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DataCell ehf
Skúlagata 19
101 Reykjavík
Iceland

via Reykjavik Law Firm
Borgartun 25, 2nd floor
105 Reykjavík
Iceland

For the attention of:
Mr. Sveinn Andri Sveinsson
Supreme Court Attorney
Email: sveinnandri@lr.is
Tel: + (00)-354-515-7400

**Subject: Case COMP/39921 – Datacell/Visa & MasterCard
(Please quote this reference in all correspondence)**

Dear Mr. Andri Sveinsson,

- (1) I am writing to you in connection with your complaint against Visa Europe, MasterCard Europe and American Express (further referred to as “Visa”, “MasterCard” and “Amex” or together as “payment card schemes”).
- (2) I regret to inform you that the Commission does not intend to conduct a further investigation into your allegation that these payment card schemes infringe EU competition law.

1. THE COMPLAINT

1.1. Procedure

- (3) Teller is an acquirer of payment card transactions – a member of both Visa and MasterCard. Datacell had a merchant agreement with Teller, concluded on 18

Commission européenne, DG COMP GREFFE ANTITRUST, B-1049 Bruxelles, Belgique
Europese Commissie, DG COMP GREFFE ANTITRUST, B-1049 Brussel, België

Tel: (32-2) 299 11 11 - Fax: (32-2) 295 01 28, e-mail: COMP-GREFFE-ANTITRUST@ec.europa.eu

October 2010 (through Korta, its licensee in Iceland). Under the terms of the merchant agreement, Datacell could accept payments for the sale of its own goods or services (here, data hosting services). In practice however, Datacell was also using its account with Teller in order to accept card payments (donations) on behalf of Wikileaks, which, according to its own website, is a not-for-profit media organisation that provides for "an innovative, secure and anonymous way for sources to leak information to [its] journalists" and then publishes both the news story and the original leaked material. The activities of Wikileaks have been attracting significant media attention since 2010, when Wikileaks released a high number of documents from classified US military databases. Wikileaks has attracted both public support and criticism from a number of government and international organisations, as well as media and academic institutions.

- (4) By letter dated 12 July 2011, you requested the Commission to launch an investigation into the suspension of payment card acceptance (acquiring) services by Teller that took place on 8 December 2010 at the request of Visa and MasterCard.
- (5) You also requested interim measures under Article 8 of Regulation 1/2003, namely to order Visa and MasterCard to lift their ban on entering into and maintaining merchant agreements with Datacell.
- (6) On 25 July 2011, and with your consent, the Commission sent Visa and MasterCard a non-confidential version of the complaint and respectively on 25 August 2011 and 2 September 2011, MasterCard and Visa submitted their comments on the complaint.
- (7) You made additional written submissions to the Commission by letters of 30 September 2011, 7 November 2011 and by e-mail of 6 March 2012.
- (8) You have also provided the Commission with information on different matters concerning Datacell by e-mails of 16, 23 and 25 July, 15 and 17 August, 3 September and 9 October 2012.
- (9) In your letter of 7 November, you specified that you wished to extend the complaint to Amex. Datacell had a contract for accepting payments by Amex cards dated 15 June 2011 with Valitor acting as an acquirer. This agreement was terminated on 8 July 2011, one day after the opening of the payment gateway. You explained that *"when referred to the card companies, card networks or card conglomerates in this letter, the complaint and in the addition to the complaint, the complainant is referring to Visa Europe, MasterCard and Amex."*
- (10) On 21 March the Commission's services sent you certain questions by e-mail, to which you replied by e-mail of 28 March 2012.
- (11) On 13 April and 4 June 2012, you responded to the public consultation on the European Commission's Green Paper "Towards an integrated market for card, internet and mobile payments", in which, among other things, you reiterated the concerns set out in the complaint.

1.2. DataCell's arguments

- (12) In your letters, you allege that *"refusal by Visa Europe and MasterCard Europe [and Amex, as can be inferred from your letter of 7 November 2011] to grant [DataCell] access to their respective payment card networks, whether that be on the grounds of "third party processing" or with reference to damages of brand image, violates the antitrust provisions of the TFEU and the EEA Agreement [...and] the reasons given by the payment card networks for refusing services to [DataCell] do not constitute an objective justification under competition law."*
- (13) As regards Article 101 TFEU, you allege that Visa and MasterCard infringe this article individually as associations of undertakings and by existence of a horizontal agreement or concerted practice between Visa and MasterCard.
- (14) As regards 102 TFEU, you claim that either Visa is dominant or it is collectively dominant with MasterCard (and Amex, as can be inferred from your letter of 7 November 2011).
- (15) According to you, the suspension of payment card acceptance services prevents DataCell from supplying card payment facilitation to Wikileaks. It also prevents it from carrying out its core business of provision of data hosting services.¹ You consider that access to the upstream market of acquiring services to merchants is indispensable to any company offering data centre and hosting services or offering payment facilitation services for third parties (please see Section 2.2.1 below in this respect).
- (16) Furthermore, you argue that *"to the extent that the conduct and actions taken by the card companies are grounded in specific provisions of their respective membership rules and/or bylaws, such provisions contravene Article 101(1) TFEU and Article 53(1) EEA."* In particular, you draw the Commission's attention to a provision in Teller's General Rules on acceptance of payment cards contained in clause 23.2, subparagraph 7, which stipulates that *"PBS can terminate the Merchant Agreement forthwith and without notice, if [...] one of the International Card companies demands that PBS do so"*. You submit that the introduction of such provisions in merchant agreements represents an anti-competitive agreement between Visa, MasterCard (and Amex, as can be inferred from your letter of 7 November 2011). You also claim that, if they were to exist, rules of MasterCard and Visa requiring certification for the provision of card payment facilitation services (please see Section 2.2.1 below in this respect) would constitute an infringement of Articles 101(1) TFEU, 53(1) EEA, 102 TFEU and 54 EEA.
- (17) In your letter of 12 July 2011, you suggest that the relevant product markets may be defined as follows:

¹ In your e-mail of 7 March 2012, you explain that following a meeting with Visa Europe and an undertaking from DataCell that *"it would not under any circumstances use such payment services for processing donations, or otherwise transferring funds, to or for the benefit of the Wikileaks project [...and that] DataCell will only use the payment services for its own business [...]"*, Korta (an agent of Teller in Iceland) is *"hopefully in the process of opening a gateway for DataCell"*.

- (a) The upstream market for payment cards network services;
 - (b) The downstream market for acquiring services;
 - (c) The further downstream market for payment card processing services, "i.e. services provided by payment facilitators and payment gateway services such as offered by the complainant";
 - (d) The market for data hosting services (with a sub-market of these services run on green and renewable energy resources).
- (18) You consider that the relevant geographical market would be at least the EEA.

1.3. Visa's and MasterCard's comments

- (19) In its comments, Visa submits that in light of the publicity attracted by the activities of Wikileaks, it conducted its preliminary investigation, which showed that Datacell had been signed by Teller as a merchant when in fact it was carrying out payment facilitation services for third parties and that Datacell was acting outside the scope of its contract with Teller. According to Visa, the legal position of Wikileaks' activities is uncertain. However, Visa's position has been and remains that, if Datacell complies with the Visa Europe Operating Regulations, it is free to process Visa payments either as a merchant or for third parties, provided this does not involve processing payments for the benefit of Wikileaks. According to Visa, it specifically informed Teller about this in January 2011. Visa argues that Article 101 TFEU is not infringed because the only restriction it has imposed is that relating to Visa payments for the benefit of Wikileaks, and this has no effect on any other business that Datacell currently runs or wishes to operate. Visa submits that, in any event, its actions had an objective justification. As regards Article 102 TFEU, Visa argues that it is not dominant and, in any event, has not abused a dominant position as its actions were proportionate and objectively justified. It adds that there is no collective dominance by Visa and MasterCard.
- (20) In its comments, MasterCard clarifies that it is not MasterCard Europe which took the decision to require Teller to suspend its services to Datacell. The decision was taken by MasterCard Incorporated. MasterCard argues that the decision was unilateral, there is no agreement or concerted practice and thus, among other reasons, no violation of Article 101(1) TFEU. Furthermore, according to MasterCard, it does not hold a collectively dominant position with Visa and its conduct does not constitute an abuse. For these reasons amongst others, MasterCard does not consider to have breached Article 102 TFEU. MasterCard explains that the reason why it required Teller to suspend provision of services to Datacell is that MasterCard learned from the press that Wikileaks engaged in potentially illegal activities and activities that "*may damage the goodwill of the Corporation or reflect negatively on the Marks.*" MasterCard refers to its rules (Section 5.11.7 and Section 3.10.4) in this respect (available on MasterCard's website). It submits that it "*required that Teller suspend the provision of services to DataCell as far as Wikileaks is concerned, pending further investigation of Wikileaks' potential illegal and/or Mark damaging activities.*"

2. PROVISIONAL ASSESSMENT

2.1. Priority setting by the Commission

- (21) As you will appreciate, the Commission is unable to pursue every alleged infringement of EU competition law which is brought to its attention. Given its limited resources the Commission must set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.²
- (22) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but the Commission takes, among other factors, into consideration whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement.

