

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

19 June 2009*

In Case T-48/04,

Qualcomm Wireless Business Solutions Europe BV, established in Waarle (Netherlands), represented by G. Berrisch, lawyer, and D. Hull, Solicitor,

applicant,

v

Commission of the European Communities, represented initially by K. Mojzesowicz and A. Whelan, and subsequently by K. Mojzesowicz and X. Lewis, acting as Agents,

defendant,

* Language of the case: English.

supported by

Federal Republic of Germany, represented initially by C.-D. Quassowski and S. Flockermann, acting as Agents, and subsequently by M. Lumma, acting as Agent, and by U. Karpenstein and A. Rosenfeld, lawyers,

and by

Deutsche Telekom AG, established in Bonn (Germany),

Daimler AG, formerly DaimlerChrysler AG, established in Stuttgart (Germany),

and

Daimler Financial Services AG, formerly DaimlerChrysler Services AG, established in Berlin (Germany),

represented by J. Schütze and A. von Graevenitz, lawyers,

interveners,

APPLICATION for annulment of Commission Decision 2003/792/EC of 30 April 2003 declaring a concentration to be compatible with the common market and the EEA Agreement (Case COMP/M.2903 — DaimlerChrysler/Deutsche Telekom/JV) (OJ 2003 L 300, p. 62),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of J. Azizi (Rapporteur), President, E. Cremona and S. Frimodt Nielsen,
Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 1 July 2008,

gives the following

Judgment

Legal context

¹ In accordance with Article 2(2) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version in OJ 1990 L 257, p. 13), amended by Council Regulation (EC) No 1310/97 of

30 June 1997 (OJ 1997 L 180, p. 1) ('the Merger Regulation'), a concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it is to be declared compatible with the common market.

- 2 Article 8(2) of that regulation provides that where the Commission finds that a concentration fulfils, following modification by the undertakings concerned if necessary, the criterion laid down in Article 2(2), it is to issue a decision declaring the concentration compatible with the common market. That decision may have attached to it conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market. The decision declaring the concentration compatible is also to cover restrictions directly related and necessary to the implementation of the concentration.
- 3 Article 20(1) of the Merger Regulation provides that the Commission is to publish the decisions which it takes pursuant to Article 8(2) to (5) in the *Official Journal of the European Communities*.

Facts

- 4 The applicant, Qualcomm Wireless Business Solutions Europe BV ('Qualcomm'), supplies throughout Europe a satellite-based truck fleet management system called 'EutelTRACS'. Using a satellite-based network, Qualcomm collects information transmitted from the truck, such as position-location data, engine diagnostics and messages from the drivers, and transmits that information to its customers' dispatch offices. It also transmits messages from the dispatch offices to the truck drivers. To that end, Qualcomm supplies the necessary equipment and service infrastructure. It is also active in the manufacture of that equipment and in the development of the software necessary to operate the EutelTRACS system.

- 5 In 2002 the Federal Ministry of Transport, Construction and Housing organised, on behalf of the German Government, a public tender for the establishment and operation of a system, with an automatic and manual charging system, for the collection of a usage charge on German motorways from heavy goods vehicles with a tonnage of 12 tonnes or more ('heavy goods vehicles' or 'trucks'). The tender did not require any specific technology.
- 6 The contract was awarded to a consortium formed by DaimlerChrysler Services AG, Deutsche Telekom AG and the Compagnie financière et industrielle des autoroutes SA (Cofiroute) ('the parties to the concentration').
- 7 Daimler Financial Services AG, formerly DaimlerChrysler Services, is a subsidiary of Daimler AG, formerly DaimlerChrysler AG, which operates in the financial services and mobility management sectors. Its activities include the management of fleets of varied composition covering all Daimler makes of vehicle. Daimler develops, manufactures and markets cars, trucks, buses and diesel engines.
- 8 Deutsche Telekom is a telecommunications operator providing, inter alia, mobile telephony services in Europe.
- 9 Areas of business in which Cofiroute is active include motorway toll collection.
- 10 The consortium formed by these undertakings subsequently established Toll Collect GmbH to build and operate the system for collecting the usage charges on German motorways from heavy goods vehicles.

- 11 Toll Collect thus developed a telematics solution for automatic toll collection. That solution involves installing on-board units in heavy goods vehicles which wish to make use of the automatic toll collection. The on-board units operate with a GPS (Global Positioning System) receiver and a GSM (Global System for Mobile Communications) transmitter. The GPS receiver determines the truck's current position and feeds it into the on-board unit. Those data are then exchanged via the GSM transmitter between the on-board unit and an application services centre. The data are processed at the centre, that is to say, on the basis of the position as determined and the section of the motorway used, the toll due is calculated and charged to the owner or operator of the truck. The on-board unit is supplied free of charge by Toll Collect to transport undertakings against security in the form of a toll credit. However, the owner or operator of the truck bears the cost of installing the on-board unit. In addition to automatic toll collection, Toll Collect's on-board units can be used for other telematics services including remote fleet management. The provision by another operator of telematics services through the Toll Collect on-board unit will be possible only once Germany (as the contracting authority) has approved such use of the system.
- 12 On 11 November 2002, DaimlerChrysler Services and Deutsche Telekom notified the Commission, in accordance with Article 4 of the Merger Regulation, of a proposed concentration by which they were to acquire joint control of Toll Collect through the purchase of shares.
- 13 Following that notification, the Commission opened the first phase of the merger-control procedure. During that phase, the parties to the concentration submitted a first set of proposed commitments. That proposal was sent to the relevant market players, including Qualcomm, for market testing.
- 14 By decision of 20 December 2002, the Commission found that the concentration raised serious doubts as to its compatibility with the common market and the functioning of

the Agreement on the European Economic Area (EEA) and opened the second phase of the procedure in accordance with Article 6(1)(c) of the Merger Regulation.

- 15 By letter of 28 February 2003, the Commission sent the notifying undertakings a statement of objections in which it stated that the initial commitments proposed were insufficient to resolve the competition problems arising from the concentration.
- 16 On 11 March 2003, the parties to the concentration submitted a second set of proposed commitments to the Commission.
- 17 On 19 and 20 March 2003, the Commission held a hearing in which Qualcomm participated. At that hearing the Commission stated *inter alia* that the second set of commitments was insufficient to address the competition concerns to which the concentration gave rise.
- 18 On 3 April 2003, the parties to the concentration submitted a third and final set of commitments to the Commission.
- 19 By Decision 2003/792/EC of 30 April 2003, the Commission declared the concentration to be compatible with the common market and the EEA Agreement (Case COMP/M.2903 — DaimlerChrysler/Deutsche Telekom/JV) (OJ 2003 L 300, p. 62; 'the contested decision'), on condition that the commitments offered by the parties to the concentration were complied with in full.

20 In the contested decision, the Commission found that the concentration raised competition concerns on the market affected by the concentration, namely the German market for traffic telematics systems, comprising hardware, software and services, for transport and logistics undertakings, as the infrastructure for toll collection which was to be set up by Toll Collect could be used for the provision by the parties to the concentration of other telematics services. The use of Toll Collect's infrastructure for the provision of traffic telematics services would allow DaimlerChrysler to obtain, through Toll Collect, a dominant position on the German market for traffic telematics systems, as a result of which effective competition would be significantly impeded in the common market.

21 More specifically, the combination of the provision of the Toll Collect on-board units free of charge and the tight margins within which transport undertakings operate would result in the creation of a dominant platform on the German market for traffic telematics systems for transport and logistics undertakings. Given that DaimlerChrysler was the largest truck manufacturer in Germany and a leading provider of telematics systems and that it would be in a position to control access to data generated by the Toll Collect on-board units which can be used by traffic telematics services, it would be in a position to foreclose the German market for traffic telematics systems and thereby acquire a dominant position on that market of such a kind as to impede significantly competition in the common market.

22 The Commission none the less found that the third and final set of commitments submitted by the parties to the concentration was sufficient to prevent the creation of a dominant position of that kind for DaimlerChrysler.

23 In the third set of commitments, the parties to the concentration undertook, first, to develop a central telematics gateway, operated by an independent company — Telematics Gateway GmbH ('TGG'), through which providers of telematics services

must be granted access, without discrimination, to the basic functions and data of the Toll Collect on-board units ('the TGG gateway commitment'), second, to develop a GPS interface for on-board units through which third-party providers of telematics services must be able to make use of the GPS functions of the on-board units ('the GPS interface commitment') and, third, to develop a module capable of being integrated in third-party equipment so that third-party providers can develop their own toll collection equipment ('the toll collection module commitment').

²⁴ Finally, the parties to the concentration undertook, fourth, that they would not, once approval was obtained from Germany to provide traffic telematics services via the Toll Collect on-board units, offer such services save with the Commission's approval. Such approval will be granted by the Commission only once the parties to the concentration have established a functioning interface for the GPS function of the on-board unit and have enabled interested third parties to develop their own equipment with which tolls can be collected via a link to the toll module developed by the parties to the concentration ('the qualitative moratorium').

²⁵ On 23 May 2003, Qualcomm received by fax a copy of the non-confidential version of the contested decision adopted, in German, by the Commission. On 18 November 2003, the non-confidential version of the contested decision was published, in English and in the other official languages, in the *Official Journal of the European Union* (OJ 2003 L 300, p. 62) in accordance with Article 20(1) of the Merger Regulation.

Procedure

- 26 By application lodged at the Registry of the Court of First Instance on 10 February 2004, Qualcomm brought the present action.
- 27 By a document lodged at the Registry on 28 May 2004, Germany applied for leave to intervene in support of the form of order sought by the Commission. That application was granted by order of the President of the Third Chamber of 16 July 2004.
- 28 By a document lodged at the Registry on 8 November 2004, Daimler AG, Daimler Financial Services AG and Deutsche Telekom applied for leave to intervene in support of the form of order sought by the Commission. The application was granted by order of the President of the Third Chamber of 21 January 2005. Since those undertakings lodged their application to intervene after the expiry of the period referred to in Article 116(6) of the Rules of Procedure of the Court of First Instance, they were only granted leave to submit, on the basis of the Report for the Hearing communicated to them, their observations during the oral procedure.
- 29 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, pursuant to Article 64 of its Rules of Procedure, requested the parties to produce certain documents and to answer a series of questions. The parties complied with those requests within the prescribed period.
- 30 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 1 July 2008.

