would favour to have at least some common filing standards on an EU-wide scale. Furthermore, some companies suggested using the information requirements according the Form CO, as applicable under the Merger Regulation, being valid as notification under national rules.

189. In relation to common filing requirements and cost reduction, some industry respondents expressed that one language, namely the English language, should be applicable when preparing multiple filings (arguing that this would reduce costs of multiple filings generated by translations).

190. One further aspect was forwarded in the context of harmonised filing requirements. Some companies with experience in multiple filings and notifications under the Merger Regulation outlined that they would prefer to complete for multiple filings, one notification form, namely the Form CO as applicable under the ECMR. Their argument runs that Member States are already familiar with the data content of the Form CO, of which they receive a copy if filing is made under the ECMR.

(4) "De-minimis rule"

191. In a few replies reference was made to the current antitrust rules in which a "de-minimis rule" has been implemented. Those who would favour such a rule in the ECMR stressed that it should be easily calculable and supplement the turnover-based test. In one reply, it was suggested that if turnover of the target company is below a certain level, e.g. the reply suggested EUR 22 million, within the EU and in Member States, no notification would be necessary to make. Another suggestion was made with reference to the German competition act ("Gesetz gegen Wettbewerbsbeschränkungen (GWB)", i.e. to apply the same rules as that of Article 35 (2) of the GWB27.

[27] Article 35(2) of the GWB provides that concentrations involving one undertaking that achieves a worldwide turnover of less than EUR 10.2 million (DEM 20 million) are exempted from notification.