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For the attention of:
Mr. Andreas Fink CEO
E-mail: afink@datacell.com

Subject: Case AT.39921 – Refusal to provide payment services
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)

Dear Sir,

- (1) I am writing to you in connection with DataCell's complaint against Visa Europe (Visa), MasterCard Europe (MasterCard) – referred to together as "the card schemes" - and American Express (Amex) pursuant to Article 7(2) of Commission Regulation (EC) 773/2004.¹ I must inform you that for the reasons set out below, the European Commission rejects the complaint.
- (2) In essence, although DataCell claims that MasterCard's and Visa's instructions to suspend card payments made through DataCell for the benefit of WikiLeaks affects DataCell's capacity to offer various services, DataCell's capacity to offer payment facilitation services does not appear to be affected as the services provided to DataCell were only suspended as far as DataCell's services to WikiLeaks were concerned. DataCell could continue offering payment facilitation services provided it agreed not to process payments for the benefit of WikiLeaks and provided payment facilitation services to other parties in compliance with the card schemes' existing rules. In any event, notwithstanding DataCell's failure to comply with the card schemes' rules relating to payment facilitation services, following the judgment by

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, page 18.

the Icelandic Supreme Court of 24 April 2013 ordering an acquiring bank to provide payment services to DataCell (see below), MasterCard confirmed that it no longer objects to card payments to WikiLeaks. Visa, although maintaining its position with respect to WikiLeaks, has confirmed it will not seek to prevent the acquirer from complying with the legal obligations flowing from the judgment. Finally, Amex has not been involved in the conduct complained of.

- (3) Consequently, it is unlikely that the conduct complained of could lead to the anti-competitive foreclosure of DataCell from the card payment facilitation market and thus it is unlikely that an infringement of the competition rules could be established. Moreover, the impact on the functioning of the internal market appears to have been very limited. The Commission therefore, in the exercise of its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringements.

1. THE COMPLAINT

- (4) On 12 July 2011 DataCell submitted a complaint to the Commission alleging that Visa and MasterCard (and Amex after the complaint was extended to it) have prevented DataCell from accepting payments by cards and thus infringed Articles 101 and 102 of the Treaty on the Functioning of the European Union ("the Treaty") or Articles 53 and 54 of the European Economic Area Agreement (the EEA Agreement).²
- (5) On 25 July 2011, with DataCell's consent, the Commission sent to Visa and MasterCard the non-confidential version of the complaint. MasterCard submitted comments on the complaint on 25 August 2011, Visa on 2 September 2011.
- (6) By letter dated 25 October 2012, the Commission informed DataCell, pursuant to Article 7(1) of Regulation (EC) 773/2004 of its intention to reject the complaint. Visa's and MasterCard's comments on the complaint were annexed to the Commission's letter.
- (7) On 26 November 2012, DataCell objected to the Commission's intention to reject the complaint.

² DataCell submitted further information by letter or e-mail on 30 September 2011, 7 November 2011, 6 December 2011, 6 and 28 March 2012, 16, 23 and 25 July 2012, 15 and 17 August 2012, 3 September 2012, 9 October 2012, 7 January 2013, 25 and 30 April 2013, 31 May 2013, 17 and 29 June 2013, 31 July 2013, 1 August 2013 and 1 May 2014. The Commission sent a request for information to DataCell on 21 March 2012, to which DataCell replied on 28 March 2012. On 13 April 2013 and 4 June 2012 DataCell submitted comments on the Commission's Green Paper on Card, Internet and Mobile Payments and on 20 September 2012 DataCell sent the Commission a copy of its letter to the EFTA Surveillance Authority. These documents were included in the case file.

- (8) Following DataCell's submission and the judgment of the Icelandic Supreme Court (see below) the Commission carried out a further preliminary investigation into the matter by sending requests for information to Visa,³ MasterCard,⁴ Teller A/S⁵ and Groupe Crédit Mutuel – CIC.⁶ On 19 December 2013, the Commission sent DataCell a copy of the replies. DataCell commented on these on 15 January 2014.

2. BACKGROUND TO THE COMPLAINT

- (9) The complainant, DataCell ehf ("DataCell"), is a limited liability company established in Iceland. DataCell is part of a group of four companies that provide computer software or services related to telephone and the internet. DataCell offers data and software hosting services, mostly to the other companies in the group.
- (10) WikiLeaks, 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. WikiLeaks' activities have been attracting significant media attention since 2010, when WikiLeaks released a large number of documents from classified US military databases. WikiLeaks has attracted both support and criticism from a number of government and international organisations, as well as media and academic institutions.
- (11) On 1 October 2010, DataCell agreed with Sunshine Press Productions, a corporate entity controlled by WikiLeaks, that DataCell, in exchange for remuneration, would host WikiLeaks' website and enable donations to WikiLeaks to be made from WikiLeaks' website. Visitors to WikiLeaks' website would be under the impression that they could make a card payment directly to WikiLeaks, although in fact the payment would be made to DataCell, which would subsequently transfer the funds received to WikiLeaks.
- (12) On 18 October 2010, DataCell concluded a merchant agreement with the Danish acquirer Teller A/S (Teller), a member of both Visa and MasterCard schemes, to be able to accept payments by Visa, MasterCard and JCB cards. The agreement was concluded through Kortabjónustan hf (Korta), Teller's 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). WikiLeaks' corporate entity, Sunshine Press Productions, is mentioned in the merchant agreement as "another

³ Requests for information dated 23 April 2013, to which Visa replied on 28 May 2013, and 22 October 2013, to which Visa replied on 15 November 2013.