2.2. Relevant considerations for priority setting in the present case

- (23) The likelihood of establishing the existence of an infringement of Articles 101 or 102 TFEU in this case appears limited.

2.2.1. Preliminary remarks

- (24) In your complaint, you refer to the market "for services provided by *payment facilitators and payment gateway services*" as a market on which Datacell is active and which constitutes therefore a relevant market for assessing the infringement of Articles 101 and 102 TFEU.
- (25) *Payment facilitation services* allow merchants and other entities to accept card payments on the basis of an agreement with a payment facilitator and without entering into their own merchant agreement with an acquirer. Payment facilitators provide such services on the basis of a specific agreement with an acquirer (which is different from a regular merchant agreement, which only allows the party to such an agreement to accept payments for its own goods or services sold).
- (26) In the Commission's understanding, *payment gateway services* constitute a different market from that of payment facilitation. Payment gateways are online application service providers offering payment card processing and authorisation services for online payment transactions. A payment gateway transmits transaction information between an e-commerce website and the merchant's acquiring bank. It is the equivalent of a POS terminal in a physical shop. Payment gateway services are primarily used by online retailers, and they are typically offered by acquiring banks as part of their acquiring services.

² Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.04.2004, p. 65:

<http://eur-lex.europa.eu/Notice.do?checktexts=checkbox&val=358874%3Acs&pos=1&page=1&lang=en&pgs=10&nb1=1&list=358874%3Acs.&hwords=&action=GO&visu=#texte>

These principles are also explained in the Commission's Annual Competition Report 2005, p. 26.

- (27) From the information in the Commission's possession, and as explained further in Section 2.2, it seems that while Datacell acted as a merchant in accepting donations to Wikileaks by hosting a payment gateway, it was Teller which was providing the payment gateway service.³ It does not appear that Datacell has been active as a payment gateways provider itself. Therefore, in order to avoid confusion of terms, we would like to clarify that, given that you refer to the relevant market defined under (c) above as the market for services as offered by Datacell, in the following assessment this market will be referred to as "the market for card payment facilitation".

2.2.2. *Article 101 TFEU – individual behaviour of payment schemes*

- (28) As regards the individual suspension of service by Visa and MasterCard, in order for this behaviour to constitute an infringement of Article 101 TFEU, the following conditions must be met:
- a) the action constitutes a decision of an association of undertakings or an agreement;
 - b) this decision or agreement restricts competition by object or by effect.
- (29) As regards the qualification of the schemes as associations of undertakings, in past decisions⁴ the Commission has taken the view that Visa Europe and MasterCard Europe are associations of undertakings. For MasterCard this view was recently confirmed by the General Court in its judgement in case T-111/08, MasterCard Inc. *et al.* vs European Commission, in which the Court held that the Commission was entitled to characterise the decisions taken by the bodies of the MasterCard payment organisation in determining the MIF as decisions by an association of undertakings.⁵ Nevertheless, to qualify the behaviour presently complained of as a decision of an association of undertakings rather than unilateral conduct, an assessment of the schemes' organisation and decision-making in relation to the conduct at hand would have to be carried out. However, given the unlikelihood of finding restrictive effects for the reasons set out below, it is not necessary to establish whether Visa and MasterCard acted as associations of undertakings in assessing the likelihood of infringement of Article 101 TFEU.

³ See *inter alia* Datacell's press release of 7 July 2011, which refers to Teller as the company providing the payment gateway.

http://www.datacell.com/news/2011-07-7/credit_card_donation_to_wikileaks_is_now_accepted_again/

⁴ See Commission's decision of 9 August 2001 in COMP/29373 Visa International (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:293:0024:0041:EN:PDF>) and Commission decision of 19 December 2007 in COMP/34579 MasterCard (http://ec.europa.eu/competition/antitrust/cases/dec_docs/34579/34579_1889_2.pdf)

⁵ Case T-111/08 *MasterCard et al v European Commission*, judgment of 24 May 2012, not yet reported (<http://curia.europa.eu/juris/document/document.jsf?text=&docid=123081&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=504654>), paras. 245-259.

- (30) In the Commission's Guidelines on the application of what is now Article 101 (3) TFEU⁶ it is explained that an agreement restricts competition by *object* if by its very nature it has the potential of restricting competition. Restrictions by object have such a high potential of negative effects on competition that it is unnecessary to demonstrate any actual effects on the market.
- (31) In the present case you have not argued that the rules applied by Visa and MasterCard as associations of undertakings or a possible agreement between Visa and MasterCard have the object of restricting competition. Visa's Operating Regulations prohibit the use of the Visa system for illegal purposes either in the jurisdiction of the merchant or the jurisdiction of the cardholder. The MasterCard Rules *i.a.* prohibit the submission and acceptance of payments for illegal transactions and transactions that may damage the MasterCard corporation or trademark. In light of the objectives these rules pursue, it does not appear that the existence of a restriction of competition by object can be presumed in this case. Therefore, in order to determine if the schemes' conduct is restrictive of competition, it must be examined whether it could potentially have restrictive effects.
- (32) A decision or agreement is held to have restrictive *effect* if it affects actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability.⁷
- (33) In this context, account should be taken of the actual conditions in which decisions and agreements produce their effects, in particular the economic and legal context in which the undertakings operate, the nature of the products or services concerned as well as the real operating conditions and the structure of the market concerned⁸. The competition in question should be assessed within the actual context in which it would occur in the absence of the decision at issue⁹. The examination must be based not only on existing but also on potential competition in order to ascertain whether, in the light of the structure of the market and the economic and legal context within which it functions, there are real concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to enter into the market¹⁰.
- (34) The likelihood of restrictive effects on competition as a consequence of the behaviour complained of must be examined in relation to each of the relevant markets, which are discussed in turn below.

⁶ Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.04.2004, para 21. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0097:0118:EN:PDF>

⁷ Ibid, para. 24.

⁸ Case T-111/08 *MasterCard v Commission*, judgment of 24 May 2012, not yet reported, para. 127.

⁹ Ibid, para. 128.

¹⁰ Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services and Others v. Commission*, [1998] ECR II-3141, paras. 136 and 137. See also Case T-461/07 *Visa Europe v. Commission*, judgment of 14 April 2011, not yet reported, para. 167.

2.2.2.1 The market for payment facilitation services

- (35) From the facts of the case it is not evident that the conduct complained of resulted in the anticompetitive foreclosure of Datacell from the market for payment facilitation services. In particular, it appears that Datacell was only prevented from providing such services to Wikileaks, but not to other organisations¹¹.
- (36) According to MasterCard's reaction to the complaint, it has required Teller only to suspend the services to Datacell **as far as services by Datacell to Wikileaks are concerned**. Likewise Teller confirmed that the merchant agreement had only been suspended **as far as Datacell's services to Wikileaks were concerned**¹². Datacell was therefore allowed to continue its services provided it did not process payments for the benefit of Wikileaks. Datacell has not disputed this in its replies to questions asked by the Commission's services.
- (37) As to Visa Europe, according to the letter sent by Visa Europe to Teller on 18 January 2011 Datacell could be offered a contract to process Visa payments either as a merchant or for third parties, **provided only Datacell agreed not to process payments for the benefit of Wikileaks**¹³.
- (38) It seems that Datacell could have and can still become a payment facilitator. In order to do so, a company is required to undergo a specific certification procedure and must comply with certain conditions. These requirements are part of Visa Europe's operating rules and apply to all entities that wish to become payment facilitators alike.
- (39) The requirements appear to have been in force at the time when Datacell started accepting donations to Wikileaks using its merchant agreement with Teller. Even if it appears that Teller had failed to enforce such rules between 18 October 2010, the date of the signature of the merchant agreement, and 7 December 2010, it does not appear that such rules have been introduced or applied to Datacell in a discriminatory fashion.
- (40) In reply to a question by the Commission, you stated that Datacell has given priority to concluding a "merchant agreement" for what Visa Europe refers to as its "own services" (data hosting services provided by Datacell and its group members). In your view no other type of contract was and should have been needed to offer the kind of services Datacell offers Wikileaks and the cancellation of the merchant agreement violated the EU and EEA competition rules¹⁴.

¹¹ See letter by Visa Europe to Teller A/S of 18 January 2011 and MasterCard's letter of 25 August 2011, page 11: '*MasterCard required PBS/Teller to suspend the provision of services to Datacell as far as services provided by Datacell to Wikileaks are concerned, pending further investigation of Wikileaks' potential and /or mark damaging activities*'.

¹² See MasterCard's letter to the European Commission of 25 August 2011, para. 4.

¹³ See Visa's reply to the complaint of 2 September 2011, para. 1.3.

¹⁴ Datacell's e-mail of 28 March 2012.