Forms of order sought

³¹ Qualcomm claims that the Court should:

- annul the contested decision;

- order the Commission to pay the costs.

³² The Commission, supported by the Federal Republic of Germany, Deutsche Telekom, Daimler and Daimler Financial Services, contends that the Court should:

- dismiss the application;

- order Qualcomm to pay the costs.

Law

I — Admissibility

A — Arguments of the parties

1. Arguments put forward by the Commission and by Germany

(a) Notification of the contested decision

³³ The Commission, supported by Germany, contends primarily that Qualcomm's application is out of time, since the contested decision was notified to it on 23 May 2003 and Qualcomm lodged its application only on 10 February 2004, that is to say, well after the time-limit of 2 months and 10 days provided for by the Rules of Procedure.

³⁴ The Commission argues that, although Qualcomm is not the addressee of the contested decision, the transmission of the decision to Qualcomm on 23 May 2003 constitutes notification for the purposes of the fifth paragraph of Article 230 EC. In its view, the case-law indicates that a decision can also be notified to a party who is not an addressee of the decision but who is directly and individually concerned by it (Case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235, paragraph 52, and, *a contrario*, Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871 and Case T-190/00 *Regione Siciliana v Commission* [2003] ECR II-5015, paragraph 31) and that, for a decision to be properly notified, it is sufficient that the decision has reached a party directly and individually concerned by it so that the party has been able to take cognisance of it (Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraph 10; Case T-12/90 *Bayer v Commission* [1991] ECR II-219; and Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 25). The transmission, on

23 May 2003, of the contested decision has all the features of a notification and Qualcomm is, as a competitor of the notifying undertakings, directly and individually concerned by the contested decision.

35 According to the Commission, the wording of Article 254(3) EC does not preclude notification to persons other than the addressee. On the contrary, such a notification is in conformity with the mechanisms of judicial review established by the Treaty, whereby persons to whom a decision is not addressed may none the less seek its annulment if it is of direct and individual concern to them. Furthermore, under Article 20(2) of the Merger Regulation, the Commission is not obliged to publish the full text of decisions adopted pursuant to Article 8(2) of that regulation but only the names of the parties and the main content of the decisions. The Commission also points out that, since 1 May 2004, the non-confidential version of such decisions is no longer published in its entirety and in all Community languages and that it confines publication of decisions adopted under Article 8(2) of the Merger Regulation to the main content of such decisions as referred to in Article 20(2) of the regulation. The fifth paragraph of Article 230 EC refers to notification to the plaintiff not to the addressee. Qualcomm cannot ignore the prior pre-publication notification of the contested decision in order to defer the moment when time began to run and thereby, de facto, put itself in a more advantageous position than the other qualified third parties or the addressees of the decision. The rules governing time-limits were laid down with a view to ensuring clarity and legal certainty and serve the need to avoid any discrimination or arbitrary treatment in the administration of justice.

36 Lastly, asked by the Court about the relevance of its judgment in Case T-17/02 *Olsen v Commission* [2005] ECR II-2031, the Commission contends that that case can be distinguished from the present case, first, because it dealt with State aid the rules relating to which specifically provide that decisions are to be notified to the Member States concerned by the aid and, second, because the communication of the decision at issue expressly stated that it did not guarantee that the decision sent corresponded to the decision notified to its addressee. The Commission none the less points out that the Court of First Instance's consideration of whether the communication at issue in *Olsen v Commission* constituted notification shows that a decision can be notified to a party

which is not an addressee. In addition, by contrast with the situation in that case, Article 6(5) and Article 8(8) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1) provide for the compulsory notification of the Member States and of the ‘undertakings concerned’ without the latter needing to be addressees of the measure in question and that is the case notwithstanding the fact that that regulation provides for publication of decisions in the *Official Journal of the European Union*.

37 The Commission notes that no provision of the Treaty or of the Merger Regulation precludes notification of a decision to third parties concerned by it. Such notification serves, moreover, to ensure legal certainty for the parties to a concentration and continuity of Community action in the control of concentrations.

(b) Knowledge

38 As a subsidiary plea, the Commission, supported by Germany, contends that, even if the contested decision cannot be regarded as having been notified to Qualcomm, the decision and its precise content came to its knowledge, at the very least, on 23 May 2003, with the result that the period prescribed for instituting proceedings began on that date and the application was out of time.

39 The case-law according to which the criterion of the day on which the contested decision came to the knowledge of the applicant, as the start of the period for instituting proceedings, is subsidiary to the criteria of publication or notification concerns only a situation in which the applicants had not had knowledge of the precise text of the contested decision prior to its notification or publication (*BP Chemicals v Commission*, cited in paragraph 34 above, paragraph 47; *Alitalia v Commission*, cited in paragraph 34 above, paragraph 61; and *Regione Siciliana v Commission*, cited in paragraph 34 above, paragraph 30). Moreover, it was only where that circumstance was combined with the

fact that the act concerned had been published within two months of its adoption that the Court of Justice held that the date of publication marked the starting point of the period prescribed for instituting proceedings (Case C-122/95 *Germany v Council* [1998] ECR I-973, paragraph 38). Finally, in its judgment in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraphs 15 to 18, the Court of Justice established that parties who clearly have standing to seek the annulment of an act should not be permitted to call that act into question indefinitely by availing themselves of other procedural rules. This reasoning, based on the function of the time-limit laid down in the fifth paragraph of Article 230 EC, ought to apply by analogy to a situation in which a third party which clearly has *locus standi* has been individually informed of the exact content of a decision.

2. Qualcomm's arguments

40 Qualcomm maintains that the application was lodged within the time-limit laid down in the fifth paragraph of Article 230 EC, since the contested decision was published in the *Official Journal of the European Union*, in accordance with Article 20(1) of the Merger Regulation, on 18 November 2003. In Qualcomm's view, the timely publication of merger decisions can ensure legal certainty.

41 Furthermore, Qualcomm submits that the transmission, on 23 May 2003, of the contested decision does not constitute notification, since only the addressees of a decision can be notified of it. That interpretation is borne out by the judgments in *Europemballage and Continental Can v Commission*, cited in paragraph 34 above, and *Dunlop Slazenger v Commission*, cited in paragraph 34 above. The fact that the contested decision came to Qualcomm's knowledge on 23 May 2003 cannot deny it of the period for instituting proceedings, the starting point of which is publication of the decision in the *Official Journal of the European Union*.

42 Finally, Qualcomm submits that *Olsen v Commission*, cited in paragraph 36 above, confirms that its application is admissible as it states that a decision can be notified only to its addressees.

B — Findings of the Court

1. Preliminary observations

43 The fifth paragraph of Article 230 EC provides that proceedings for annulment are to be instituted within two months of the publication of the measure, or of its notification to the applicant or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

44 In accordance with Article 102(1) of the Rules of Procedure, where the period of time allowed for commencing proceedings against a measure adopted by an institution runs from the publication of that measure, that period runs from the end of the 14th day after publication of the measure in the *Official Journal of the European Union*. In accordance with Article 102(2) of those rules, that period must also be extended on account of distance by a single period of 10 days.

45 In this instance, the contested decision was published in the *Official Journal of the European Union* on 18 November 2003. A non-confidential version of the contested decision was, however, sent by the Commission to Qualcomm on 23 May 2003. Qualcomm's application for annulment of the contested decision was lodged at the Registry on 10 February 2004, that is to say, within the prescribed period calculated from the day of publication of the contested decision in the *Official Journal of the European Union*.

2. Concerning publication or notification of the contested decision

46 In *Olsen v Commission*, cited in paragraph 36 above, it was held that, for the purposes of the fifth paragraph of Article 230 EC, notification is the operation by which the author of a decision of individual relevance communicates the latter to the addressees and thus puts them in a position to take cognisance of it. That interpretation also derives from

Article 254(3) EC, under which decisions are to be notified to those to whom they are addressed and are to take effect upon such notification (*Olsen v Commission*, cited in paragraph 36 above, paragraph 74).

⁴⁷ In the present case, only DaimlerChrysler and Deutsche Telekom are included in the contested decision as addressees thereof (see Article 4 of the decision). Since Qualcomm is not one of the addressees of the contested decision, the condition relating to notification of the measure is not applicable to it. The Commission cannot therefore cite as grounds for the inadmissibility of Qualcomm's application the fact that the application was made after the expiry of the period for instituting proceedings, which it claims began to run on the day on which it 'notified' Qualcomm of the contested decision, although Qualcomm was not one of the addressees formally identified by the decision.

⁴⁸ That finding is not called in question by the arguments put forward by the Commission to demonstrate that a decision can be notified, under the fifth paragraph of Article 230 EC, not only to the addressees identified in the decision in question in accordance with Article 254(3) EC but also to persons other than those addressees. It must be observed in that regard that Article 20(1) of the Merger Regulation requires there to be publication in the *Official Journal of the European Union* of decisions taken pursuant to that regulation and, accordingly, so far as persons who are not addressees identified in the contested decision are concerned, the period for instituting proceedings must be calculated by reference to the first of the cases set out in the fifth paragraph of Article 230 EC, namely from the time of publication in the *Official Journal of the European Union*.

⁴⁹ To accept the Commission's broad interpretation of the term addressee, which encompasses both the addressee(s) identified in a decision and any other persons designated as such by the Commission although they have not been so designated in the decision, would be to diminish the obligation provided for by Article 20(1) of the Merger Regulation and confer on the Commission a discretion for the purpose of identifying from among persons who are not expressly named as addressees in a decision those who may bring an action from notification of a decision and not from its publication. The conferral of such a discretion could, however, entail a breach of the principle of equal treatment inasmuch as, among the persons who are not specifically

named as addressees in a decision, certain persons to whom that decision has been ‘notified’ will be able to challenge it from ‘notification’, whilst other persons to whom the decision has not been ‘notified’ will be able to challenge it from publication. However, every person who is directly and individually concerned by a decision adopted by the Commission is, as a rule, entitled to challenge that decision. Furthermore, it is not always possible for the Commission to identify at the outset the persons who may bring an action as from notification of a decision. Thus, for example, it is difficult to identify all the actual and potential competitors who may be affected by the concentration with which the contested decision is concerned.