⁴ Requests for information dated 29 April 2013, to which MasterCard replied on 22 May 2013, and 22 October 2013, to which MasterCard replied on 15 November 2013.

⁵ Requests for information dated 23 April 2013, to which Teller replied on 17 May 2013.

⁶ Request for information dated 22 October 2013, to which Groupe Crédit Mutuel – CIC replied on 20 November 2013.

name" for DataCell⁷. In practice, DataCell used its account with Teller in order to accept card payments (donations) on behalf of WikiLeaks.

- (13) On 7 December 2010, Teller, on instructions from Visa and MasterCard⁸, suspended payment services to DataCell. In their suspension requests to Teller, the card schemes referred to legal and reputational risks posed by WikiLeaks' activities, which needed to be investigated. MasterCard also referred to the fact that DataCell appeared to be accepting payments on behalf of a third party without being registered as a payment facilitator, contrary to MasterCard rules. The card schemes required Teller to perform a due diligence review of the merchant and its activities. During its investigation, Teller found that DataCell had signed up as a merchant rather than as an "aggregator" accepting payments on behalf of third parties. The card schemes' rules prohibit holders of merchant agreements from accepting payments on behalf of third parties and require parties that wish to provide such payment facilitation services to conclude a specific contract to this effect.⁹
- (14) On 3 January 2011, DataCell concluded a second merchant agreement with Teller's licensee in Iceland, Korta, to be able to accept card payments for data hosting services only. On 18 January 2011, Teller was informed by Visa that DataCell could accept card payments for data hosting services provided by it, on condition that the suspension of payments to WikiLeaks remained in place. According to DataCell, this second merchant agreement was never confirmed by Teller and DataCell's payment gateway was not activated¹⁰. According to Teller, on 17 December 2010 it informed DataCell that if DataCell wished to retain the merchant agreement with Teller, DataCell had to inform Teller in detail what DataCell intended to use the agreement for. According to Teller, Teller never received a sufficient reply from DataCell.¹¹
- (15) On 15 June 2011, DataCell concluded a merchant agreement with the Icelandic acquirer Valitor, and started to accept payments on behalf of WikiLeaks on 7 July 2011. According to DataCell¹² Visa alerted Valitor and on 8 July 2011, Valitor terminated the agreement and referred to DataCell's infringement of the general rules preventing merchants from accepting payments on behalf of third parties and to the fact that the card schemes did not permit their payment cards to be used to make donations to WikiLeaks.

⁷ Annex 3 of DataCell's complaint of 12 July 2011.

⁸ Teller's reply to the Commission's request for information, question 1. See also Annex 1 of Visa's comments on the complaint of 2 September 2011 and Annex 1 to MasterCard's comments on the complaint of 25 August 2011.

⁹ Visa's comments on the complaint of 2 September 2011 and Annex 1 to MasterCard's comments on the complaint of 25 August.

¹⁰ DataCell's letter of 7 November 2011, page 4, and DataCell's reply to the Article 7(1) letter, paragraph 37-38.

¹¹ Teller's reply to the Commission's request for information, question 2.

¹² DataCell's submission of 6 March 2012, point A.

- (16) On 6 February 2012, DataCell commenced proceedings before an Icelandic court against Valitor for breach of contract. On 24 April 2013, the Supreme Court of Iceland found that Valitor had unlawfully terminated the merchant contract with DataCell and ordered Valitor to provide payment services to DataCell. Further to that judgment Valitor resumed the provision of payment services to DataCell on 1 July 2013.¹³
- (17) Following the Icelandic Supreme Court judgment, Visa has maintained its position in principle, and continues to object to its payment cards being used for payments to WikiLeaks. However, it confirmed to DataCell on 8 May 2013 that it would not prevent Valitor from complying with the obligations imposed on it by the judgment.¹⁴
- (18) MasterCard has stated that it was not approached by DataCell to reconsider its position about donations to WikiLeaks after 9 June 2011. When approached by Valitor regarding the re-instatement of services to DataCell, after the Supreme Court judgment of 24 April 2013, MasterCard confirmed that it no longer had any objections to the MasterCard scheme being used to make payments to WikiLeaks.¹⁵
- (19) American Express informed DataCell by letter of 28 October 2011 that it did not influence Valitor's decision to terminate its merchant agreement with DataCell.