- (41) However, these issues primarily seem to be of a contractual nature and not to concern the application of the competition rules. What is relevant for the application of the latter is that you do not seem to contest that Visa would readily allow Datacell to process Visa payments for third parties, provided it agreed not to process payments for the benefit of Wikileaks.
- (42) You have also stated that Datacell has not attempted to conclude an agreement as payment facilitator with any acquirer and that it did not intend to do so. According to Datacell, applying for a registration or an account to accept donations for entities other than Wikileaks would be interpreted as acceptance of the scheme's behaviour. Also, you stated that Datacell had already suffered extensive losses and seeks a declaration that its treatment constitutes a violation of the competition rules of the TFEU¹⁵.
- (43) Such a violation could however only be established if Datacell's possible exclusion from the market, as a consequence of choosing to continue servicing Wikileaks, would have a restrictive effect on competition in payment facilitation services in the sense that it would be likely to give rise to negative effects on prices, output, innovation or the variety or quality of payment facilitation services.
- (44) At the moment this would not seem likely to be established even if further investigation would be undertaken. The market of payment facilitation services appears to be global and fragmented, with many large and small players. At the time of the suspension of service, Datacell had only provided such services to other members of the corporate group to which it belongs, and to Wikileaks. It claims that the latter was going to be a platform on which Datacell was going to build its entry into the payment facilitation market¹⁶. However, at the time of the alleged infringement, apart from Wikileaks, Datacell only provided services to other group members. Based on these circumstances it does not appear that at the time of the alleged infringement Datacell's position on the relevant market was such that its foreclosure could give rise to negative effects of the kind listed above.
- (45) Neither does it appear, on the basis of the information you submitted¹⁷, that Datacell's possible foreclosure from the market would likely restrict *potential* competition on this market. In this regard, the restriction of potential competition must represent not a mere hypothesis, but a real, concrete possibility, supported by evidence or an analysis of the structure of the relevant market¹⁸.

¹⁵ Datacell's letter of 7 November 2011, pages 4 and 5.

¹⁶ Ibid, page 2.

¹⁷ Datacell has not provided any evidence to support the argument that its expansion into this market is likely and sufficient to have an impact on prices, output, innovation or the variety or quality. Such evidence would need to show that Datacell's expansion into this market is possible and profitable, taking into account size of the market, risks of failure, reactions of competitors, etc.

¹⁸ Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services and Others v. Commission*, [1998] ECR II-3141, paras. 136 and 137.

- (46) Finally, it is unclear what an economic incentive existed for Visa and MasterCard to suspend services to Datacell, as by doing so the schemes lost revenue.

2.2.2.1 The market for data hosting services

- (47) As regards the market for *data hosting services*, you claim that Datacell's operation on this market has been disrupted as its "*access to receive payments for hosting services was closed along with the payment gateway it operated for Sunshine Press/Wikileaks*"¹⁹.
- (48) The term "data hosting" covers a whole series of services, such as hosting of websites, hosting of physical and virtual servers, operation of data centres.
- (49) As regards Datacell's potential foreclosure from the market, since Datacell seems to have relied on the same merchant agreement to accept payments for its own services and on behalf of Wikileaks, it appears that the schemes' refusal to allow card payments to Wikileaks indeed prevented Datacell to accept card payments for its own data hosting services but only temporarily. In particular, it appears that - with the exception of a short period for investigation²⁰ - the card schemes did not prevent Datacell from accepting card payments as a merchant in its own right. They neither prevented Datacell from accepting payments on behalf of other entities, under the condition that it meets the necessary requirements, as laid out in their operating rules. The schemes in fact suspended payment services to Datacell only insofar as such services were carried out for the benefit of Wikileaks²¹.
- (50) However, even assuming that the measures did have the effect of foreclosing Datacell from the market for data hosting services, there would only be a restriction of competition by effect if this foreclosure would be likely to give rise to negative effects on prices, output, innovation or the variety or quality of data hosting services.
- (51) Given the nature of the data hosting services, this market appears to be global. Furthermore, there seems to be a large number of players²² on this market (some of the largest being CISCO, Yahoo! and Microsoft). In this context, Datacell's position on this market (both current and likely) does not seem to be such as to have the required effect²³.

¹⁹ Datacell's letter of 7 November 2011, page 3.

²⁰ Between 7 December 2010 and 18 January 2011, all payments to Datacell (including thus those it could have received for its own data hosting services) were suspended at Visa's request, pending its investigation.

²¹ Visa's response to the complaint of 2 September 2011, MasterCard's response to the complaint of 25 August 2011 and annexes 6 and 7 of Datacell's complaint.

²² In your complaint you mention a number of data centres operating in Iceland.

²³ At the time when Datacell's access to card payments was suspended, Datacell was only providing data hosting services to a limited number of companies (all part of the group of which Datacell is a

- (52) You also point to a "sub-market" of data hosting services run on green and renewable energy resources. In order for this to be considered as a relevant market for the purpose of assessing an Article 101 TFEU infringement, it would have to be established that users would not see it as a substitute with the data hosting services based on "conventional" energy resources. From the information provided, it does not seem that data hosting services run on green and renewable energy resources are likely to constitute a market in its own for the purpose of assessing an Article 101 TFEU infringement.

2.2.2.3 The market for payment gateway services

- (53) As regards the market for payment gateway services, as explained in Section 2.2.3 below, it does not appear that Datacell is active on this market, therefore this market does not seem to be relevant for the assessment of an infringement of Article 101 TFEU.

2.2.3. Article 101 TFEU – coordinated behaviour of payment schemes

- (54) You further allege that the provision found in merchant agreements which allows the acquirer to terminate the agreement at the request of any (other) card company represents an anti-competitive agreement between Visa, MasterCard and Amex.
- (55) This claim would require, first of all, that the origin of this provision in the merchant agreements would be established. This would clarify whether the provision could be considered as (based on) an agreement between the payment card schemes.
- (56) However, given the publicity around Wikileaks' activities, it would not seem excluded that the behaviour of the payment card schemes was parallel but not coordinated. In response to the Commission's enquiry, the two card schemes deny that they have co-ordinated their behaviour in this matter.
- (57) *Prima facie*, the payment schemes do not appear to have an incentive to have such an anti-competitive agreement. Making the termination of acquiring agreements subject to a competitor's decision would risk leading to loss of business without any apparent financial benefit.
- (58) Even in the event such an agreement between the schemes existed, in order to constitute an infringement of Article 101 TFEU such a provision would need to have the same negative effects on competition on the relevant markets as discussed in the foregoing paragraphs. In addition, it would have to not be objectively necessary. Since in the foregoing paragraphs it was not deemed likely that any foreclosure of Datacell from the markets of payment facilitation services or data hosting services would lead to negative effects on prices, output, innovation or the variety or quality of payment facilitation or data hosting services, it is not necessary to investigate this issue further.

member, and with a total turnover of 34 million EUR). Datacell submits that it has the capacity to service 4000 SMEs. Currently Datacell is providing services to a lower number of SMEs, from which it obtains revenues in the range of 100 – 150 EUR per month per customer.

2.2.4. Article 102 TFEU

- (59) According to the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (now 102 TFEU) to abusive exclusionary conduct by dominant undertakings (further referred to as "Article 102 Guidance")²⁴, the Commission will focus on those types of conduct that are most harmful to consumers.
- (60) The assessment of whether an undertaking is in a dominant position is a first step in the application of Article 102 TFEU. It is therefore necessary at the outset to identify the market on which a dominant position may exist. One of the markets suggested in your complaint of 12 July 2011 as potentially relevant is the market for payment cards network services. Considering that donations can and are made also through other payment means, it is not excluded that a definition of a wider market, e.g. that of payment services could be more appropriate in this case. A fully-fledged analysis based on empirical evidence would be required to establish which market is relevant in this respect. However, for the purpose of the assessment of the likelihood of establishing the existence of an infringement of Article 102 TFEU, it will be assumed that the market relevant for assessing dominance is the market for payment card network services, as suggested in the complaint.
- (61) Dominance is defined as *"a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers."*²⁵ According to the Article 102 Guidance, in order to assess whether an undertaking is dominant, various factors of the competitive structure of the market, such as the market position of the allegedly dominant undertaking and its competitors, entry and expansion as well as countervailing buyer power, need to be taken into account.
- (62) However, given the unlikelihood of the anti-competitive foreclosure for the reasons set out below, it is not necessary to assess whether Visa would have single dominance or collective dominance together with MasterCard and Amex in assessing the likelihood of infringement of Article 102 TFEU.
- (63) As stated in the foregoing the actions taken by the payment card schemes seem to be directed to Datacell's activities only in as far as they concern Wikileaks, which means that Datacell can still accept card payments for its own data hosting services and payments (donations) for third parties, provided it goes through the procedure foreseen for the provision of such services in the payment cards schemes' rules. The schemes' conduct therefore does not seem to have the effect of excluding Datacell from the markets of payment facilitation and data hosting services.

²⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF> OJ C 45, 24.2.2009, para. 5.

²⁵ See Case 27/76 *United Brands Company and United Brands Continental v Commission* [1978] ECR 207, para 65; Case 85/76 *Hoffmann La Roche & Co v Commission* [1979] ECR 461, para 38.