50 Such discrimination cannot be justified by the objective of ensuring legal certainty as swiftly as possible through limiting the possibility for bringing an action against the contested decision. That objective cannot be achieved by the broad interpretation advocated by the Commission, since the latter will not be in a position to identify at the outset and in a consistent manner the persons to whom the contested decision is of direct and individual concern. Besides, that objective is in any event perfectly well secured by the Commission’s obligation under Article 20(1) of the Merger Regulation to publish decisions in the *Official Journal of the European Union*.

51 Furthermore, the Court finds of no relevance the Commission’s argument that there is discrimination between, on the one hand, the notifying parties to a concentration who can initiate annulment proceedings against the decision notified to them only within the period starting with such notification and, on the other, third parties who have participated in the administrative procedure culminating in that decision to whom the decision has been ‘notified’ but for whom time would not begin to run until publication of the decision. That argument is based on the premiss that the Commission may properly notify its decision to persons other than the notifying parties. For the reasons given in paragraphs 49 and 50 above, that cannot, however, be the case.

52 It must also be observed, with regard to the case-law on which the Commission relies and which is cited in paragraph 34 above, that the cases concerned do not expressly

address the question as to whether a decision may be regarded as notified to a person who is not an addressee of the decision even though publication of the decision is provided for by the applicable legislation.

53 The Court also rejects the argument which the Commission bases on the fact that Article 20(2) of the Merger Regulation requires only the names of the parties and the main content of the decision to be published and that, since 1 May 2004, the non-confidential version of decisions under that regulation has not been published in its entirety and in all Community languages. It must be noted in that regard that, in this case, the non-confidential version of the contested decision was published in its entirety in the *Official Journal of the European Union* and was available in all the official languages on the date of publication, including that of Qualcomm, whilst only the German version of the non-confidential version of the contested decision was communicated to Qualcomm, that is to say, a version in a language other than that of Qualcomm's articles of association. Publication of the contested decision in the *Official Journal of the European Union* thus ensured that Qualcomm had access to all the main elements necessary for it to bring an action for annulment of the contested decision.

54 Finally, Regulation No 139/2004 is of no relevance to the present proceedings, since it became applicable on 1 May 2004, after the contested decision was adopted.

3. Knowledge of the contested decision

55 It is clear simply from the wording of the fifth paragraph of Article 230 EC that the criterion of the day on which the contested measure came to the knowledge of an applicant, as the starting point of the period for instituting proceedings, is subsidiary to the criteria of publication or notification (see *Regione Siciliana v Commission*, cited in paragraph 34 above, paragraph 30 and the case-law cited).

56 Consequently, 23 May 2003, the date on which the contested decision came to Qualcomm's knowledge, cannot be regarded as the starting point of the period for instituting proceedings under the fifth paragraph of Article 230 EC, since the decision was published in the *Official Journal of the European Union* pursuant to Article 20(1) of the Merger Regulation on 18 November 2003. The latter date alone starts time running for the purposes of the period within which Qualcomm could bring an action for annulment of the contested decision under Article 230 EC.

57 That finding is not affected by the case-law cited by the Commission in paragraph 39 above. Contrary to the Commission's interpretation thereof, it cannot be concluded from that case-law that, where there is knowledge of the contested decision prior to publication thereof, the period for instigating proceedings starts from the date of such knowledge.

4. Conclusion

58 In view of all of the foregoing, it must be concluded that in the present case the starting point of the period for instituting proceedings referred to in the fifth paragraph of Article 230 EC was the date on which the contested decision was published in the *Official Journal of the European Union*, namely 18 November 2003. The Commission cannot rely on the fact that, on 23 May 2003, it sent the non-confidential version of the contested decision to a person who was not an addressee of that decision in order to call in question the starting point of the period for instituting proceedings and thereby draw a distinction between the various persons who are not addressees of such an act on the basis of whether or not the Commission decides to notify them of it. Accordingly, the application in this case was not out of time and the Commission's objection of inadmissibility must be rejected.

II — *Substance*

A — *Introduction*

⁵⁹ The various complaints raised by the applicant can be divided into three distinct pleas in law. The first plea alleges manifest error of assessment, incorrect findings of fact and contradictory reasoning as regards the sufficiency of the commitments to resolve the competition problems on the relevant market. The second plea alleges misuse of powers. Finally, the third plea alleges failure to state reasons.

B — First plea: manifest error of assessment, incorrect findings of fact and contradictory reasoning as regards the sufficiency of the commitments to resolve the competition problems on the relevant market

1. Arguments of the parties

(a) Qualcomm's arguments

— Introduction

⁶⁰ Qualcomm submits that the commitments set out in the contested decision do not serve to dispel doubts as to compliance with the rules of competition. In particular, the GPS interface commitment and the toll collection module commitment do not

establish a 'level playing field' for undertakings providing telematics systems that do not use the TGG gateway, on the one hand, and those offering telematics services that operate through the TGG gateway and the Toll Collect on-board unit, on the other.

61 Qualcomm maintains that transport undertakings will not use alternative platforms to the Toll Collect on-board unit because they can obtain all of the main telematics services using that unit. In its view, the fact that the TGG gateway commitment provides that, to use the on-board unit concerned for the supply of telematics services, the parties to the concentration and any other telematics services providers must operate through the TGG gateway does not alter this conclusion because those providers can offer all the services which the parties to the concentration, notably DaimlerChrysler, could have offered if they had been allowed to offer telematics services directly using the Toll Collect on-board unit. Consequently, neither the GPS interface commitment nor the toll collection module commitment eliminates the price advantage of the Toll Collect on-board unit.

62 Qualcomm submits that Germany's observation that the Toll Collect on-board units provided pursuant to the Operator Agreement between Germany and Toll Collect for the operation of a system of toll collection from trucks using the German motorways are not immediately capable of providing telematics services is inadmissible and incorrect. The observation is inadmissible inasmuch as it is based on developments occurring after the adoption of the contested decision. Furthermore, it is incorrect, since, through the on-board units in question, Toll Collect would be able to provide basic telematics services without any need for upgrading with additional memory or software. According to Qualcomm, Germany's argument that Toll Collect is not able to provide telematics services because it has not yet obtained approval from Germany is also inadmissible, since it challenges an assumption — which was duly substantiated and which was not contested during the proceedings leading up to adoption of the contested decision — that Germany would authorise Toll Collect to provide telematics services. Furthermore, Germany is not asserting that it was unreasonable at the time of adoption of the contested decision to assume that the necessary authorisation would be

forthcoming but only that it has not yet been given. Its argument is disingenuous because Germany does not assert that the necessary authorisation will not be granted, but simply that it has not yet been granted.

⁶³ Qualcomm further submits that the Commission infringed the Merger Regulation in holding, in the contested decision, that it was sufficient if the commitments ‘limit’ or ‘largely limit’ the chances of the Toll Collect on-board unit becoming the dominant platform (see recitals 71 and 72 of the contested decision).

— The GPS interface commitment

⁶⁴ Qualcomm submits that the Commission does not explain why the cost savings which might result from the GPS interface commitment, estimated to be between EUR 150 and EUR 200 per unit, would allow third parties to compete with the Toll Collect on-board unit and ‘further limit’ the anticipated dominance of the platform consisting in the Toll Collect on-board units. The Commission’s assessment of the GPS interface commitment is founded on wrong facts and is a manifest error of assessment.

⁶⁵ First, Qualcomm submits that the GPS interface commitment does not result in cost savings of EUR 150 to EUR 200 per unit. It was able to purchase GPS units for use in its telematics devices at prices between EUR 30 and EUR 55. Furthermore, the Commission assumes that the potential cost savings are equal to the cost of a GPS unit. Third parties using the GPS interface of the Toll Collect on-board unit will incur additional costs which they would not incur if they developed their own system.

66 Those additional costs are the following: development costs for the necessary adjustments of their hardware and software in order to connect their devices to the GPS interface; the reimbursement of the costs related to the development of the interface, the payment of licence fees pursuant to Clause B.III.3 of the commitments; the costs related to the development of two parallel production lines, namely a ‘connectable’ device for use in Germany and an operating device with GPS functionality for use outside that territory.

67 Qualcomm submits that, even if those costs cannot at present be quantified with a sufficient degree of accuracy because the technical details of the GPS interface are not yet known, the total amount of those costs are likely to eliminate completely the cost savings made as a result of the GPS interface commitment. Qualcomm also maintains that it would be more economical to develop and market a telematics device with a GPS unit.

68 Second, Qualcomm submits that the GPS interface commitment would not eliminate the competitive advantage of the Toll Collect on-board unit even if it led to cost savings of EUR 150 to EUR 200. It points out that the Commission established, in recital 62 of the contested decision, that the cost of telematics devices currently on the market ranges from EUR 1 000 to EUR 2 500. Consequently, even if the GPS interface commitment were to result in cost savings of EUR 150 to EUR 200 per unit, and on the assumption that it permits savings of the amounts given by the Commission in its defence, third-party suppliers of telematics systems would still face a significant cost disadvantage compared with the Toll Collect on-board unit which is supplied free of charge. In addition to the cost of purchasing alternative telematics systems, transport undertakings will also have to pay for installation costs and the standstill time of their trucks, as the Commission itself recognises in recital 72 of the contested decision. Those costs amount to an estimated EUR 100 to EUR 200 per truck. Furthermore, the Commission does not provide any explanation of or evidence concerning how third-party suppliers would thus be able to compete with the Toll Collect on-board unit.

69 Third, Qualcomm suggests that third-party suppliers of telematics systems capable of being connected to the Toll Collect on-board units through its GPS interface must provide a second device which takes up space in a truck’s cabin.