3. DATACELL'S ALLEGATIONS OF COMPETITION LAW INFRINGEMENTS

- (20) DataCell's allegations, as set out in its complaint and subsequent submissions, including its reply to the Commission's letter informing DataCell of its intention to reject the complaint, are summarised below.

3.1. Services concerned

- (21) DataCell claimed in its complaint that the alleged refusal to supply prevented DataCell from carrying out data hosting services. It maintained that claim in its reply to the Commission's Article 7(1) letter. According to DataCell, access to acquiring services is indispensable to any company offering data centre and hosting services or offering card payment facilitation services for third parties.¹⁶ In this respect DataCell also argues that there is a submarket for data hosting services run on green and renewable energy sources.¹⁷
- (22) Moreover, DataCell claims that the agreement with WikiLeaks was going to help DataCell to launch card payment facilitation services to non-profit organisations and the like that cannot or do not want to enter into a merchant agreement with an

¹³ DataCell's submission of 31 July 2013.

¹⁴ DataCell's submission of 31 May 2013.

¹⁵ MasterCard's reply to request for information of 22 May 2013 and DataCell's letter of 31 July 2013.

¹⁶ DataCell's reply to the Article 7(1) letter, paragraph 5.

¹⁷ DataCell's reply to the Article 7(1) letter, paragraphs 55-56.

acquirer.¹⁸ According to DataCell, this market can be subdivided according to the characteristics of certain organisations, their needs and requirements.¹⁹

- (23) DataCell argues that it facilitated payments for WikiLeaks "*in a technical and financial transaction sense*" and was competing with the card schemes, which process payments. DataCell was operating a website that allowed for donations (a gateway) and allowed DataCell to handle financial transactions (card payment facilitator). According to DataCell, the reality of financial services today is that there is no distinction between payment gateway services and card payment facilitation services. From WikiLeaks' perspective there was no difference between having a merchant agreement directly with an acquirer or with DataCell, since through DataCell it received all necessary services to receive donations by card payments.

3.2. Article 101 of the Treaty or Article 53 of the EEA Agreement

- (24) According to DataCell, Teller did not suspend services on its own initiative, but following requests from Visa and MasterCard. DataCell argues that there was an agreement or concerted practice between MasterCard and Visa to suspend payment services to DataCell on 7 December 2010. On the same date, Teller suspended its payment services to DataCell. The suspension affected payments with Visa, MasterCard, Diners and JCB cards.
- (25) Visa's and MasterCard's letters to Teller are both written on 7 December 2010, whereas the merchant agreement between DataCell and Teller was concluded on 18 October 2010 and activated a few days later. In its reply to the Commission's Article 7(1) letter, DataCell claims that it is overwhelmingly unlikely that the payment card schemes would write the same day without prior concertation. Moreover, DataCell argues that Visa refers in its letter to Teller to MasterCard's decision to disassociate its brand from WikiLeaks. However, MasterCard had not publicly announced such a decision. According to DataCell, this shows that Visa is referring to private correspondence between Visa and MasterCard. According to DataCell, the card schemes' denial of the existence of such correspondence is not plausible.²⁰ DataCell thus argues that this is proof of a prior agreement or concerted practice between Visa and MasterCard. DataCell claims that a further indication of such collusion between the schemes is provided by Valitor's suspension of its payment services to DataCell on 8 July 2011: the suspension affected payments with Visa, MasterCard and Amex cards. The suspension was triggered by Visa's contacts with Valitor.²¹
- (26) DataCell also claims that, even in the absence of coordination between Visa and MasterCard, each card scheme's decision to suspend services to it is a decision of an association of undertakings according to Article 101 of the Treaty (and Article 53 of the EEA Agreement).

¹⁸ DataCell's reply to the Article 7(1) letter, paragraph 5.

¹⁹ DataCell's reply to the Article 7(1) letter, paragraphs 21-26, DataCell's submission of 30 May 2013, page 3.

²⁰ DataCell's reply to the Article 7(1) letter, paragraphs 63-64.

²¹ DataCell's reply to the Article 7(1) letter, paragraph 59.

- (27) According to DataCell, the card schemes' suspension of card payment services to WikiLeaks has foreclosed DataCell from the market for card payment facilitation services in violation of Article 101 of the Treaty. DataCell argues that Article 101 TFEU is not a "*rule of reason*" and that any elimination of a player from a market is liable to affect the structure of the market and is hence liable to thwart the attainment of objective of effective competition.²²
- (28) Furthermore, according to DataCell Teller's General Rules on Acceptance of Payments with International Cards²³, pursuant to which Teller "*can terminate the Merchant Agreement forthwith and without notice, if ... one of the International Card companies demands that [Teller] do so*" amount to an agreement between the card schemes that restricts competition by object.²⁴ If one of the card schemes orders an acquirer (Teller in this case) to terminate a merchant agreement, then such a termination shall apply to all the card brands.²⁵ According to DataCell the Commission should investigate whether there are other examples of acquirers suspending payments services for all card brands on the request of only one card scheme.²⁶
- (29) Finally, according to DataCell, the card schemes' rules requiring merchants that want to accept payments on behalf of third parties to enter into a particular third party card payment facilitation agreement with acquirers, restrict competition by object.²⁷