- (64) However, even if the schemes' conduct would have such an effect it would be unlikely that this would amount to an infringement of Article 102 TFEU. The type of exclusionary conduct claimed in the complaint would seem to be refusal to supply. In your letter of 7 November 2011 you also mention that card networks "*may be claimed to constitute an essential facility*". It must be noted that the Commission starts from the position that, "*generally speaking, any undertaking, whether dominant or not, should have a right to choose its trading partners [...] and therefore considers that intervention on competition law grounds requires careful consideration where the application of Article 102 would lead to the imposition of an obligation to supply on the dominant undertaking.*"²⁶ Typically competition problems arise when the dominant undertaking competes on the "downstream" market with the buyer whom it refuses to supply. Based on the information provided to the Commission, it is unlikely that Datacell could be considered an actual or potential competitor of the payment card schemes. In the letter of 7 November 2011, you refer to Visa's acquisition of CyberSource, a company providing payment gateways for online merchants. However, from the information in the Commission's possession, it seems that Datacell acted as a merchant in accepting donations to Wikileaks by hosting a payment gateway but it was Teller which was providing the payment gateway service (see Section 2.2.1 above). Therefore, even considering that Visa may own a company involved in the provision of payment gateway service, it seems unlikely that Datacell and Visa could be considered as competitors on the downstream markets of card payment facilitation for third parties or data hosting services where Datacell is present.
- (65) In your letter of 12 July 2011, you allege that "*[...] the member firms and licensees of Visa and MC, Teller, Valitor and Borgun are competitors (or at least potential competitors) on [the downstream market for payment card processing services].*" In assessing whether the payment card schemes engaged in anticompetitive foreclosure as referred to under Article 102 TFEU, the fact that *acquirers* may be competitors of Datacell would only be relevant if Teller or other acquirers would have a stake in Visa, MasterCard or Amex or *vice versa*. Furthermore, as discussed above, acceptance of card payments for third parties seems to be a different service to the acquiring services provided by Teller or other acquirers. In any case, there does not seem to be evidence that payment card schemes or acquirers are present on the markets that Datacell is present on.
- (66) It follows that neither the payment card schemes nor Teller would seem to have an incentive to foreclose Datacell from the downstream markets of card payment facilitation and data hosting services.
- (67) In any case, irrespective of whether Datacell and the payment schemes would be competing on any downstream market (acquiring, card payment facilitation or data hosting), in determining whether a refusal to supply amounts to an abuse of a dominant position, the following circumstances should be present:
- a) the refusal should relate to a product or service that is *objectively necessary* to be able to compete effectively on a downstream market;

²⁶ Article 102 Guidance, para. 75.

- b) it should be likely to lead to the *elimination of effective competition* on the downstream market and;
- c) it should be likely to lead to *consumer harm*.²⁷

In light of the analysis above, in particular under paragraphs 42-43 and 49, these requirements do not seem to be fulfilled in the present case.

- (68) As regards the foreclosure of *potential* competition, the entry or expansion of Datacell into other markets such as acquiring would have to be "likely, timely and sufficient" in order to have an impact on the market.²⁸ From the information available to the Commission, it seems unlikely that Datacell would fulfil these criteria.
- (69) Consequently, it is unlikely that the conduct complained of could lead to the anti-competitive foreclosure of Datacell and thus it is unlikely that an infringement of Article 102 TFEU could be established.

2.2.5. *Objective justification*

- (70) Finally, even if they were established, both the restriction of competition under Articles 101 and 102 TFEU could be objectively justified. Visa and MasterCard have brought forward arguments that their conduct was objectively necessary in order to eliminate the risk of criminal liability or harm to the schemes' brands. These reasons cannot be dismissed as *prima facie* irrelevant for consideration of whether there was an objective justification for the behaviour of the payment schemes. However, since in the foregoing the conclusion was drawn that it is unlikely that the conduct complained of could lead to the anti-competitive foreclosure of Datacell, it is not necessary to further investigate these arguments.

2.3. **Other means for addressing the issue**

- (71) Fundamentally Datacell's complaint is against the schemes acting as a "para-regulator" in respect of Datacell's activity as a card payment facilitator. The wider policy issues raised in this respect by the present case are currently under consideration in a regulatory context. As you know, the Green Paper "Towards an integrated European market for card, internet and mobile payments"²⁹ invited stakeholder views on, among other things, whether there are companies whose activities depend on their ability to accept payments by card and, if so, whether there is a need to set objective rules addressing the behaviour of payment service providers and payment card schemes vis-à-vis dependent users. On the basis of the contributions received in the public consultation on the Green Paper the Commission is assessing the need for policy measures.

²⁷ See Joined Cases C-241/91 P and C 242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications LTD (ITP) v Commission (Magill)* [1995] ECR 743; Case C-7/97 *Oscar Bronner GmbH & Co. KG* [1998] ECR I-7791; Case T-201/04 *Microsoft v Commission* [2007] ECR II 3601.

²⁸ Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services and Others v. Commission*, [1998] ECR II-3141, paras. 136 and 137. See also Case T-461/07 *Visa Europe v. Commission*, judgment of 14 April 2011, not yet reported, para. 167.

²⁹ COM(2011) 941 final, 11.01.2012.
http://ec.europa.eu/internal_market/consultations/docs/2012/cim/com_2011_941_en.pdf

3. PROVISIONAL CONCLUSION

- (72) For the reasons set out above, the Commission intends to reject your complaint, pursuant to Article 7(1) of Regulation No. 773/2004, without conducting further investigation.

4. PROCEDURE

4.1. Possibility of submitting observations

- (73) You may choose to submit written observations on this provisional assessment. The time-limit for submitting observations expires four weeks from the date of receipt of this letter. Please note that the Commission is not obliged to take into account any submissions made after the expiry of the time-limit.
- (74) If you do not submit written observations within the time-limit, your complaint will be deemed to have been withdrawn pursuant to Article 7(3) of Regulation No. 773/2004.

4.2. Access to relevant documents

- (75) You have the right to request access to the documents on which the Commission bases its provisional assessment. Please note that this provisional assessment is based on documents that are already in your possession. The relevant documents that are not already in your possession are included as an annex to this letter.
- (76) We would like to draw your attention to the fact that, according to Article 8(2) of Regulation No. 773/2004, *"the documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles [101 and 102 of the TFEU] may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those Treaty provisions"*.

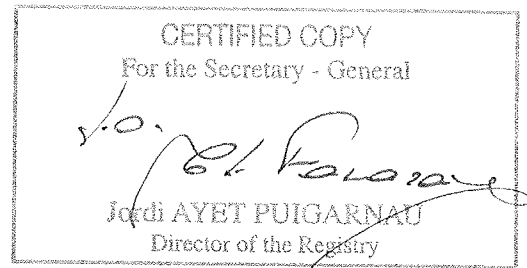
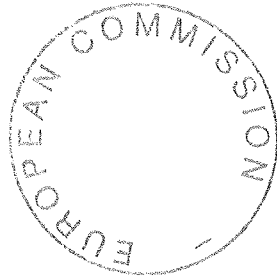
4.3. Confidentiality

- (77) The Commission reserves the right to send a copy of this letter – and of any written observations you may later submit – to Visa, MasterCard and Amex.
- (78) If you consider that certain parts of this letter contain confidential information, I should be grateful if, within two weeks of the date of receipt, you would inform Ms. Alexandra Patriciu (e-mail: comp-d1-mail@ec.europa.eu). Please identify clearly the information in question and indicate why you consider that it should be treated as confidential.
- (79) If you decide to submit written observations on this letter which contain confidential information, please also submit a non-confidential version of those observations.

4.4. Further information

- (80) For more information on the Commission's procedures for dealing with complaints, please consult Regulation 773/2004³⁰ and the Notice on the handling of complaints. Both documents are available at <http://ec.europa.eu/competition>.