— The toll collection module commitment

- 70 First, Qualcomm disputes the statement, made in recital 71 of the contested decision, that truck manufacturers and their equipment suppliers will probably take up the development and manufacture of equipment which can be used for automatic toll collection and the provision of telematics services. With the exception of a non-specific reference to its market test, the Commission does not provide any explanation on the considerations and evidence on which its statement is based.
- 71 Second, Qualcomm claims that the toll collection module commitment also does not eliminate the problem arising from the fact that the third-party device still costs money while the Toll Collect on-board unit is free, so no transport undertaking will purchase the third-party device. The toll collection module commitment does not allow any cost savings for third-party suppliers of telematics systems with an integrated module, since they have to pay (at least) between EUR 1 000 and EUR 2 500, even though they can obtain the on-board unit free of charge. Furthermore, third-party telematics systems suppliers will not have access to any of the data generated by the Toll Collect on-board unit so that they will have to generate all data for telematics services themselves and manufacture the necessary hardware (GPS, text display, messaging unit, mobile communication device, etc.) and software.
- 72 Qualcomm concludes by maintaining that undertakings which create their own toll collection module as a consequence of the toll collection module commitment will incur additional costs. Referring in particular to Clause B.IV.2.4 of the commitments,

Qualcomm explains that the costs are not insignificant, since third parties providing telematics systems will incur, inter alia, the following costs:

- development costs for the necessary adjustments to their devices in order to integrate the toll collection module;

- development costs related to the joint venture partners' development of the toll collection module and/or the licence fee charged to third-party suppliers;

- costs for the non-gratuitous supply of toll collection modules;

- certification costs for their devices.

⁷³ Since the technical details of the toll collection modules are not yet known, it is at present impossible to give precise estimates of those additional costs.

⁷⁴ Third, Qualcomm submits that the assurance given by Germany that the costs-related position of third-party providers of telematics equipment with an integrated toll module would be no different (recital 70 of the contested decision) does not eliminate the cost advantage of the Toll Collect on-board unit, since, in order to eliminate that cost advantage, Germany would have to have undertaken to cover all costs that third-

party suppliers incur in order to provide free of charge telematics equipment with an integrated toll collection module.

75 Fourth and finally, Qualcomm objects to the fact that the Commission introduces, in its defence, an argument that truck manufacturers will be able to integrate the toll collection module into the telematics equipment which is line-fitted into their trucks and thus will not buy the Toll Collect on-board units. In that regard, Qualcomm submits, first, that all the heavy goods vehicles currently on the road and those to be built over the next two to five years will be retrofitted with a 'telematics terminal', which means that customers will have a choice between receiving a free Toll Collect on-board unit and paying for a telematics terminal offering additional services. In its experience, truck fleet operators do not like to have telematics terminals line-fitted on their trucks, since, as a general rule, they use different makes of trucks. If each make of truck is line-fitted with a different telematics terminal, the different makes cannot communicate among themselves. Moreover, the central fleet operator will not be equipped to communicate with different kinds of telematics terminals and the training of drivers will be more complicated. Lastly, the Commission does not explain why line-fitting telematics equipment integrating a toll collection module will necessarily prevent the Toll Collect on-board unit from becoming the dominant platform. Even if customers were to prefer line-fitted telematics terminals, the Commission has not shown that this trend would prevent the Toll Collect on-board unit from becoming the dominant platform.

— The arguments put forward by the Commission during the proceedings before the Court are unfounded

76 Qualcomm challenges the Commission's argument that, since the TGG gateway commitment is sufficient to maintain effective competition on the relevant market as a whole, the impact of the other commitments on that market is of little consequence. In that regard, it points out that, although in the contested decision, the Commission in fact identified the relevant market as the German market for traffic telematics systems, it none the less analysed the impact of Toll Collect on that market in two separate

sections (see Sections IV.D.2.1 and IV.D.2.2 of the contested decision). The Commission thus indicated that there are different competition problems on the relevant market which must be resolved by appropriate commitments. Qualcomm therefore focused on the GPS interface commitment and the toll collection module commitment, since they are intended to open up competition on the segment of the relevant market which is important for it as a supplier of telematics systems. It adds that, even if it were assumed that the TGG gateway commitment were sufficient to maintain effective competition for telematics services, that would not be sufficient to preserve competition on the relevant market as a whole, since, as is stated in recital 30 of the contested decision, most operators on the relevant market are, like it, 'one-stop shops'.

77 Furthermore, Qualcomm disputes the validity of the Commission's argument that third-party suppliers of telematics systems and hardware can compete with the free Toll Collect on-board unit by offering additional telematics services. Nothing in recitals 71 to 73 of the contested decision suggests that this was a consideration giving grounds for the Commission's conclusion that the GPS interface commitment and the toll collection module commitment can prevent the Toll Collect on-board unit from becoming the dominant telematics platform. Moreover, the Commission stated in recitals 62 and 63 of the contested decision that the telematics services that can be provided through the current generation of Toll Collect on-board units constitute the core functions of telematics systems and that transport undertakings will not purchase additional telematics services if that entails extra costs. The Commission itself thus held that the ability to offer additional telematics services cannot eliminate the cost disadvantage.

78 Furthermore, it is wrong to hold, as the Commission does, that there is a price which customers would be willing to pay for a second telematics terminal in order to obtain additional services which they do not need. Apart from the fact that the Commission does not offer the least evidence in support of its argument and, in particular, no evidence as to what that price may be, Qualcomm submits that the Commission has made no attempt to explain the contradiction between (i) the conclusion in recitals 54 and 63 of the contested decision that transport undertakings will not be willing to pay anything for a telematics terminal if the Toll Collect on-board unit is provided free of charge and (ii) the finding, in recital 72 of the contested decision, that a saving of

EUR 150 to EUR 200 per unit puts third-party telematics system suppliers in a position to compete on telematics services offered on the basis of the Toll Collect on-board units. In fact, even if the Commission's assumptions regarding the cost savings were correct, there would still be a price difference of EUR 800 to EUR 2 300 between the Toll Collect on-board unit and a terminal relying on the GPS interface.

79 Last, Qualcomm submits that the market study by Frost & Sullivan, 'European Commercial Vehicle Telematics Markets, 2002' ('the Frost & Sullivan report') on which the Commission relied shows that at present few customers are interested in services which go beyond those offered on the basis of the Toll Collect on-board unit and that that situation is unlikely to change in the foreseeable future. The Frost & Sullivan report distinguishes between 'basic' telematics systems, 'intermediate' telematics systems and 'advanced' telematics systems. According to that report, the on-board unit in question would have to be qualified as an 'intermediate' system, notably because of its messaging capacity. The report also noted that, in 2001, market shares were the following: 90% for basic telematics systems, 9% for intermediate telematics systems and 1% for advanced telematics systems. Furthermore, the report also predicted the following market shares for 2009: 78% for basic telematics systems, 12% for intermediate systems and 10% for advanced systems. Qualcomm points out that the forecast assumes a fair and undistorted price competition between the different types of system and not a situation in which, as in the present case, trucking companies could obtain Toll Collect on-board units free of charge, that is to say, a basic, or even intermediate, telematics system, whereas they would have to pay if they want an advanced system. In any event, the evidence put forward by the Commission shows that the German market for advanced traffic telematics systems was very small. Qualcomm also disputes the Commission's interpretation of the market study. Even if it were interpreted in the way the Commission advocates, it has not been shown that the Toll Collect on-board unit would not be dominant, since basic telematics systems would have 78% of the market by volume and 45% of the market by value. It also maintains that the Toll Collect on-board unit is an intermediate telematics system and that in 2009 the combined market shares of basic and intermediate telematics systems will, according to the forecast set out in the Frost & Sullivan report, be 90% by volume and 68% by value. Furthermore, those figures are only projections for 2009. According to the Frost & Sullivan report, in 2004,

the relevant year for the contested decision, ‘basic’ systems would have 94% of the market by volume and 82% by value.

(b) Arguments of the Commission and of Germany

80 The Commission, supported by Germany, contends that Qualcomm’s first plea is founded on a basic misunderstanding of the contested decision inasmuch as the decision does not identify a market for telematics hardware and a market for telematics services but just one market for traffic telematics systems comprising hardware, software and services.

81 Furthermore, for the Commission, Qualcomm’s arguments are inherently insufficient to undermine the overall analysis of the effect of the entire package of commitments on the German market for traffic telematics systems. Even on the assumption that the GPS interface commitment and the toll collection module commitment were not sufficient to resolve the competition problem identified in the contested decision, Qualcomm has not shown that competition in respect of traffic telematics devices would be entirely suppressed and has made no submissions on the fact that the TGG gateway commitment, linked with the ‘qualitative moratorium’, would prevent DaimlerChrysler from dominating the overall market for traffic telematics systems by ensuring non-discriminatory access to that platform.

82 In that connection, the Commission confirms that what is important when it applies the Merger Regulation is to prevent the creation of a dominant position rather than to limit it. Although in the present case, the GPS interface commitment and the toll collection module commitment limit the dominance of the Toll Collect platform, the

commitments, taken as a whole, prevent the creation, through the Toll Collect platform, of a dominant position in favour of DaimlerChrysler on the German market for traffic telematics systems.

83 As a secondary plea, the Commission, supported by Germany, disputes Qualcomm's claims concerning the GPS interface commitment and the toll collection module commitment.

84 As regards the GPS interface commitment, the Commission submits that it was entitled to conclude from the favourable reception accorded to the interface during the administrative procedure by Qualcomm and other competitors of the parties to the concentration that the interface would enable those undertakings to make significant cost savings. Moreover, the information gathered during the administrative procedure shows that the savings which those undertakings were likely to make as a result of that commitment, which cannot be based exclusively on the purchase price of the GPS module but includes other costs, was between EUR 150 and EUR 200 per unit on a cautious estimate. Last, the advantage deriving from the GPS interface commitment will enable providers of traffic telematics systems, notwithstanding the installation of a separate device, to compete better on the telematics services supplied by means of the Toll Collect on-board units since they will be able to offer a wider range of more advanced services. Irrespective of whether the Toll Collect on-board units are qualified as intermediate or advanced telematics systems, the Frost & Sullivan report confirms that there will be a market for more advanced and diversified services.