3.3. Article 102 of the Treaty or Article 54 of the EEA Agreement

- (30) DataCell claims that Visa is either dominant on its own or collectively together with MasterCard.²⁸ It claims that both companies, being in a collectively dominant position, or Visa being in a dominant position on its own, have abused that dominant position in the following ways.
- a) *Refusal to supply*
- (31) According to DataCell, Visa abused its dominant position by suspending the acceptance of payment services to WikiLeaks through DataCell. DataCell argues that a dominant undertaking's freedom of contract is limited and refusal to supply or discrimination between trading partners amounts to an abuse of a dominant position if it is not objectively justified. The suspension of payment services prevents

²² DataCell's reply to the Article 7(1) letter, paragraph 61.

²³ Clause 23.2, subparagraph 7.

²⁴ DataCell's reply to the Article 7(1) letter, paragraphs 28 and 58-59.

²⁵ DataCell has clarified that Valitor does not have a similar clause and that these rules do not apply to cards issued by Amex - DataCell's reply to the Article 7(1) letter, paragraph 95.

²⁶ DataCell's reply to the Article 7(1) letter, paragraph 59.

²⁷ DataCell's reply to the Article 7(1) letter, paragraph 29.

²⁸ In DataCell's letter of 7 November 2011, DataCell states that the complaint also refers to Amex. The case of Amex is dealt with in Section 6.8.

DataCell from supplying card payment facilitation services.²⁹ Any refusal to supply would therefore need to be objectively justified. In its reply to the Commission's Article 7(1) letter, DataCell argued that the Commission should have assessed whether the reasons given by the payment schemes for not dealing with DataCell constitute an objective justification.³⁰ Moreover, according to DataCell an abuse is an objective concept and the Commission errs if it rejects the complaint on the basis of lack of foreclosure.³¹

b) *Discrimination*

- (32) In its reply to the Commission's Article 7(1) letter DataCell claims that it is discriminated against by Visa and MasterCard since they allow *Fond de Défense de la Neutralité du Net*, 'FDN2', to facilitate the acceptance of payments to WikiLeaks by payment cards.³²

3.4. American Express

- (33) DataCell has extended its complaint against Visa and MasterCard to Amex because "[b]y its failure to react on the actions of Visa and MasterCard against DataCell, Amex de facto participated in an infringement of the competition rules of the EU".³³

3.5. Breach of Human Rights

- (34) DataCell has added that the Commission, when setting its priorities, should consider the right of freedom of expression and the Council of Europe's (and thus the foreign ministers of the EU) political will to protect the rights of whistle blowing websites.³⁴

3.6. Public interest in an investigation

- (35) DataCell has held that the Commission, when setting its priorities, should consider that the European Parliament, in the context of the Commission's "Green Paper – Towards an integrated European Market for card, Internet and mobile payments", has considered it to be in the public interest to define objective rules describing the circumstances and procedures under which card schemes may unilaterally refuse acceptance.³⁵

²⁹ DataCell's reply to the Article 7(1) letter, paragraph 72-73.

³⁰ DataCell's reply to the Article 7(1) letter, paragraph 62.

³¹ DataCell's reply to the Article 7(1) letter, paragraphs 69-70.

³² DataCell's reply to the Article 7(1) letter, paragraph 73.

³³ DataCell's submission of 7 November 2011, DataCell's reply to the Article 7(1) letter, paragraphs 95-99.

³⁴ DataCell's reply to the Article 7(1) letter, paragraphs 12-18.

³⁵ DataCell's reply to the Commission's Article 7(1) letter, paragraphs 19-20.

3.7. Involvement of the EFTA Surveillance Authority

- (36) DataCell claims that the EFTA Surveillance Authority should be involved in the decision whether to reject the complaint or not.³⁶