Yours sincerely,
Alexander ITALIANER
Director General



Enclosures:

1. Non-confidential version of MasterCard's reply to the complaint of 25 August 2011, together with:

Annex 1: Letter of 7 December 2010 from MasterCard Incorporated to PBS/Teller

Annex 2: Press reports alerting to potential illegal and Mark damaging activities of Wikileaks

2. Non-confidential version of Visa's response to the complaint of 2 September 2011, together with:

Annex 1: Email of 7 December 2010 from Visa Europe to Teller

Annex 2: Letter of 18 January 2011 from Visa Europe to Teller

Annex 3: Letter of 9 June 2011 from Bender von Haller Dragsted to Visa Europe, with attached draft complaint

Annex 4: Visa Europe letter of 21 December 2010 to Icelandic Parliament

Annex 5: Visa Europe submission of 11 January 2011 in response to questions from the ECB

³⁰ OJ L 123, 27.04.2004, p. 18 (last amended on 30 June 2008); see in particular Article 7(1) and (2) and Article 8(1) of that Regulation

LUC G. HOUBEN*
BERNARD AMORY
ALEXANDRE VERHEYDEN*
HOWARD M. LIEBMAN**
THOMAS JESTAEDT***
SEBASTIEN CHAMPAGNE
VINCENT BROPHY
YVAN DESMEDT
SERGE CLERCKX
CHANTAL BIERNAUX
FRANCESCA MARCHINI CAMIA
WERNER HEYVAERT
FILIPPO AMATO****
DAVID ROGER
WERNER DERIJCKE

BOULEVARD BRAND WHITLOCKLAAN 165
B-1200 BRUSSELS, BELGIUM
TELEPHONE: 32.(0)2.645.14.11 • FACSIMILE: 32.(0)2.645.14.45

Advocaten-Avocats
Members of the Brussels Bar
*Members of the New York Bar
**Member of the District of Columbia Bar
***Member of the Düsseldorf Bar
****Member of the Turin Bar

25 August 2011

BRI-1362928v2

European Commission
Competition DG / Antitrust Registry
B-1049 Brussels

CONFIDENTIAL
BY EMAIL (COMP-GREFFE-ANTITRUST@EC.EUROPA.EU)

Dear Ms. Wezenbeek,

Case COMP/39921 - DataCell / Visa & MasterCard

1. This is MasterCard's response to the questions raised in your letter of 25 July 2011 to our client, MasterCard Europe SPRL, enclosing a copy of the complaint lodged by DataCell in the above mentioned case (the "Complaint").

As agreed during our telephone conversation in relation to this matter, we enclose a power of attorney from our client, MasterCard.

The Complaint alleges MasterCard has breached Articles 101 and 102 TFEU by requiring from PBS/Teller (an acquirer) that it suspends the provision of acquiring services to DataCell as far as Wikileaks is concerned.

MasterCard provides below some general comments on the Complaint, before answering the specific questions raised by the Commission.

General comments by MasterCard in relation to the Complaint

2. We set out below (1) MasterCard Incorporated's, MasterCard International Incorporated's and MasterCard Europe SPRL's (together "MasterCard") views on the law, (2) the context of MasterCard Incorporated's decision to require PBS International A.S. ("PBS/Teller") to suspend the provision of services to DataCell as far as Wikileaks is concerned, (3) the MasterCard Rules relevant to the above, (4) what MasterCard understands the relevant facts are and (5) the reasons for MasterCard Incorporated's decision.

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SAN FRANCISCO • SÃO PAULO • SHANGHAI • SILICON VALLEY • SINGAPORE • SYDNEY • TAIPEI • TOKYO • WASHINGTON

(1) EU competition rules

3. Contrary to the allegations made in the Complaint, MasterCard Incorporated's decision does not amount to a breach of the EU competition rules. In particular:

- As regards Article 101 TFEU, MasterCard decided *unilaterally* that it should require PBS/Teller to suspend its services to DataCell as far as Wikileaks is concerned, pending further investigation of Wikileaks' activities which are potentially illegal and/or may damage MasterCard's goodwill or reflect negatively on its Marks. This decision was not discussed beforehand with any competitor, including Paypal or Visa (see below). Therefore, there is no agreement or concerted practice and, for this reason amongst others, no violation of Article 101(1) TFEU.
- As regards Article 102 TFEU, contrary to what DataCell indicated in the Complaint, MasterCard does not hold a collective dominant position with Visa¹. In addition, taking measures in order to suspend the provision of services to third parties engaging in activities which are potentially illegal and/or may damage the goodwill of the Corporation or reflect negatively on the Marks does not constitute an abuse. Consequently, for these reasons amongst others, MasterCard has not breached Article 102 TFEU².

Therefore, MasterCard believes that the Complaint should be rejected on its face as it errs in facts (there was no concerted action by MasterCard Incorporated and its competitors) and errs in law (there was no infringement of the EU competition rules).

Should the Commission believe that the complaint merits closer attention, MasterCard reserves its right to respond fully to the allegations made in the complaint – although it believes that this is not necessary at this stage.

4. For the reasons set out below, MasterCard rejects the allegation that it is in breach of the EU competition rules. Consequently, MasterCard invites the Commission to reject without further delay the Complaint and the application for interim measures.

(2) The factual context around MasterCard Incorporated's decision

5. Wikileaks is an international non-profit organisation that publishes submissions of private, secret, and classified media from anonymous news sources, news leaks, and whistleblowers.

Its website, launched in 2006 under The Sunshine Press organisation, claimed a database of more than 1.2 million documents within a year of its launch.

In July 2010, Wikileaks released the Afghan War diary, a compilation of more than 76,900 confidential documents about the war in Afghanistan, and in October 2010, Wikileaks released a package of almost 400,000 confidential documents called the Iraq War Logs about the war in Iraq.

The documents released about the war in Afghanistan and the war in Iraq disclosed confidential foreign policy and military strategy of the United States and its partners.

¹ Nor an individual dominant position, which is not alleged in the Complaint.

² It is also worth mentioning here that MasterCard does not constitute an "essential facility", and therefore is under no legal obligation to provide its services to any particular undertakings.

According to the US State Department, the release of these documents has put United States military personnel in grave jeopardy, and US President Obama's administration has declared the release a threat to lives and national interests. Numerous other government officials around the world, including from countries involved in the two conflicts, have made statements to the same effect.

Wikileaks is, according to its own information, primarily funded by private donations. Private donations to Wikileaks take place through a payment gateway hosted by an Icelandic hosting company, Datacell. According to Datacell's merchant agreement with the Danish company PBS/Teller, payments can be made to Datacell, including donations to Wikileaks, by using MasterCard and Visa.

It is evident that any affiliation with an organisation causing damage to the national interests of several nations involved in the wars in Afghanistan and Iraq, and possibly putting lives needlessly at risk, will be damaging for the public perception of MasterCard and consequently damage for MasterCard's goodwill or its Marks.

(3) The relevant MasterCard Rules

6. Section 5.11.7 of the MasterCard Rules (available on MasterCard's external website) reads as follows:

"5.11.7 Illegal or Brand-damaging Transactions

A Merchant must not submit for payment into interchange, and an Acquirer must not accept from a Merchant for submission into interchange, any Transaction that is illegal, or in the sole discretion of the Corporation, may damage the goodwill of the Corporation or reflect negatively on the Marks.

The Corporation considers any of the following activities to be in violation of this Rule:

1. The sale or offer of sale of a product or service other than in full compliance with law then applicable to the Acquirer, Issuer, Merchant, Cardholder, Cards, or the Corporation.

2. The sale of a product or service, including an image, which is patently offensive and lacks serious artistic value (such as, by way of example and not limitation, images of nonconsensual sexual behavior, sexual exploitation of a minor, nonconsensual mutilation of a person or body part, and bestiality), or any other material that the Corporation deems unacceptable to sell in connection with a Mark.

An Acquirer that has been notified of a Merchant's noncompliance with this Rule and that fails promptly to cause the noncompliant practice to cease, or that has been notified multiple times regarding violations of this Rule, is subject, at the Acquirer's expense, and in addition to any other noncompliance assessment or other discipline, or both, to any one or more of the following:

1. A RAMP Level 3 review as described in the Security Rules and Procedures manual

2. An audit at the sole expense of the Acquirer by a third party selected by the Corporation, of the Acquirer's acquiring practices

The Corporation may list a Merchant which the Corporation determines is noncompliant with this Rule on the MATCH system. (See chapter 11 of the Security Rules and Procedures manual.)"

Section 3.10.4 of the MasterCard Rules reads as follows:

"A Member may not directly or indirectly engage in or facilitate any action that is illegal, or that, in the opinion of the Corporation and whether or not addressed elsewhere in the Standards, damages or may damage the goodwill or reputation of the Corporation or of any Mark, and the Member will promptly cease engaging in or facilitating such action upon request of the Corporation.

In addition, a Member may not place or cause to be placed on any Card or on any terminal or acceptance device any image, information, application, or product that would in any way, directly or indirectly, have or potentially have the effect of diminishing or devaluing the reputation or utility of the Marks, a Card, or any of the Corporation's products, programs, services, networks, or systems."

MasterCard has already enforced the above Rules on several occasions in the past (see below).

In this case, MasterCard required that PBS/Teller suspend the provision of services to DataCell as far as Wikileaks is concerned, pending further investigation of Wikileaks' potential illegal and/or Mark damaging activities.

(4) The relevant facts

7. In summary, the key milestones of this case are as follows:

- As from June 2010, MasterCard learned from the press of activities by Wikileaks, and that Wikileaks were funded by private donations through Datacell. Pursuant to Datacell's agreement with PBS/Teller, such donations to Wikileaks could be made using MasterCard cards. The actions of Wikileaks were considered potentially illegal and/or damaging for MasterCard's goodwill and Marks, and consequently contrary to sections 3.10.4 and 5.11.7 of the MasterCard Rules.
- On 7 December 2010, MasterCard Incorporated sent a letter to PBS/Teller informing them of their possible non-compliance with the above MasterCard Rules and that, unless they certified in writing that Wikileaks' potentially illegal and Mark damaging activities had ceased, it would impose the noncompliance assessment provided for in the MasterCard Rules (see Annex I).