85 With regard to the toll collection module commitment, the Commission, supported by Germany, reiterates that the commitment will prevent the Toll Collect on-board unit, which is supplied free of charge, from becoming the dominant platform. According to the Commission, the Frost & Sullivan report confirms that the development and production of such telematics devices, which are capable of collecting tolls, will mainly be carried out by truck manufacturers and equipment suppliers. Telematics devices including a toll collection module will give truck manufacturers and their equipment suppliers an advantage in that they will be able to offer a much wider range of functionalities and services than systems retrofitted by Toll Collect. Such devices also

enable truck manufacturers and equipment suppliers to integrate the telematics device into the modular electronic layout in trucks.

2. Findings of the Court

(a) Introduction

⁸⁶ In order to assess the various complaints put forward by Qualcomm in its first plea, it is appropriate to look first at the scope of the review to be carried out by the Commission in the context of decisions concerning concentrations, in particular, when decisions are adopted following commitments and then turn to the Commission's assessment, in the contested decision, of the concentration and the commitments. Next, the Court will analyse the complaints concerning the standard by reference to which the commitments were assessed. Finally, the complaints concerning the alleged insufficiency of the toll collection module commitment and the GPS interface commitment will be evaluated.

(b) Considerations of principle

⁸⁷ Under Article 8(2) of the Merger Regulation, where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the requirements laid down in Article 2(2) of the regulation, namely that the concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it, it is to adopt a decision declaring the concentration compatible with the common market.

- 88 The review of concentrations therefore calls for a prospective analysis which consists in an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely (see, to that effect, Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paragraph 43).
- 89 Consequently, it has been held that under Article 8(2) of the Merger Regulation the Commission has power to declare a concentration involving commitments compatible with the common market only if those commitments enable it to conclude that the concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market (Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paragraph 318, and Case T-282/02 *Cementbouw Handel & Industrie v Commission* [2006] ECR II-319, paragraph 294; see also, to that effect, Case T-87/05 *EDP v Commission* [2005] ECR II-3745, paragraph 63). It is therefore for the Commission to show, with a sufficient degree of probability, in its decision declaring a concentration compatible with the common market that the concentration, as modified by the commitments proposed by the parties thereto, will not create or strengthen a dominant position as a result of which effective competition will be significantly impeded in the common market or in a substantial part of it. The burden of proof thus placed on the Commission is none the less without prejudice to its wide discretion with regard to complex economic assessments (see, to that effect, *EDP v Commission*, paragraph 63, and the case-law cited).
- 90 It is therefore for interested third parties whose action seeks annulment of a decision declaring a concentration to which commitments are attached to be compatible with the common market to show that the Commission erred in its assessment of those commitments in such a way that the compatibility of the concentration with the common market is called in question.

91 It should also be noted that in principle the Community judicature has a comprehensive power of review of the Commission's application of the competition rules. However, it has been held that the substantive rules of the Merger Regulation, in particular Article 2, confer on the Commission a certain margin of discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375 ('*Kali & Salz*'), paragraphs 223 and 224; *Commission v Tetra Laval*, cited in paragraph 88 above, paragraph 38; Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, paragraph 60).

92 Whilst the Community judicature recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that they must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community judicature, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (*Commission v Tetra Laval*, cited in paragraph 88 above, paragraph 39).

93 The arguments advanced by the parties in the present case fall to be examined in the light of those principles, which govern both evidential requirements and the burden of proof in the matter of concentrations and the extent of the review to be carried out by the Community judicature in that sphere.

(c) The Commission's analysis of the concentration and the commitments

- 94 Recital 19 et seq. of the contested decision explain that Toll Collect was created by the parties to the concentration, following the award of a public procurement contract, for the purpose of collecting, on behalf of Germany, the toll for the use by heavy goods vehicles of the German motorways. In that capacity, Toll Collect is not in competition with other private service providers.
- 95 The Toll Collect on-board unit intended for toll collection is, however, capable of collecting and making available data for telematics services. Such use of the Toll Collect on-board units did not form part of the call for tenders relating to the system for collecting tolls payable by heavy goods vehicles using the German motorways but the Operator Agreement entered into with Toll Collect following that procedure provides that Toll Collect will be able to offer other telematics services once it has obtained the relevant authorisation from Germany. The parties to the concentration have announced that they wish to avail themselves of this possibility in order to supply telematics services through the Toll Collect on-board unit. The Commission therefore concluded that, since the provision of telematics services through the Toll Collect on-board unit will contribute to the general interest objective of reducing bottlenecks in the transport network, Germany will not raise objections to the provision of such services through the Toll Collect on-board unit and consequently that the concentration will have an impact on the development, production and operation of traffic telematics systems (recitals 20 to 22 and 47 to 49 of the contested decision).
- 96 The traffic telematics systems which the Commission identified as the relevant product market include the hardware, software and services for transport and logistics undertakings. From the point of view of the transport undertakings which are the customers, that market includes 'one-stop shops' (suppliers of software, hardware and telematics services), 'hardware suppliers' (suppliers who produce only terminal equipment including software) and 'service providers' (suppliers providing only traffic telematics services (recitals 23 to 32 of the contested decision).

- 97 Having defined the geographic market in question as the territory of Germany, the Commission went on to assess the concentration from the standpoint of competition law without considering the commitments given by the parties to the concentration (recitals 33 to 36 of the contested decision).
- 98 First, the Commission noted that the concentration linked the leading German truck manufacturer, DaimlerChrysler, which, on its own admission, is also one of the leading suppliers of mobile and telematics services, and Deutsche Telekom, one of the leading German mobile telecommunications providers. The Commission found that the two undertakings are therefore very well placed to provide traffic telematics services (recitals 39 and 40 of the contested decision).
- 99 The Commission then observed that DaimlerChrysler had confirmed that its intention was to use the Toll Collect on-board unit to provide traffic telematics services and that it could be assumed that Germany would give the authorisation needed under the Operator Agreement to provide such traffic telematics services (recitals 43 to 50 of the contested decision).
- 100 As the Toll Collect on-board unit will be provided free of charge and as it is of practical interest to transport undertakings, the Commission concluded that the on-board unit would be installed in the majority of heavy goods vehicles regularly using the German motorways. The fact that units capable of providing telematics services were to be provided free of charge to those liable to pay motorway tolls would result in the vast majority of heavy goods vehicles equipped with one of Toll Collect's on-board units using these also for traffic telematics services. The Commission found, by contrast, that, from the standpoint of transport undertakings, the installation at their own cost of a second on-board unit for the use of traffic telematics services provided by competing suppliers was not a viable economic proposition. That is explained, in the Commission's view, by the tight margins within which transport undertakings operate in Germany and in Europe (recitals 51 to 54 of the contested decision).

- 101 The Commission accordingly assumed that the Toll Collect on-board units would cover almost all heavy goods vehicles in Germany and would therefore become the dominant platform on the German market for traffic telematics systems (recital 56 of the contested decision).
- 102 The creation of that dominant platform entails, in the Commission's view, foreclosure of the German market for traffic telematics systems for transport and logistics undertakings. More specifically, providers of traffic telematics services would become dependent on use of the Toll Collect on-board unit as a result of the creation of a dominant platform for traffic telematics services. Since the Toll Collect on-board units are a closed proprietary system, DaimlerChrysler would be able to control, through Toll Collect, access to the future German market for traffic telematics systems (recitals 57 to 59 of the contested decision). Furthermore, the Toll Collect platform would lead to the disappearance of suppliers of telematics systems currently on the market. Given that the on-board units cover the core functions which are also available in the traffic telematics systems currently available on the market and, given that those units would be provided free of charge, the Commission found that transport undertakings whose trucks have already been equipped with a Toll Collect on-board unit would not acquire 'any further telematics terminal equipment for the use of additional traffic telematics offerings of competing system suppliers over and above the Toll Collect on-board unit'. Thus, the announcement that the Toll Collect telematics system would be provided free of charge has made it very difficult for traffic telematics systems suppliers currently on the market to win new customers and poses a threat to their continued economic existence. This foreclosure would intensify if the functions of the Toll Collect on-board unit were extended in a second-generation unit (recitals 60 to 65 of the contested decision).
- 103 The Commission accordingly concluded that, in the absence of commitments, the concentration would lead to the creation of a dominant position on the part of DaimlerChrysler, through the Toll Collect joint venture, on the German market for traffic telematics systems for transport and logistics undertakings, as a result of which effective competition would be significantly impeded in the common market (recital 66 of the contested decision).

104 The Commission concluded, however, that the commitments submitted by the parties to the concentration were sufficient to remove the objections that it had raised (recital 69 of the contested decision).

105 More specifically, with regard to the toll collection module commitment, the Commission states, in recital 70 of the contested decision, that the parties' undertaking to develop a toll collection module for third-party equipment, to provide backup for the adjustment of that equipment to the toll module and to grant the necessary approvals for the use of equipment will make it possible for third parties to manufacture their own telematics equipment with a toll function. The Commission explains that the Federal Ministry of Transport, Construction and Housing has undertaken to ensure that the costs-related position of third-party providers of telematics equipment with a toll module is no different from that of the operators of the truck toll system.

106 In recital 71 of the contested decision, the Commission found that 'the development and manufacture of third-party equipment with which tolls can be collected in connection with a toll module will be taken up [particularly] by truck manufacturers and their equipment suppliers'. On that basis, and in accordance with the findings of the market test, the Commission assumes that 'granting third parties the possibility of integrating a toll module into their own equipment largely limits the chances of Toll Collect becoming the dominant platform and acquiring the gatekeeper function on the market for telematics systems for transport and logistics undertakings in Germany'.

107 With regard to the GPS interface commitment, the Commission found that, according to its market test, the ability to use the GPS functionality of the Toll Collect on-board unit enables third parties providing telematics equipment to make savings of around EUR 150 to EUR 200 per unit and, despite the need to integrate further terminal equipment in the vehicle, puts them in a position to compete with telematics services offered on the basis of the Toll Collect on-board unit (recital 72 of the contested decision).

108 With regard to the TGG gateway commitment, the Commission found that it allowed third-party telematics services providers to obtain non-discriminatory access to the basic functionalities and raw data of the on-board units via a central telematics gateway, operated neutrally and independently in relation to the parties to the concentration (recitals 73 and 74 of the contested decision).