4. VISA AND MASTERCARD'S COMMENTS

- (37) Both Visa and MasterCard, in letters of 2 September 2011 and 25 August 2011 respectively, stated that the decision to suspend services to DataCell insofar as services provided by DataCell to WikiLeaks were concerned was based on their concern that WikiLeaks' activities were potentially illegal and/or damaging to the card schemes' brands and reputation.³⁷ Both Visa's and MasterCard's operating rules contain specific provisions which prohibit their members (acquirers) from processing illegal transactions or transactions which may damage the reputation or goodwill of the scheme.
- (38) Both card schemes stressed in their comments on the complaint that the suspension of services to DataCell only concerned services that DataCell provided to WikiLeaks. Visa explicitly states that it did not object to DataCell having a merchant agreement with an acquirer in order to accept payments by card for its data hosting services, or to DataCell accepting card payments on behalf of third parties, provided that DataCell complies with its relevant rules.
- (39) According to Visa, as explained in its letter to DataCell of 2 September 2011, Visa's investigation revealed that DataCell had been accepting payments for a third party, i.e. WikiLeaks, on the basis of a merchant agreement concluded with Teller. This practice is contrary to Visa's rules, which require payment facilitators, i.e. entities that want to accept payments on behalf of third parties, to conclude a specific type of contract (called an "Internet Payment Service Provider" agreement) with an acquirer to this effect.³⁸
- (40) MasterCard has similar rules prohibiting holders of a merchant agreement to accept payments for the benefit of third parties and requiring payment facilitators to enter into a specific type of agreement.³⁹ As appears from Annex 1 to its comments on the complaint of 25 August 2011, MasterCard's investigation had also revealed that DataCell was providing payment facilitation services (to WikiLeaks) without being registered as a payment facilitator, and drew Teller's attention to the fact that this practice was in breach of MasterCard's rules.

³⁶ DataCell's reply to the Article 7(1) letter, paragraphs 86-93, DataCell's submission of 30 May 2013, page 3.

³⁷ Visa's comments on the complaint of 2 September 2011, paragraphs 1.3, 2.1, 4.4, and Annex 1 to MasterCard's comments on the complaint of 25 August, paragraphs 3, 6, 8, 9.

³⁸ Visa's replies to the Commission's requests for information of 28 May 2013 and 15 November 2013.

³⁹ MasterCard's replies to the Commission's requests for information of 28 May 2013 and 15 November 2013.

5. THE NEED FOR THE COMMISSION TO SET PRIORITIES

5.1. EU Competition law

- (41) The Commission is unable to pursue every alleged infringement of EU competition law which is brought to its attention. Unlike civil courts whose task it is to safeguard the individual rights of private persons, the Commission is an administrative authority whose task is to act in the public interest.⁴⁰ The Commission has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.⁴¹
- (42) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but the Commission may take into consideration whether, on the basis of the information available, it seems unlikely that further investigation will result in the finding of an infringement. The Commission may also attach importance to the potential lack of impact of the alleged infringement on the functioning of the internal market. In addition, the Commission may consider the scope of the investigation required. If it emerges that an in-depth investigation would be a complex and time-consuming matter and either the likelihood of establishing an infringement appears limited or the potential impact of the alleged infringement on the internal market appears limited, this will weigh against further action by the Commission.
- (43) Moreover, the Commission may take into account whether the conduct complained of is continuing or has completely ceased.
- (44) Where the Commission, in its discretion to set priorities, forms the view that there are insufficient grounds for conducting a further investigation into the alleged infringements, the Commission may reject the complaint on that ground.

5.2. Human Rights

- (45) As follows from the description of the facts, Visa and MasterCard do not deny that they intervened to prevent the acceptance of payments through cards issued within their schemes to WikiLeaks (MasterCard today no longer objects to its cards being used to donate money to WikiLeaks, but Visa maintains this position, subject to recognising that Valitor is bound by the judgment of the Icelandic Supreme Court). In this context DataCell claims that the Commission should consider the protection of the right of freedom of expression and the Council of Europe's will to protect the rights of whistle blowing websites⁴² also taking into account that Visa and MasterCard payment cards are used to sponsor other controversial organisations.⁴³ However, DataCell has submitted its complaint on the basis of Article 7 of Regulation (EC) 1/2003 on the implementation of the EU competition rules. Pursuant

⁴⁰ Commission Notice on Handling of Complaints, point 27.

⁴¹ OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, p. 25-27.

⁴² DataCell's reply to the Commission's Article 7(1) letter, paragraphs 19-20.

⁴³ DataCell's submission of 26 November 2012, paragraph 75: DataCell refers to Sea Shepard, Green Peace, KuKluxKlan.

to Article 103 of the Treaty, the Commission's task in the framework of the competition rules of the Treaty is to ensure the application of the principles laid down in these rules by investigating cases of suspected infringement and, once found, proposing measures to bring infringements to an end, and not to investigate potential breaches of human rights other than within the scope of the application of EU competition rules themselves.

6. ASSESSMENT OF THE COMPLAINT

- (46) After a preliminary assessment of the complaint, in light of the considerations set out in Section 5, the Commission does not intend to conduct an in-depth investigation into your claims, for the reasons set out below.

6.1. Services concerned

- (47) First it is necessary to determine which services are potentially affected by the alleged infringements. DataCell has claimed that Teller's suspension of payment services affected its capacity to offer data hosting services, payment processing and gateway services and payment facilitation services. However, for the reasons set out below, card payment facilitation services appear to be the only services concerned.