- MasterCard required PBS/Teller to suspend the provision of services to DataCell as far as services provided by DataCell to Wikileaks are concerned, pending further investigation of Wikileaks' potential illegal and/or Mark damaging activities.
- On 9 December 2010, PBS/Teller informed MasterCard that its merchant agreement with DataCell had been suspended as far as services to Wikileaks are concerned, and that further investigation and assessment of Wikileaks' activities would take place.
- On 9 June 2011, DataCell sent a letter to PBS/Teller, MasterCard Europe SPRL and Visa Europe requesting that the suspended agreement between DataCell and Wikileaks be reinstated.

For the sake of clarity, please note that as a result of the suspension of acquiring services to DataCell as far as Wikileaks is concerned, Wikileaks may no longer receive donations with MasterCard cards. However, there are still many other ways in which Wikileaks can receive donations, as explained on Wikileaks' website (e.g. bank transfers, cheques, Bitcoin, postal mail, buying Wikileaks gifts such as t-shirts, etc). As Wikileaks itself has stated, "*After Visa/MasterCard stopped processing donations to WikiLeaks, DataCell started helping people to donate by bank transfer. In an interview dated 9th of December 2010 on Icenews, Olanfur V. Sigurvinsson co-founder of swiss-Icelandic DataCell, said that despite Visa/MasterCard shutdown, bank transfer donations were going very well and that donations had increased*"³.

(5) The reasons behind MasterCard Incorporated's decision

8. As explained below in response to the Commission's specific questions, the reason why MasterCard Incorporated required PBS/Teller to suspend the provision of services to DataCell as far as Wikileaks is concerned is because MasterCard learned from the press that Wikileaks engaged in potentially illegal activities and activities that "*may damage the goodwill of the Corporation or reflect negatively on the Marks*" (see above, section 5.11.7 of the MasterCard Rules).

Clarification of the reasons that determined MasterCard Europe SPRL to suspend the provision of card acquiring services to DataCell

9. As indicated above, numerous press reports alerted MasterCard to the potential illegal activities of Wikileaks – see, for example, the press articles enclosed as Annex 2.

In addition, MasterCard Incorporated concluded that the activities of Wikileaks "*may damage the goodwill of the Corporation or reflect negatively on the Marks*" (see above, section 5.11.7 of the MasterCard Rules). As stated above, it is evident that any affiliation with an organisation such as Wikileaks will be greatly damaging for the public perception of MasterCard and consequently damaging for MasterCard's Marks.

For these reasons, and in line with the above mentioned Rule, MasterCard Incorporated took the appropriate measures which are described above.

³ <http://wikileaks-press.org/wikileaks-struggle-against-visa-and-mastercard/>. Emphasis added.

For the sake of clarity, and contrary to what is stated in the Commission's question, it is not MasterCard Europe SPRL which took the decision to require the suspension of services to DataCell as far as Wikileaks is concerned. This decision was taken by MasterCard Incorporated.

Has MasterCard Europe terminated contracts with other contracting parties in the EEA in similar circumstances? If so, please describe such instances.

10. In several instances over the last five years, MasterCard has enforced the above mentioned Rules against acquirers because of merchants' activities that were potentially illegal and/or harmful to MasterCard's goodwill and Marks.

In the limited time available, MasterCard has prepared the table below which seeks to provide an overview of these Rule enforcement cases between 2007 and 2011 in cases other than this case, as well as the reasons underlying these Rule enforcement actions by MasterCard.

| Categories of Merchants Which Were Suspended or Terminated Based on MasterCard Identification of Illegal or Mark-Damaging Activity | | | | | | | | | |
|--|-------------------------|-----------------------|----------|------------------------------|-------------------|----------------------|----------------------|--------------------|-------|
| YEAR/ CATEGORY | Bestiality ⁴ | Counterfeit Piracy | Gambling | Pharmaceuticals ⁵ | Rape Brutality | Tobacco ⁶ | Child Pornography | Other ⁷ | TOTAL |
| 2007 | | | | | | | | | |
| 2008 | | | | | | | | | |
| 2009 | | | | | | | | | |
| 2010 | | | | | | | | | |
| 2011 | | | | | | | | | |
| TOTAL | | | | | | | | | |

⁴ By way of example, in 2004, MasterCard requested the Dutch acquirer, then "Interpay Nederland B.V." (now "Paysquare"), to suspend the provision of acquiring services to merchants operating websites offering access to pornographic material, including showing sexual acts with animals ("bestiality content"). These merchants included Cybermedia B.V. Cybermedia litigated the suspension of services by Paysquare before various Dutch courts and was dismissed on all grounds. In particular, the Dutch courts confirmed that there was no violation of the Dutch competition rules given the fact that the suspension was justified by MasterCard's legitimate interest in (i) protecting its commercial interests and (ii) avoiding any association with controversial expressions that could harm its reputation.

⁵ These cases pertain to the illegal sale of prescription medications.

⁶ These cases pertain to the illegal sales of tobacco products such as cigarettes and cigars

⁷ These cases pertain to three merchant accounts with one merchant who verbally abused and threatened its customers.

Out of the [REDACTED] enforcement cases mentioned in the table above, [REDACTED] (i.e. more than half) concerned merchants established in Europe⁸.

Please also clarify whether in deciding to suspend services to the complainant MasterCard Europe has acted on request of MasterCard Incorporated or any public authorities.

11. As indicated above, the decision to require PBS/Teller to suspend the provision of services to DataCell as far as Wikileaks is concerned was taken and implemented by MasterCard Incorporated. MasterCard Europe SPRL did not intervene in the decision-making process nor in the communications between MasterCard Incorporated and the acquirer (PBS/Teller).

Although the Commission's question is strictly limited to MasterCard Europe SPRL, for the sake of completeness MasterCard adds that, before taking its decision, MasterCard Incorporated did not have any contacts with public authorities, and therefore did not act upon request from any public authorities.

Has MasterCard Europe discussed this issue with MasterCard Incorporated or any public authorities?

12. As indicated above, MasterCard Incorporated took its decision and communicated it to PBS/Teller without any prior discussions with MasterCard Europe SPRL, nor any public authorities.

Although the Commission's question is strictly limited to MasterCard Europe SPRL, for the sake of completeness MasterCard adds that MasterCard Incorporated, after having taken its decision, had the following discussions with public authorities:

- After its decision to suspend services to Wikileaks, Paypal was subject to Distributed Denial-of-Service ("DDoS") attacks (i.e. hackers trying to make Paypal's website unavailable for use for a certain period). MasterCard Incorporated had several conversations with the FBI, US Treasury and the Department of Homeland Security (DHS) about the possibility of MasterCard becoming a target of such DDoS attacks.
- During the DDoS attack against MasterCard in December 2010, MasterCard Incorporated had further contact with the FBI and DHS.
- Since the DDoS attack against MasterCard, MasterCard Incorporated has had regular interaction with various FBI officials regarding the ongoing criminal investigation.

⁸ In most of these cases, the acquirer concluded that the only way to ensure that the merchant had ceased the potentially illegal and/or Mark damaging behaviour was to suspend or terminate the agreement with the merchant. Some of these merchants subsequently entered into an agreement with another acquirer, which required MasterCard to carefully scrutinise these merchants to make sure they were not still engaged in the same potentially illegal and/or Mark damaging conduct.

- MasterCard Incorporated had conversations with certain Congressional staff (i.e. Chairman Lieberman and Chairman King's [Senate and House Homeland Security Chairs] staff).

Also after MasterCard Incorporated had adopted its decision, the National Bank of Belgium (NBB) asked MasterCard Europe SPRL on what legal basis this decision had been taken. MasterCard Europe SPRL confirmed to the NBB, by email to [REDACTED] that the decision was taken by MasterCard Incorporated on the basis of the above mentioned MasterCard Rules (see Annex X). The NBB seemed satisfied with this response as it did not investigate the matter further.

Has MasterCard Europe discussed this issue with Visa?

13. MasterCard Europe SPRL has not discussed this issue with Visa (neither before the decision was taken by MasterCard Incorporated, nor after it took the decision).

Although the Commission's question is strictly limited to MasterCard Europe SPRL, for the sake of completeness MasterCard adds that MasterCard Incorporated did not discuss this issue with Visa before its decision was adopted. However, after MasterCard Incorporated had adopted its decision, and in connection with MasterCard Incorporated's discussions with the FBI and DHS (see above), MasterCard Incorporated had contacts with Paypal and Visa regarding the ongoing DDoS attacks. These discussions related to possible defense strategies against these DDoS attacks.

*

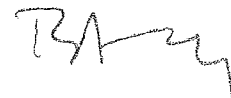
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We remain available should you like to discuss any of the above.