109 Last, the Commission stressed the importance of the qualitative moratorium preventing the Toll Collect platform from becoming the dominant platform on the German market for traffic telematics systems as long as the GPS interface and toll collection module commitments are not fulfilled (recital 76 of the contested decision).

110 In view of those factors, the Commission found that overall the commitments would ensure that the market for traffic telematics systems in Germany remained open and that the parties and third parties would continue to enjoy equal conditions of competition. The Commission therefore concluded that, provided that the parties comply with the commitments, the notified concentration would not lead to the creation of a dominant position on the part of DaimlerChrysler, through Toll Collect, on the German market for traffic telematics systems (recital 77 of the contested decision).

(d) The standard by reference to which the commitments were assessed

111 Qualcomm complains, in essence, that the Commission assessed the commitments on the basis of the wrong standard when it stated that the GPS interface commitment and toll collection module commitment merely limited the dominance of the Toll Collect platform.

- 112 In that regard, the Court observes that under the Merger Regulation it is not the task of the Commission to determine whether the commitments limit the impact of a concentration on competition but rather to determine whether those commitments enable it to conclude that the concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it (see paragraph 89 above).
- 113 It must none the less be held, in the present case, that the fact that the Commission found that the GPS interface commitment ‘further limit[ed] the anticipated dominance of Toll Collect as a telematics platform’ and that the toll collection module commitment ‘largely limit[ed] the chances of Toll Collect becoming the dominant platform and acquiring the gatekeeper function on the market for telematics systems for transport and logistics undertakings in Germany’ (recitals 72 and 71 of the contested decision) does not support the conclusion that the Commission’s assessment of the concentration was carried out by reference to the wrong standard.
- 114 Contrary to what Qualcomm appears to be arguing, the competition concerns expressed by the Commission with regard to the concentration are not made for the purpose of declaring incompatible with the common market a potential dominant position of the platform formed by the Toll Collect on-board units (‘the Toll Collect platform’) as such but refer to the fact that DaimlerChrysler may obtain, on the basis of the Toll Collect on-board units, a dominant position on the German market for traffic telematics systems (recitals 38 and 66 of the contested decision).
- 115 The commitments of the parties to the concentration which the Commission considered sufficient to remove the objections it had raised seek to prevent DaimlerChrysler becoming dominant on the relevant market, first, by limiting the dominance of the Toll Collect platform by means of the GPS interface commitment and

the toll collection module commitment, second, by ensuring, by means of the TGG gateway commitment, open access to the Toll Collect platform in order to provide traffic telematics services and, third, by making the provision of traffic telematics services on the basis of the Toll Collect on-board units conditional on observance of the qualitative moratorium (recitals 70 to 76 of the contested decision).

116 It was only by assessing those commitments in their entirety that the Commission reached the conclusion that, if the parties to the concentration complied with them, the concentration would not result in the creation of a dominant position on the part of DaimlerChrysler, through Toll Collect, on the German market for traffic telematics systems (recital 77 of the contested decision).

117 It is appropriate, in that regard, to point out, first, that Toll Collect is responsible only for establishing and operating, on behalf of Germany, the system for collecting the tolls payable by heavy goods vehicles using the German motorways and that consequently it is not active on the relevant market (recitals 7 and 19 of the contested decision) and, second, that the provision free of charge of the Toll Collect on-board units (recital 17 of the contested decision) was a requirement imposed by Germany for the operation, by Toll Collect, of the motorway toll system. It follows that the creation of Toll Collect and the provision free of charge of the on-board units in question could not, in themselves, form the subject-matter of the Commission's assessment in the course of a procedure governed by the Merger Regulation.

118 In the light of the foregoing, the Court rejects Qualcomm's complaint that the Commission assessed the commitments on the basis of the wrong standard.

(e) The toll collection module commitment and the GPS interface commitment

Introduction

119 As a preliminary point, it should be observed that the competition concern identified by the Commission following notification of the concentration was the creation of a dominant position on the part of DaimlerChrysler, through Toll Collect, on the German market for traffic telematics systems, which includes both the provision of traffic telematics services and that of equipment making the supply of such services possible.

120 The commitments given by the parties to the concentration cover both the provision of traffic telematics services and the provision of the equipment by means of which such services may be supplied. Thus, the TGG gateway commitment, which ensures a non-discriminatory access for suppliers of telematics services to the core functions and raw data of the Toll Collect on-board units, concerns only the supply of traffic telematics services. The GPS interface commitment and the toll collection module commitment, for their part, concern the provision of equipment by means of which such services can be supplied.

121 Qualcomm's complaints concern only the commitments relating to the provision of equipment by means of which traffic telematics services can be provided. Qualcomm is not challenging the TGG gateway commitment.

122 Finally, it should be noted that it was on the basis of an assessment of these commitments overall that the Commission concluded that they would allow the market for traffic telematics systems to remain open and would prevent the creation of a

dominant position on the part of DaimlerChrysler, through the joint venture, on the German market for traffic telematics systems (recital 77 of the contested decision).

The toll collection module commitment

— Introduction

¹²³ As regards Qualcomm's complaints concerning the toll collection module commitment, it is clear from recitals 70 and 71 of the contested decision, as referred to in paragraphs 105 and 106 above, that the commitment ensures, at the outset, that it will be possible for third parties supplying traffic telematics systems, including truck manufacturers, to create and place on the market an on-board unit capable of being used, like that of Toll Collect, for toll collection. As a result of that commitment, transport undertakings wishing to use traffic telematics services other than those supplied through the Toll Collect on-board units will not have to install a second terminal.

¹²⁴ Qualcomm submits, however, that the commitment will not permit third-party suppliers of telematics systems to compete with the Toll Collect on-board unit, since, first, it does not eliminate the cost advantage of the Toll Collect on-board unit, which is supplied free of charge, and, second, if third parties develop their own on-board unit with a toll collection function, they will incur additional costs. Furthermore, Qualcomm questions the Commission's finding that truck manufacturers will develop telematics terminals with an integrated toll function.

— The advantage deriving from the fact that the Toll Collect on-board units are to be provided free of charge

125 It is not in dispute that the Toll Collect on-board units are to be provided free of charge to transport undertakings against a security. The requirement that such provision be free of charge was imposed on Toll Collect by Germany following its award of the public procurement contract in question to the parties to the concentration.

126 Nor is it in dispute that, pursuant to the qualitative moratorium, the Toll Collect on-board units will not be able to be used to supply traffic telematics services until authorisation for such supply is given by Germany. That authorisation will be granted only when the parties to the concentration have complied with all the commitments, including the toll collection module commitment.

127 In the course of the administrative procedure prior to adoption of the contested decision, Germany stated in a letter to the Commission that any financial assistance on its part in favour of the parties to the concentration would cover only the costs necessary for the implementation of the toll collection. Germany confirmed that position in its statement in intervention and at the hearing.

128 Furthermore, as regards the costs of the Toll Collect on-board unit, Germany undertook that the treatment of third parties supplying telematics devices incorporating toll collection modules would be no different from that of the operator of the truck toll system (recital 70 of the contested decision). That undertaking is confirmed by Germany's letter of 2 April 2003 to the Commission. It was also confirmed by Germany at the hearing.

129 Thus, the provision free of charge of the Toll Collect on-board unit entails no competitive advantage for DaimlerChrysler so far as the operating costs of Toll Collect are concerned. As a result of Germany's undertaking not to treat differently the manufacturer of the on-board units in question and third parties offering their own traffic telematics systems capable of being used for toll collection when compensating them for the costs incurred in developing their respective toll collection equipment, no competitive advantage is afforded to Toll Collect or DaimlerChrysler in comparison with those third parties. Equal treatment as between the parties to the concentration which designated Toll Collect to develop the on-board unit in question and third parties who develop other on-board units in response to the toll collection module commitment is thus ensured so far as the financing by Germany of the costs of the on-board units is concerned.

130 It was thus reasonable for the Commission to conclude that the toll collection module commitment dealt with the competitive disadvantage identified in the contested decision, namely that transport undertakings would not be prepared to pay for a second on-board unit. By reason of that commitment, third-party manufacturers will be able to offer telematics systems incorporating a toll collection module and enjoy the same financial support as Toll Collect in respect of the provision free of charge of its on-board units.

131 Finally and for the sake of completeness, it should be noted that, even though, in the contested decision, the Commission does not expressly refer, in the course of its assessment of the toll collection module commitment, to any difference in quality between the traffic telematics services which may be supplied via the Toll Collect on-board unit and those which may be supplied via third-party equipment, it is apparent from the contested decision, taken as a whole, that such qualitative difference is relevant for the purpose of assessing the impact of the concentration on competition.

132 In its assessment of the impact of the concentration on competition in the absence of commitments, the Commission alludes to the difference in quality (recitals 62 to 65 of the contested decision). Thus, the Commission stated that traffic telematics services

accessible via the Toll Collect on-board unit do not cover all the services offered using the telematics terminals currently on the market but ‘they do constitute core functions which are also part of the systems currently available on the market’. In addition, it stated, having regard to the fact that Toll Collect’s on-board units are provided free of charge, that ‘it [was] ... to be expected that fleet operators whose trucks have already been equipped by Toll Collect with an on-board unit will not acquire any further telematics terminal equipment for the use of additional traffic telematics offerings of competing system suppliers over and above the Toll Collect on-board unit’.

133 That difference in quality substantiates the Commission’s analysis with regard to the toll collection module commitment.

134 In that connection, the Frost & Sullivan report relied on by the Commission in support of its argument states that, at the time the concentration was assessed, there was a demand in Europe for systems through which more advanced traffic telematics services could be supplied and confirms that that demand is set to grow in the years to come.

135 Accordingly, it was reasonable for the Commission to conclude that, at the time the concentration was assessed, there was a demand in Europe for systems through which more advanced traffic telematics services could be supplied and that that demand was set to grow in the years to come. Moreover, it is common ground that the Toll Collect on-board unit was at the outset capable of being used only for less sophisticated telematics services (recital 62 of the contested decision). It can therefore be concluded that ‘one-stop shop’ suppliers offering via their systems, in addition to toll services, more sophisticated telematics services than those which can be provided via the Toll Collect on-board unit have a competitive advantage vis-à-vis the suppliers of services operating via the on-board unit in question.