6.1.1. Operation of payment card networks

- (48) Payment cards can be used for purchases of goods or services at physical shops or "at distance" over the telephone or Internet. In so-called four party systems such as Visa and MasterCard, transactions typically involve the cardholder, the merchant, the card issuing bank, the bank acquiring the payment and the network operator. The *issuing bank* is the bank of the cardholder which issues the card under a specific scheme (e.g. Visa or MasterCard). The *acquiring bank* is the bank of the merchant, with which the merchant has concluded a so-called "merchant agreement" allowing it to accept payments by card. Instead of concluding a merchant agreement directly with an acquiring bank, it is also possible for smaller merchants or non-commercial entities to conclude a merchant agreement with a "*payment facilitator*" that functions as an intermediary between the acquiring bank and the merchant (or non-commercial entity) and accepts payments on behalf of third parties.
- (49) In case of Internet payments the processing of the payment takes place through "*payment gateways*". The gateway uses special software that allows the transmission of data in a secure way between the merchant and the banks.
- (50) A merchant who wants to be able to accept payments by cards over the Internet must conclude a merchant agreement with an acquiring bank, receive processing services, and have access to a payment gateway. In most cases the acquiring services, the processing services and the payment gateway are offered by the acquiring bank as a package to the merchant.

6.1.2. Data hosting services

- (51) The term 'data hosting services' covers a whole range of services, such as hosting of websites, hosting of physical and virtual servers and operation of data centres.
- (52) According to DataCell, Teller's suspension of payment services disrupted DataCell's possibilities to provide data hosting services. According to DataCell, access to acquiring services is indispensable to any company offering data centre and hosting services.
- (53) However, DataCell's possibilities to provide data hosting services appear unaffected by the alleged infringement.
- (54) First, DataCell has clarified that the payment services provided by Teller were "*exclusively used to receive donations to WikiLeaks*".⁴⁴ Also payment services provided by Valitor were used only for the purpose of receiving donations to WikiLeaks.⁴⁵ DataCell therefore *de facto* did not use the payment services provided for any other purpose than accepting payments on behalf of WikiLeaks.
- (55) Second, as described in section 4 above, the card schemes have never objected to DataCell accepting payments by card for data hosting services. On the contrary, it appears that at least Visa specifically confirmed to Teller that DataCell can have a merchant agreement for the sale of its own goods and services.⁴⁶ DataCell has argued that this is not true because in practice an agreement allowing DataCell to use payment services for the purpose of providing data hosting services has never been concluded. In particular DataCell refers to the fact that Teller never confirmed the merchant agreement signed with its licensee Korta in January 2011.⁴⁷ However, this seems to be due to a miscommunication between DataCell and Teller rather than to a unilateral refusal on the part of the card schemes or Teller. In its reply to the Commission's request for information, Teller states that in December 2010, it had asked DataCell for further details about the services DataCell intended to sell but it did not receive "a sufficient reply". Furthermore, Teller indicates that, after receiving DataCell's latest application, in July 2012, it requested further clarifications to which DataCell did not respond. The Commission considers that these circumstances cannot be interpreted as a refusal by Teller or the schemes to allow DataCell to use Teller's services for the purpose of data hosting.⁴⁸

⁴⁴ DataCell's reply to the Commission's Article 7(1) letter, paragraph 5.

⁴⁵ See the judgement of the Icelandic Supreme Court: "[...] *it would have been obvious that the only purpose of the payment gateway was to receive donations to WikiLeaks*".

⁴⁶ See Annex 2 of Visa's comments on the complaint of 2 September 2011.

⁴⁷ DataCell's reply to the Commission's Article 7(1) letter, paragraph 38, DataCell's reply to the Commission's Article 7(1) letter, paragraph 37.

⁴⁸ Teller's reply to the Commission's request for information, question 2.

- (56) Having concluded that DataCell's capacity to provide data hosting services is not affected by the alleged behaviour, it is not necessary to assess whether this market could be divided into submarkets, e.g. for the data hosting services run on green and renewable energy sources.

6.1.3. Processing and payment gateway services

- (57) DataCell considers that the aim of its contract with WikiLeaks was to "*facilitate payments for WikiLeaks in a technical and financial transaction sense*"⁴⁹ and that the suspension of payment services prevented DataCell from continuing the provision of such processing and gateway services.
- (58) However, DataCell's possibilities to provide processing and payment gateway services do not seem affected by the alleged infringement.
- (59) Although DataCell acted as an intermediary between WikiLeaks and the acquiring bank, at no time did it, or was it able to, provide processing services or operate a payment gateway. In this respect it is irrelevant whether WikiLeaks had the impression that DataCell provided processing or payment gateway services. In fact, such services were provided by other parties under DataCell's merchant agreement with Teller.