Yours sincerely,



Vincent Brophy



Bernard Amoré

Annexes: 2

- letter of 7 December 2010 from MasterCard Incorporated to PBS/Teller
- press reports alerting to the potential illegal and Mark damaging activities of Wikileaks

MasterCard Worldwide
2000 Purchase Street
Purchase, NY 10577-2509, USA

Phone: 914 249-5447
Fax: 914 249-4257
Internet Home Page: <http://www.mastercard.com>



MasterCard
Worldwide

December 7, 2010

Via E-mail: investigation@pbs.dk

[REDACTED]
PBS International A.S.
Lautrupbjerg 10
Ballerup, Denmark 2750

Re: Noncompliance with MasterCard Standards (Sunshine Press/Wikileaks)

Dear [REDACTED]

The purpose of this letter is to notify PBS International A.S. ("PBS") (ICA # 1303) that it may be noncompliant with MasterCard Standards regarding its acquiring relationship with the merchant Sunshine Press/Wikileaks ("Wikileaks").

Business Risk Assessment and Mitigation (BRAM) Program

MasterCard has reason to believe that the merchant Wikileaks may be accepting MasterCard cards as payment for donations for supporting illegal and/or brand damaging activity via the URL <http://www.wikileaks.org>.

Such support of illegal and/or brand damaging activities are considered a direct violation of rule 3.10.4, "Integrity of Brand and Network", as well as rule 5.11.7, "Illegal or Brand-damaging Transactions" of the MasterCard Rules. These rules prohibit acquirers from engaging in or supporting any activity that is illegal, or that may, in the opinion of MasterCard, damage the goodwill of MasterCard or reflect negatively on the MasterCard brand. Under MasterCard rules, PBS has the obligation to ensure that the merchants from which it acquires are not using the acquiring relationship for illegal activities.

If it is determined the merchant activity outlined above violates rules 3.10.4 and 5.11.7 of the MasterCard Rules, MasterCard may impose a noncompliance assessment of [REDACTED] violation in accordance with the noncompliance assessment framework described in rule 3.1.2.1.

[REDACTED]

[REDACTED]

[Redacted]
Page 2 of 2

Member Service Provider (MSP) Registration

[Redacted] MasterCard determined that Datacell may be providing MSP services for the merchant Wikileaks. However, Datacell was not registered by PBS as an MSP with MasterCard. Section 7.6.1 of the MasterCard *Rules* states that each Class A Member, for itself and each of its sponsored affiliate members, must use the MasterCard Registration Program (MRP) system to register any MSPs. [Redacted]

[Redacted] If it is determined that Datacell has not been registered as outlined in rule 7.6.1 of the MasterCard *Rules*, MasterCard may impose a noncompliance assessment of [Redacted] in accordance with the Category A noncompliance assessment framework described in rule 3.1.2.1.1 for this MSP registration violation.

Merchant Category Code (MCC) Coding Standards

Acquirers must provide valid and accurate transaction data in all authorization and clearing IPM messages, including a valid and accurate MCC that most reasonably and fairly describes the merchant's business. See Chapter 3, "Required Use of Card Acceptor Business Codes/MCCs", of the *Quick Reference Booklet* for additional details.

MasterCard has determined that PBS identified the transactions acquired from the merchant Wikileaks with MCC [Redacted]. Please refer to the MasterCard *Quick Reference Booklet* for the list of MCCs and their descriptions. [Redacted]

[Redacted] As this merchant was not correctly identified with the proper MCC, MasterCard may impose a noncompliance assessment of [Redacted] for this violation.

Merchant Identification and Responsibility for Transactions

As per rule 5.6, "Merchant Identification and Responsibility for Transactions", of the MasterCard *Rules*, acquirers must ensure that each of its merchants prominently and unequivocally informs the cardholder of the identity of the merchant at all points of interaction, so that the cardholder readily can distinguish the merchant from any other party, such as the supplier of products or services to the merchant. The CNP merchant, www.wikileaks.com, failed to identify Sunshine Press/Wikilea as the merchant responsible for the transaction and as the billing descriptor that will appear on a cardholder's statement for purchases made at this website. The applicable assessment for noncompliance with Rule 5.6 can be up to [Redacted]

[Redacted]

If you have any questions regarding the issues described in this letter, please contact me by phone at [Redacted]

Sincerely,

[Redacted Signature]

Business Leader
Fraud Detection and Review

cc: [Redacted]

Legally Privileged and Confidential

Response to the ECB regarding 'WikiLeaks'

This is the response of Visa Europe to the questions received from the ECB on 22 December 2010 regarding Wikileaks.

"Referring to the decision of VISA to seize services for transactions involving Wikileaks:

We would kindly invite you to provide the ECB with more information on

- (1) the legal basis of this decision as well as
- (2) with a report on the incident due to the hacking attack".

One preliminary issue to note is that, so far as 'WikiLeaks' exists as an organisation or as an individual person, it is not itself a merchant that uses the Visa payment service. We are aware of two Icelandic companies, DataCell ehf and Sunshine Press Productions ehf, that purport to offer members of the public the opportunity to donate money to 'Wikileaks'. DataCell was, until the recent suspension, using our payment services; Sunshine Press is seeking to commence use of our payment services (it has not previously used the Visa payment services).

Secondly, it is very important to stress that Visa Europe has not permanently seized services for transactions involving DataCell, Sunshine Press or 'WikiLeaks'. The decision has been taken to temporarily suspend providing payment services to DataCell, and to delay the commencement of services to Sunshine Press, pending an investigation into whether the Visa Europe Operational Regulations have been complied with both in relation to establishing the merchant relationship in the correct manner and in relation to the legality of the operations of 'WikiLeaks'.

(1) The Visa Europe Members and any agents who participate in the Visa system must comply with our Operating Regulations which include requirements that seek to ensure transparency of the identity of the parties who use our services and the protection of data, and to provide for strict rules to prevent those services from being used for unlawful activities.

In the present case, it became apparent in early December that basic and key information about the ultimate merchant of our services (in this case DataCell), had not been provided to our acquiring member, Teller AS. In accordance with our normal practice, we immediately took steps to rectify this situation by requesting that Teller AS carry out full due diligence on the relevant entities, to ensure that they complied with the Visa Europe Operating Regulations. During this process it was uncovered that the named merchant was in fact acting as an agent/processor and that the proper process to establish a new Merchant relationship (including KYC) needed to be undertaken with the entity Sunshine Press. Such steps are currently being undertaken, as far as we understand.

As you will no doubt be aware, in some jurisdictions stakeholders have questioned whether 'WikiLeaks' is, in respect of some of the material it publishes, committing criminal acts. Our Operating Regulations prohibit the use of the Visa system for illegal purposes either in the jurisdiction of the merchant (in this case Iceland) or the jurisdiction of the cardholder (which could be anywhere in the world). It is possible that activities that are permitted in one jurisdiction may be illegal in others. . Accordingly, the application of the relevant provision under the Operating Regulations does not necessarily depend solely on Icelandic law.

Visa Europe considers that it has a duty to act when issues of possible illegality are brought to its attention (as in the present case). Relevant steps may include obtaining legal advice to assess the legality of the underlying activities as it is often not possible or workable to await the outcome of civil or criminal proceedings. This process is regularly used in relation to on-line activity e.g. the selling of illegal substances, violation of intellectual property rights and certain pornographic sites, all of which Visa Europe takes very seriously.

The potential legal complexity surrounding the activities of 'WikiLeaks' (and the novelty of those activities) have meant that we have considered it appropriate to investigate this matter further to ensure that we are satisfied that in this case our services are not being used for any unlawful purpose.

Given the added uncertainty surrounding the activities of those entities, our intention is to keep that suspension in place until we have completed our investigations in relation to DataCell, Sunshine Press and 'WikiLeaks', to ensure that the Visa network is not being used for unlawful purposes and that our Operating Regulations are otherwise being observed.

During the time of suspension of payment services to DataCell and Sunshine Press, we note that it has been possible for those wishing to donate money to 'WikiLeaks' to continue to do so by cheque, cash or bank transfer.



1

Box 1

Confidential information - Response to a regulatory question asked by the ECB



21 December 2010

Mr Róbert Marshall
Chairman of the General Committee of the Icelandic Parliament
Icelandic Parliament
Skrifstofa Alþingis
150 Reykjavík
Sími 563 0500
ICELAND

Dear Sirs,

**Temporary suspension of online payment services in respect of DataCell ehf ("DataCell");
Sunshine Press Productions ehf ("Sunshine") and the WikiLeaks website**

We are writing to you regarding the Extraordinary Meeting of the General Committee of the Parliament of Iceland that we understand to have taken place on 10 December 2010. The discussion that took place at that meeting has been reported to us. From what we understand of the discussion that took place, we are concerned by the negative sentiment that appears to have been expressed by some members of the General Committee towards the decision of Visa Europe and one of its Members to suspend certain online payment services, and the apparent intention of some members of the General Committee to take steps against Visa Europe. While Visa Europe appreciates some of the concerns expressed at the meeting, it is unfortunate that the Committee did not have benefit at the meeting of an explanation of the factual background to the decision made, as that should have avoided the misunderstandings that unfortunately appear to have arisen (we do not believe that an invitation to participate in the meeting was extended to Visa Europe).

We wish to make the following observations which we hope will be of assistance to the General Committee in its further consideration of this matter.