¹³⁶ That qualitative advantage in conjunction with the non-discriminatory treatment with regard to costs of third parties making use of the toll collection module commitment gave the Commission grounds for concluding, without making a manifest error of assessment, that the toll collection module commitment would largely limit the chances of Toll Collect becoming the dominant platform and acquiring the gatekeeper function on the market for telematics systems for transport and logistics undertakings in Germany.

— The additional costs

¹³⁷ Qualcomm submits that third parties supplying telematics systems will incur additional costs including those of adapting their systems in order to integrate the toll collection module, those of developing and supplying the module (see point B.IV.2.4 of the commitments) and certification costs for systems integrating the module (see point B.IV.2.4 of the commitments).

¹³⁸ In that regard, the Court observes that it is clear from the commitments entered into by the parties to the concentration that the Toll Collect on-board units will not immediately be able to provide telematics services. Indeed, under points A.3 and B.II.16.1 of those commitments, it is necessary to fit additional software to the on-board units concerned in order to be able to supply such services. The second paragraph of point A.3 of the commitments provides that '[a]dded-value services can be provided directly via the functionalities of the [on-board units concerned] only by means of additional pilot software in [those units] (which requires central action)'. It follows that the operation of the on-board units concerned will also give rise to certain adaptation costs if undertakings are to be able to use them as a traffic telematics device. As regards the costs of developing and supplying the module and the certification costs for devices integrating the module, as referred to in point B.IV.2.4 of the commitments, Qualcomm does not show that those costs would be higher than those which Toll Collect has had to

bear in developing its own toll collection module. Finally, in any event Qualcomm provides no quantification, or even an initial estimation, of those alleged additional costs.

¹³⁹ Consequently, Qualcomm has not established, sufficiently to call in question the Commission's evaluation, that third parties supplying telematics systems will incur additional costs when making use of the toll collection module commitment.

— The development by truck manufacturers of telematics terminals integrating a toll function

¹⁴⁰ Qualcomm also challenges the Commission's finding that truck manufacturers are likely to take up the development of telematics terminals with integrated toll functions.

¹⁴¹ The Court observes in that connection that it is apparent from the Frost & Sullivan report that, from 2000, manufacturers of original equipment in Europe had line-fit telematics systems installed in their trucks (see Chart 3-10 and Figure 3-14 of the Frost & Sullivan report). Furthermore, that report found that vehicle manufacturers intend to develop and lead the commercial vehicle telematics market and that the combination of electronic toll collection and telematics systems presents a significant opportunity (see the Frost & Sullivan report, p. 2-21). The report also states that it is expected that vehicle manufacturers will aim to make line-fit traffic telematics systems a priority (see Frost & Sullivan report, p. 3-11). Finally, the authors of the report predict that, in 2009, original equipment manufacturers will have achieved, in Europe, almost 80% penetration on the heavy commercial vehicle (16 tonnes or over) traffic telematics market and more than 50% penetration for the combined market of heavy and medium commercial vehicles (see the charts on pages 3-20, 3-21 and 3-22 of the Frost & Sullivan report).

- 142 It was therefore reasonable for the Commission to conclude from the report that the manufacturers of heavy goods vehicles and their equipment suppliers will develop their own traffic telematics systems. Furthermore, given the significant opportunity represented by the combination of electronic toll systems and telematics systems, it is not manifestly incorrect to conclude that manufacturers of heavy goods vehicles and their equipment suppliers will integrate an electronic toll collection system into their traffic telematics system in view of the toll collection module commitment.
- 143 Qualcomm submits, however, that, in its experience, fleet operators do not like to have telematics terminals line-fitted on their trucks, since they use different makes of trucks and line-fitting creates problems of interoperability between the line-fitted systems of the various manufacturers, in particular at the level of the fleet's dispatch centre. Furthermore, the installation of different terminals makes it more complicated to train drivers.
- 144 Those arguments must none the less be rejected. The Frost & Sullivan report states that the manufacturers of heavy goods vehicles are developing vehicle-independent systems to overcome the issue of vehicle operators having fleets of trucks of different makes (Frost & Sullivan report, p. 3-21). According to the report, the 'FMS standard' is a step towards systems able to operate on all vehicles with a higher level of sophistication. Moreover, there is nothing to prevent the owners of mixed fleets installing, for a part of the fleet, additional equipment compatible with their vehicles. Furthermore and in any event, Qualcomm puts forward no evidence demonstrating that fleet operators do not like to have telematics terminals line-fitted on their trucks or that most of them use different makes of trucks.
- 145 The Commission could therefore properly conclude that it can be expected that it will be particularly truck manufacturers and their equipment suppliers which develop and manufacture the telematics equipment covered by the toll collection module commitment.

— Conclusion

¹⁴⁶ In the light of all of the foregoing, the Court must reject Qualcomm's complaint that there was a manifest error of assessment so far as the toll collection module commitment is concerned. Qualcomm has not shown that that commitment was incapable of allaying the Commission's competition concerns with regard to equipment enabling traffic telematics services to be supplied on the market for traffic telematics systems.

The GPS interface commitment

¹⁴⁷ Qualcomm submits that the Commission's assessment of the GPS interface commitment is manifestly incorrect, since the GPS interface does not result in any savings and, in any event, any cost advantage does not eliminate the competitive advantage of the Toll Collect on-board unit.

¹⁴⁸ The Court none the less finds that, taken in its entirety, the contested decision addresses sufficiently the competition concerns identified by the Commission in the decision and, in particular, Qualcomm's concern about competition with regard to the provision free of charge of the Toll Collect on-board units.

¹⁴⁹ It must be observed in that regard that the provision free of charge of the Toll Collect on-board unit is an obligation incumbent on the parties to the concentration following Germany's awarding them the public procurement contract concerned and the Commission could not, in its analysis of the concentration, call in question that obligation as such (see paragraph 117 above).

- 150 That circumstance in conjunction with the fact that, at the time of the Commission's assessment of the concentration, it was not economically viable for transport undertakings to install at their own expense a second on-board unit admittedly means that the Toll Collect on-board unit is likely to have a dominant position on the German market for traffic telematics systems. Nevertheless, as the Commission pointed out in its assessment of the concentration, that is simply a direct result of the award of the contract concerned by Germany and not of the concentration.
- 151 Moreover, by ensuring by means of the TGG gateway commitment — which is not challenged by Qualcomm in the present case — that third parties have the opportunity to provide their own traffic telematics services on non-discriminatory terms via the Toll Collect on-board unit, the Commission satisfied itself that DaimlerChrysler could not, by means of Toll Collect, foreclose the relevant market and be dominant in traffic telematics services on that market.
- 152 Furthermore, the toll collection module commitment in conjunction with Germany's undertaking that there would be no discriminatory treatment in relation to its contribution to the costs of the toll collection module ensures that third parties will be able to offer their own on-board units with a toll collection function in competitive conditions. It should be observed that, given that undertaking on the part of Germany, the fact that the Toll Collect on-board units are provided free of charge does not represent a competitive advantage for the parties to the concentration in relation to Qualcomm (see paragraph 122 et seq. above).
- 153 Finally, the commitment relating to the qualitative moratorium ensures that the Toll Collect on-board unit cannot become a dominant platform before third parties have actually had the chance to make use of the GPS interface commitment and the toll collection module commitment.
- 154 It must therefore be held that the Commission rightly found that overall, that is to say, taken as a whole, the commitments ensured that the concentration would not lead to

the creation of a dominant position on the part of DaimlerChrysler, through the joint venture Toll Collect, on the market for telematics systems for transport and logistics undertakings in Germany.

155 Moreover, with regard to Qualcomm's submission that the GPS interface commitment does not result in any cost savings, the Court observes that recital 72 of the contested decision does not state that the saving of EUR 150 to EUR 200 per unit arises solely from the purchase price of the unit, as suggested by Qualcomm. In its defence, the Commission asserts, and Qualcomm does not dispute, that the savings also relate to the costs of the antenna, the wiring and the installation of the GPS function, costs which must be borne by third parties who wish to provide their own telematics equipment with a GPS function. Furthermore, the Commission's estimate of the cost savings is not erroneous given the positions taken during the administrative procedure by operators on the market. Thus, one operator estimated that a GSM/GPS interface would allow savings on the costs of a telematics system of around EUR 500, a second operator took the view that a telematics unit without a GPS and GSM module would cost only EUR 500 and a third operator stated that the costs of the GPS and GSM module would account for more than half of the cost of the telematics unit, itself estimated at between EUR 1 000 and EUR 2 500 in the contested decision (recital 62 of the contested decision). Furthermore, the mere fact that third parties offering telematics services through the GPS interface incur costs related to the adaptation of their own equipment and the Toll Collect on-board unit in order to be able to take advantage of that interface does not, in the Court's view, support the conclusion that the Commission's estimate is manifestly incorrect. Apart from the fact that the Commission considered the sum of EUR 150 to EUR 200 per unit to be a cautious estimate of the savings which might be made as a result of the GPS interface commitment, Qualcomm admits that the costs involved in adapting third-party equipment and the Toll Collect on-board unit in order to use the GPS interface cannot at present be quantified with a sufficient degree of accuracy. Finally, Qualcomm's assertion that, in any event, the total amount of the costs will probably completely eliminate the cost savings for a GPS unit is wholly unsubstantiated and is therefore not such as to call in question the Commission's assessment. Accordingly, there are no grounds for concluding that the Commission made a manifest error of assessment in finding that the GPS interface commitment may entail cost savings of between EUR 150 to EUR 200 per unit for third parties supplying telematics systems.

156 As to Qualcomm's submission that, even if the GPS interface commitment entails savings of between EUR 150 and EUR 200 per unit, that advantage does not eliminate the competitive advantage of the Toll Collect on-board units which are provided free of charge, it must be held that, for the reasons set out in paragraph 148 et seq. above, the other commitments, taken as a whole, ensure that the concentration does not result in the creation of a dominant position on the part of DaimlerChrysler, through Toll Collect, on the German market for traffic telematics systems.