6.1.4. Card payment facilitation services

- (60) Card payment facilitation services are understood as comprising the acceptance of payments on behalf of another entity. A card payment facilitator offers payment services under the agreement it has to this effect with an acquirer. Under the umbrella of a card payment facilitator several smaller merchants or organisations may accept card payments.
- (61) DataCell has suggested that card payment facilitation is a downstream market to the acquiring market.⁵⁰ Card payment facilitators can compete with acquirers for smaller merchants (or other organisations), who have the choice between concluding a merchant agreement directly with the acquirer or indirectly with the card payment facilitator. A provider of card payment facilitation services is nevertheless dependent on an agreement with an acquirer to offer its services. Actions by acquirers or card schemes with the aim or effect of limiting card payment facilitators' access to card payment services may lead to restrictions of competition on the market for card payment facilitation services.
- (62) The suspension of payment services to DataCell effectively prevented DataCell from acting as a card payment facilitator with respect to WikiLeaks. Card payment facilitation services therefore are potentially affected by the alleged infringement and the provisional assessment of the alleged infringements will look at the effects on this market.

⁴⁹ DataCell's reply to the Commission's Article 7(1) letter, paragraph 22.

⁵⁰ DataCell's complaint of 12 July 2011, section 4.

6.1.5. *No separate market for card payment facilitation services to WikiLeaks or non-profit organisations*

- (63) DataCell has suggested that card payment facilitation services for non-profit organisations and the like that cannot or do not want to conclude a merchant agreement with an acquirer constitute a specific market, which may be further divided into submarkets according to the characteristics of organisations, their needs and requirements.⁵¹
- (64) In its reply to the Commission's Article 7(1) letter DataCell has argued that card payment facilitation to WikiLeaks alone may form a specific relevant market.⁵²
- (65) However, it would not appear that the market can be defined so narrowly. In general terms, a market is defined by considering the competitive constraints faced by companies⁵³. In this respect, both the demand side substitutability, *i.e.* what customers as a group perceive as interchangeable products or services, based on their characteristics,⁵⁴ and the supply side substitutability are relevant.⁵⁵ It is not clear how payment services to WikiLeaks or other non-profit organisations would be different from payment services offered to typical merchants and it does not seem that such services would constitute a separate market. Although WikiLeaks has been singled out by the card schemes, the relevant market should not, in the Commission's view, be defined to include only one customer. There will always be particular customers with particular attributes, needs or wishes. However, the card payment facilitation services required by WikiLeaks do not appear to have been of a particular technical nature, either, or as having objectively unique attributes distinguishing them from card payment facilitation services offered to other non-profit, "loosely organised"⁵⁶ organisations or even regular merchants. From a supply side perspective, the card payment facilitation services offered to WikiLeaks are virtually the same as those offered to other non-profit organisations or regular merchants. They can easily be supplied by any of the card payment facilitators servicing these other entities.
- (66) These facts seems to be confirmed by DataCell itself in its complaint, where it states that *"the services provided by Datacell to Wikileaks/Sunshine Press are in no way different from those payment card processing services (payment gateways) which are provided by competitors of DataCell to organisations and companies around Europe and around the world"*⁵⁷. There are currently many companies in the EEA which

⁵¹ DataCell's reply to the Commission's Article 7(1) letter, paragraph 22.

⁵² DataCell's reply to the Commission's Article 7(1) letter, paragraph 32 - 36.

⁵³ Commission Notice on market definition, paragraph 2.

⁵⁴ Commission Notice on market definition, paragraph 7.

⁵⁵ Commission Notice on market definition, paragraph 13.

⁵⁶ DataCell's reply to the Commission's Article 7(1) letter, paragraph 36.

⁵⁷ DataCell's complaint of 12 July 2011, section 3.

provide card payment facilitation services for payments with Visa and MasterCard cards.⁵⁸

6.2. Likelihood of establishing an infringement under Article 101 of the Treaty and 53 of the EEA Agreement

- (67) For the reasons explained below, the likelihood of establishing the existence of an infringement of Article 101 of the Treaty or Article 53 of the EEA Agreement on the market for card payment facilitation services appears limited.

6.2.1. Alleged coordination between the card schemes to suspend payment services provided by Teller and by Valitor; alleged decisions of associations of undertakings; alleged foreclosure of DataCell on the market

- (68) The concordance of the timing of Visa's and MasterCard's requests to Teller to suspend its merchant agreement with DataCell may raise questions as to a possible coordination. However, this is contested by Visa and MasterCard⁵⁹ and given the publicity around WikiLeaks' activities, it cannot be excluded that the payment card schemes took their decisions independently of each other.
- (69) As to Valitor, it suspended payment services upon the request of only one of the card schemes, and it would therefore not appear that the card schemes coordinated their behaviour regarding Valitor.
- (70) DataCell also claims that, in the absence of a finding of coordination between Visa and MasterCard, each card scheme's decision to suspend card services would amount to a decision of an association of undertakings in the meaning of Article 101 of the Treaty.
- (71) In any event, even if DataCell's claim of coordination were plausible or if each card scheme's decision is a decision of an association of undertakings, an infringement of Article 101(1) of the Treaty could only be established if the schemes' behaviour could found to be restrictive by *object* or by *effect*.
- (72) An agreement restricts competition by *object* if by its very nature it has the potential of restricting competition.⁶⁰ Restrictions by object have such a high potential for negative effects on competition that it is unnecessary to demonstrate any actual effects on the market.