Visa Europe in Iceland

Visa Europe has always had a special relationship with Iceland which has one of the highest card penetrations in the world. Visa Iceland was established in 1983 and we have been working with our Members since that time to ensure that Iceland reduced its dependency on inefficient means of payment such as cash or cheques. Iceland was the leading country in moving to a cashless society with almost 45 % all payment transactions carried out by a Visa card. This is significantly above all other European countries. During the financial crisis of 2008/9 we worked very closely with the Icelandic banks to ensure Visa cards could still be used both at home and abroad. We believe that our record in supporting Icelandic consumers and payment service providers speaks for itself and it is our wish to continue to maintain and increase our relationship with both banks and cardholders in Iceland.

Suspension of online payment services

Visa Europe is a so-called four party payment system whereby Visa Europe provides the rules and infrastructure for making Visa card payments, but the issuing of Visa cards and acquiring of Visa transactions solely rests with the Visa Members (Issuers and Acquirers) which are all regulated payment service providers institute.. The way in which the services of Visa Europe are provided in Iceland (as in all of the countries in which we operate) is through our Operating Regulations. These set out minimum contractual arrangements that are necessary to permit the functioning of the system whereby Visa cards are issued and accepted and thus used by merchants and cardholders, sometimes through a number of intermediaries, as in the present case. The payment service providers and agents who participate in the Visa system must all comply with our Operating

Regulations. These contain also requirements based on e.g. the European Money Laundering Directive and Data Protection Directive that seek to ensure transparency of the identity of the parties who use our services and the protection of data, as well as providing strict rules to prevent those services from being used for unlawful activities.

In the present case, it became apparent to us that basic and key information about the ultimate merchant of our services (namely, DataCell, Sunshine and WikiLeaks) had not been provided to our acquiring member, Teller AS. From what we understand, Teller is operating in Iceland through a local company, Korta, which is acting as Teller's agent. In accordance with our normal practice, we immediately took steps to rectify this irregularity by requesting that Teller carry out full due diligence on the relevant entities, to ensure that they complied with the Visa Europe Operating Regulations. Pending that due diligence being completed in a satisfactory manner, we have asked Teller to suspend the online payment platform to DataCell and to Sunshine. This step has been taken in full compliance with the terms of our Operating Regulations and the requirements of our Members' covering contracts with intermediaries and merchants. These arrangements are governed by the laws of England.

During the time that Teller has suspended DataCell's use of payment services, we note that it has apparently been possible for those wishing to donate money to WikiLeaks to continue to do so by cheque, cash or bank transfer.

For the avoidance of any doubt, we should point out that Visa Europe has not come under or reacted to pressure from any government or other official body anywhere in the world to take steps in respect of the activities of WikiLeaks but is seeking to protect all parties to the Visa system by carrying out due diligence as quickly as possible.

Activities of WikiLeaks


As you will no doubt be aware, in some jurisdictions various stakeholders have questioned whether WikiLeaks is, in respect of some of the material it publishes, committing criminal acts. Our Operating Regulations prohibit the use of the Visa system for illegal purposes either in the jurisdiction of the merchant (in this case Iceland) or the jurisdiction of the cardholder (which could be anywhere in the world). It is possible that activities that are permitted in one jurisdiction may be illegal in others. Accordingly, the application of the relevant provision under the Operating Regulations does not necessarily depend solely on Icelandic law.

Visa Europe considers that it has a duty to act when issues of possible illegality are brought to its attention (as in the present case). Relevant steps may include obtaining legal advice to assess the legality of the underlying activities as it is often not possible or workable to await the outcome of civil or criminal proceedings. This process is regularly used in relation to on-line activity e.g. the selling of illegal substances, violation of intellectual property rights and certain pornographic sites, all of which Visa Europe takes very seriously. (Visa Europe has also recently collaborated with the pharma industry and law enforcement internationally in relation to curtailing the selling of illegal substances on-line; the so-called operation PANGEA III).

The potential legal complexity surrounding the activities of WikiLeaks (and the novelty of those activities) have meant that we have considered it appropriate to investigate this matter further to ensure that we are satisfied that in this case our services are not being used for any unlawful purpose. We will not prejudge the outcome of that investigation. As explained above, we have temporarily suspended the provision of payment services to DataCell, Sunshine and WikiLeaks, pending further due diligence which is being carried out as quickly as possible. Given the added uncertainty surrounding the activities of those entities, our intention is to keep that suspension in place until we have completed our investigations in relation to DataCell, Sunshine and WikiLeaks, to ensure that the Visa network is not being used for unlawful purposes and that our Operating Regulations are otherwise being observed.

If the General Committee still has concerns about this matter

[REDACTED]


we would ask that you address these directly to us as a matter of urgency. In such event please contact Visa Europe directly by telephone or by email.

Yours faithfully

Visa Europe

Box 1

Business secrets - Details concerning Visa Europe's business in Iceland.



Carol S. P. Walsh
Executive Vice President
General Counsel

18 January 2011

CONFIDENTIAL

[REDACTED]

1

Teller A/S
Lautrupbjerg 10, 500
DK-2750 Ballerup

Dear [REDACTED],

2


I am writing to you in response to your email of January 13 2011 regarding the letter I sent to you on January 10 2011. There are two matters that we need to clarify in respect of your question whether Visa Europe has modified its position. The first one relates to DataCell and the other one to Wikileaks.

As we discovered through our own investigation prior to December 7 2010, donations using Visa cards to Wikileaks were facilitated through DataCell but the merchant name descriptor field indicated Sunshine Press to be the merchant. On the basis that we needed Teller AS to conduct its own due diligence in order to provide us accurate information with respect to the actual merchant and the legal implications of donations to Wikileaks, we requested that payments facilitated through DataCell must cease until your investigation had concluded, initially for a period of seven days.

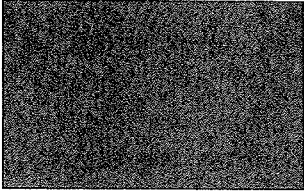
The request that DataCell must suspend facilitating payments was due to the fact that we needed Teller to establish the identity of the merchant as well as the ultimate beneficiary of the donations, and to understand whether the activities supported presented legal issues for Teller AS and Visa Europe. As we understand from previous correspondence from you, DataCell is no longer considered a merchant or service provider in relation to donations to the benefit of Wikileaks. However, subject to the point in the final paragraph below, DataCell may operate as a merchant in its own right by providing what we understand to be the computer programming and data processing services (MC code 7372) previously notified to us, or provide payment related services to members and/or merchants. This is on the condition that it is properly registered and is able to demonstrate that it meets the requirements set out in the Visa Europe Operating Regulations (Section 1.14A, November 2010 edition).

The second issue relates to Sunshine Press, who act as part of the Wikileaks organisation and who you have identified to be the proper merchant following your own investigations.

3

. Our concerns remain exactly the same as previously stated and we would therefore require that the current suspension of payment services facilitating donations – involving Sunshine Press, DataCell or any other company - to Wikileaks remains in force to allow the legal review to conclude.

Yours sincerely,



4

Box 1, 2 and 4

Confidential information - names of individuals

Box 3

Confidential information - details of Visa Europe's internal investigation



December 07 , 2010

Teller AS

Attn:  A

Lautrupbjerg 10
PO Box 500
DK-2450 Ballerup
DENMARK

VIA EMAIL

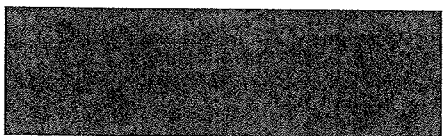
Visa Europe Confidential

RE: SUNSHINE PRESSWIKILEAKS

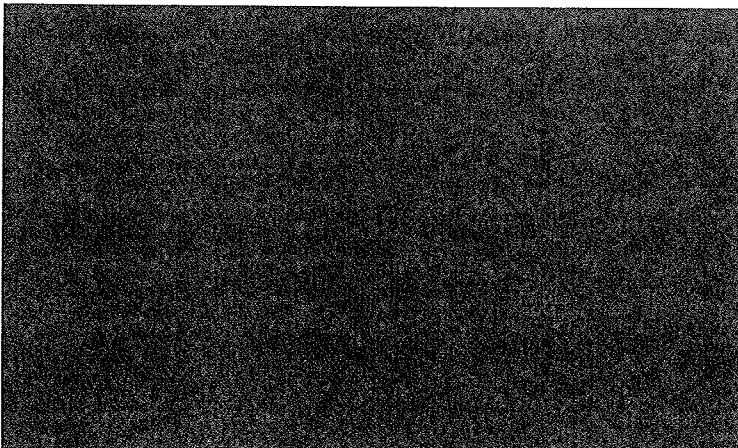
Dear  A

With reference to our recent conversation over the phone, please be advised that Visa Europe is formally asking you to identify the below referenced merchant descriptor and that authorisation and settlement be suspended for the merchant/IPSP for 7 days in order to allow Visa Europe and PBS to carry out an investigation into the legal and reputational matters relating to Wikileaks's activities.

The system information we have is as follows:

 B

SUNSHINE PRESSWIKILEAKS

 B