157 Finally, inasmuch as Qualcomm challenges the admissibility of Germany's argument that Toll Collect is not in a position to supply telematics services because it has not yet obtained an authorisation to do so from Germany, the Court observes that in referring to the fact that it must authorise any provision of traffic telematics services through the Toll Collect on-board unit and that such authorisation has hitherto been neither granted nor sought by Toll Collect, Germany is merely stating one of the conditions which must be fulfilled if traffic telematics services are to be offered via the on-board unit concerned. Such a reference is not inadmissible.

158 In view of the foregoing, Qualcomm's first plea must be rejected.

C — The second plea in law alleging misuse of powers

1. Arguments of the parties

159 Qualcomm submits that the Commission misused its powers in taking account, in its assessment of the concentration, of general policy considerations. The Commission

thus wrongly took account of the fact that the Toll Collect system presented an opportunity to launch telematics services in Germany and Europe and that it did not want to stall that launch.

160 The Commission denies that it has misused its powers in any way.

2. Findings of the Court

161 According to settled case-law, the concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent indicia, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 24; Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, paragraph 99; and Case T-143/89 *Ferriere Nord v Commission* [1995] ECR II-917, paragraph 68). Where more than one aim is pursued, even if the grounds of a decision include, in addition to proper grounds, an improper one, that would not make the decision invalid for misuse of powers, provided that the decision does not cease to pursue the main aim (Case 2/54 *Italy v High Authority* [1954] ECR 37, 54, and *EDP v Commission*, cited in paragraph 89 above, paragraph 87).

162 In the present case, Qualcomm does not deny that the contested decision does not contain any reference to general policy considerations. It confines itself to maintaining that general policy considerations underpinned the Commission's acceptance of the final commitments and relies, in that regard, on the observations made at the oral hearing on 20 March 2003 by the head of the Commission team responsible for the case.

- 163 It appears from the excerpts from the transcript of the oral hearing on 20 March 2003 that the Commission's representative referred to the fact that the Toll Collect on-board unit will probably be a very large telematics platform and that there will be much greater market penetration with that platform than without it. In the light of what he called these 'more strategic observations', the Commission's representative asked the market players for their observations on the problems generated by Toll Collect, the implications were DaimlerChrysler not to have control over that platform and the possibility of connecting more sophisticated devices to that platform.
- 164 It cannot, however, be concluded from those observations that the contested decision was taken, or, in particular, that the commitments were assessed, with any other aim than that of ensuring effective competition on the market for traffic telematics systems. The analysis of the impact on competition of commitments proposed in a merger procedure necessarily involves assessments of the existing situation and of the future development of the relevant market. Since the Commission accepted commitments ensuring effective competition on the relevant market, the fact that it accepted commitments potentially entailing development of the relevant market by greater penetration of traffic telematics systems does not show that the Commission used its powers for a purpose other than that for which those powers were conferred on it under the Merger Regulation.
- 165 Moreover, the fact that other commitments not entailing such market development could also have been accepted cannot lead to the annulment of the contested decision since the Commission was entitled to conclude that the commitments set out in the decision gave it grounds for declaring the concentration in question compatible with the common market.
- 166 In any event, the mere fact that a representative of the Commission put questions to the undertakings concerned by the concentration in the context of possible market developments following the opening-up of the Toll Collect platform to traffic telematics services does not demonstrate that the Commission pursued the objective of not affecting any greater penetration, or even of not delaying the launch, of telematics systems and services in Germany and, less still, that the contested decision was adopted on the basis of that objective.

167 Qualcomm has thus failed to establish, on the basis of objective, relevant and consistent indicia, that the contested decision was taken with the purpose of achieving an end other than that stated by the Merger Regulation. Accordingly, the second plea alleging a misuse of powers must be rejected.

D — *The third plea in law alleging a failure to state reasons*

1. Arguments of the parties

168 Qualcomm maintains that the Commission has infringed Article 253 EC because it does not provide sufficient reasoning in support of its conclusion that the commitments are sufficient to remove the competition doubts that it had raised. Referring to the judgment in Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071, paragraphs 197 and 203, Qualcomm submits that the conclusion reached by the Commission must be supported by detailed reasoning with regard to the aspects which the Commission identifies as being relevant for the assessment of the impact of the concentration on competition. Furthermore, specific conclusions within the overall reasoning must be internally coherent. Qualcomm submits that in this instance those requirements have not been met.

169 Qualcomm maintains that, when examining, in the context of its assessment of the concentration, whether the Toll Collect platform was to become the dominant platform on the market and whether that was going to lead to the disappearance of suppliers of alternative telematics systems currently on the market, the Commission addressed a number of detailed issues (see recitals 38 to 56 and 64 and 65 of the contested decision). However, when the Commission considered the GPS interface commitment and the toll collection module commitment, it did not address any of these issues.

170 Thus, as regards the toll collection module commitment, the Commission merely stated, in recital 71 of the contested decision, without offering any explanation in that regard, that the technical possibility largely limits the chances of the Toll Collect on-board unit becoming the dominant platform on the relevant market. The same is true, according to Qualcomm, with respect to the Commission's statement, in recital 72 of the contested decision, that the GPS interface commitment would put third parties in a position to compete with the telematics services offered on the basis of the Toll Collect on-board units. That situation is comparable to that considered by the Court of Justice in Case C-76/00 P *Petrotub and Republica v Council* [2003] ECR I-79, paragraph 87. In that case, the Court held the reasoning to be insufficient on the ground that there was a purely peremptory statement, which did not contain any explanatory element of such a kind as to enlighten the parties concerned and the Community judicature as to the reasons which led the author to make the findings concerned.

171 Furthermore, the Commission's reasoning is not coherent. In recitals 62 and 63 of the contested decision, it estimated the cost advantage of the Toll Collect on-board unit to be between EUR 1 000 and EUR 2 500 and stated that transport undertakings would not pay for alternative telematics systems if they could obtain telematics services through the Toll Collect on-board units. However, when considering the GPS interface commitment, the Commission stated that a cost saving of EUR 150 to EUR 200 per unit would be sufficient to allow telematics systems offered by third parties to compete with the Toll Collect on-board units. Even if the cost advantage of the Toll Collect on-board unit is between EUR 150 and EUR 200, the advantage of that free on-board unit none the less remains 'overwhelming'.

172 In its reply, Qualcomm argues that, although the Commission's interpretation of the commitments as intended only to limit the dominance of the Toll Collect on-board unit renders the reasoning of the contested decision more coherent, it is based on wrong legal standards. That places Qualcomm in a dilemma regarding the reasoning in the contested decision: either it is coherent, in which case it is based on the wrong legal standard, or it is based on the correct legal standard but is blatantly contradictory.

173 The Commission contends, in essence, that the contested decision is sufficiently reasoned and that it is not contradictory since it merely claimed that the GPS interface commitment and the toll collection module commitment would limit the dominance of DaimlerChrysler.

2. Findings of the Court

174 The statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Community Court to exercise its power of review (Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraph 4725). The question as to whether the statement of reasons satisfies the requirements of Article 253 EC must be assessed by reference to the nature of the act concerned and the context in which it was adopted (Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I-1809, paragraph 39).

175 It follows that a claim that there is no, or only an inadequate, statement of reasons constitutes a plea of infringement of an essential procedural requirement, which, as such, is different from a plea that the grounds of the decision are inaccurate, the latter plea being a matter to be reviewed by the Court when it examines the substance of that decision (Case T-310/94 *Gruber + Weber v Commission* [1998] ECR II-1043, paragraph 41, and Case T-311/94 *BPB de Eendracht v Commission* [1998] ECR II-1129, paragraph 66).

176 In the present case, recital 69 et seq. of the contested decision disclose the Commission's reasoning in a clear and unequivocal fashion.

177 In those various recitals, the Commission sets out the content of each of the commitments as well as their impact on Toll Collect and/or the traffic telematics services supplied through Toll Collect. In addition, the Commission concluded, having considered the commitments as a whole, that they were sufficient to prevent the creation of a dominant position on the part of DaimlerChrysler, through Toll Collect, on the market for traffic telematics systems in Germany.

178 As is apparent from paragraph 119 et seq. above, the various recitals have enabled the Court to exercise its power of review following Qualcomm's assertion that they are not well founded. It cannot therefore be held that the Commission confined itself to peremptory statements or that the contradictions pointed to by Qualcomm were such as to render the statement of reasons defective. Qualcomm itself accepts moreover, in its reply, that the Commission's reasoning is not incoherent as long as the GPS interface commitment or the toll collection module commitment are intended solely to limit the dominance of the Toll Collect platform.

179 Finally, in so far as Qualcomm relies on paragraphs 197 and 203 of the judgment in *Schneider Electric v Commission*, cited in paragraph 168 above, and on confusion and contradictions in the Commission's reasoning in the contested decision, it must be stated that those arguments allege errors in the Commission's reasoning in the contested decision, a matter pertaining to the assessment of the substance of the decision and not to the statement of reasons (see, with regard to the substance, paragraph 86 et seq. above).

180 It follows that the plea alleging a failure to state reasons must be rejected as unfounded.

181 In the light of all of the foregoing considerations, Qualcomm's action must be dismissed.

Costs

- 182 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 183 As Qualcomm has been unsuccessful and the Commission has applied for costs, Qualcomm must be ordered to pay the costs.
- 184 As Deutsche Telekom, Daimler and Daimler Financial Services have only supported the Commission's contentions but have not expressly applied for costs against Qualcomm, they are to bear their own costs.
- 185 The first subparagraph of Article 87(4) of the Rules of Procedure provides that the Member States which have intervened in the proceedings are to bear their own costs. Accordingly, the Federal Republic of Germany is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the action;

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- 2. Orders Qualcomm Wireless Business Solutions Europe BV to bear its own costs and to pay those incurred by the Commission;**
- 3. Orders the Federal Republic of Germany to bear its own costs;**
- 4. Orders Deutsche Telekom AG, Daimler AG and Daimler Financial Services AG to bear their own costs.**

Azizi

Cremona

Frimodt Nielsen

Delivered in open court in Luxembourg on 19 June 2009.

[Signatures]

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