⁵⁸ Visa's and MasterCard's replies to the Commission's request for information of 23 October 2013, submitted on 15 November 2013, question 5.

⁵⁹ Visa Europe's and MasterCard's comments on the complaint of, respectively, 25 August and 2 September 2011.

⁶⁰ See the case law referred to in the Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.04.2004, paragraph 21.

- (73) Visa and MasterCard based their instructions to suspend the acceptance of payment services on provisions in their respective membership rules which prohibit the use of the Visa and MasterCard systems for the processing of illegal transactions or transactions that may damage the scheme's reputation or trademark.⁶¹
- (74) It thus appears that the main aim of the schemes was to prevent payments to WikiLeaks and not to exclude DataCell from the market for card payment facilitation services. In light of the objectives these rules pursue, it does not appear likely that the Commission could establish the existence of a restriction of competition by object in this case.
- (75) As explained above, DataCell could have provided card payment facilitation services to other parties than WikiLeaks, as long as it did so on the basis of a card payment facilitator contract⁶².
- (76) A decision or agreement will have restrictive effects 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.⁶³
- (77) 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 concerned.⁶⁴ The competition in question should be assessed within the actual context in which it would occur in the absence of the decision at issue⁶⁵. 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 market.⁶⁶

⁶¹ Visa's comments on the complaint of 2 September 2011 and MasterCard's comments on the complaint of 25 August 2011.

⁶² As explained in paragraphs 38 – 40, the schemes also consider that DataCell's use of its merchant agreement to accept payments on behalf of a third party was in contravention of their rules, which require companies wishing to provide payment facilitation services to conclude a specific contract with an acquirer to this effect. DataCell's claim that this requirement in itself constitutes a restriction of competition is discussed in Section 6.2.3.

⁶³ See the case law referred to in the Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.04.2004, paragraph 24.

⁶⁴ Case T-111/08 *MasterCard v Commission*, judgment of 24 May 2012, not yet reported, paragraph 127.

⁶⁵ *Ibid*, paragraph 128.

⁶⁶ 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, paragraph 167.

- (78) DataCell argues that negative effects on competition have occurred since it has been foreclosed from the market for card payment facilitation services. However, as noted above, the card schemes' suspension of card payment services concerned payments to WikiLeaks only and, as also stated above, the Commission considers that Wikileaks is not a market in itself. Visa did not object to DataCell accepting card payments on behalf of third parties, provided that DataCell complied with its rules. MasterCard stated that it had not been approached by DataCell to accept card payments on behalf of other parties than WikiLeaks. DataCell acknowledges that it has not tried to conclude a card payment facilitation agreement.⁶⁷ In these circumstances it would seem that nothing prevented DataCell from applying for a payment facilitator agreement with Visa and MasterCard and it cannot be considered that DataCell has been foreclosed from the market.
- (79) In addition, it does not appear that servicing WikiLeaks was a necessary "entry point" on the payment facilitation market.⁶⁸ It may be correct that the services it provided to WikiLeaks could have been used as a sales argument when approaching other clients, but the same could be said about services to any well-known or large customer. It does not appear therefore that servicing WikiLeaks was necessary as a precondition for servicing other customers. In this respect, it is relevant to note that there are many companies providing card payment facilitation services in Europe which entered the market without having serviced WikiLeaks.
- (80) Thus, it seems unlikely that, even following further investigation, it could be established that the schemes' decision to suspend DataCell's services insofar as card payments to WikiLeaks were concerned resulted in the foreclosure of DataCell from the market for payment facilitation.

6.2.2. *Alleged restrictions arising from Teller's general rules*

- (81) In its reply to the Commission's Article 7(1) letter DataCell argued that Teller's General Rules on Acceptance of Payments with International Cards,⁶⁹ provides that Teller can suspend payment services for all payment card brands if one card company demands that Teller does so. According to DataCell, this would amount to an agreement between the card schemes that restricts competition by object.⁷⁰
- (82) The Commission has carried out a preliminary investigation into this matter by sending requests for information to Visa, MasterCard and Teller. In reply to the questions
- Visa has stated that the relevant provision of Teller's General Rules is required by Visa Rules but it is not agreed with other schemes;

⁶⁷ DataCell's reply to the Commission's Article 7(1) letter, paragraph 46. DataCell claims that it tried to get a regular merchant agreement with Teller for the purpose of accepting card payments for data hosting services and was refused. Teller claims that DataCell was asked to supplement its application but never provided sufficient information for the agreement to be concluded.

⁶⁸ DataCell's reply to the Commission's Article 7(1) letter, page 2.

⁶⁹ Clause 23.2, subparagraph 7.

⁷⁰ DataCell's reply to the Article 7(1) letter, paragraph 28 and 58.

- Visa has claimed that no communication took place between the card schemes in relation to the termination of merchant agreements;⁷¹
- MasterCard has declared that its rules do not require an acquirer to notify MasterCard if it is instructed by a competing brand to terminate the merchant agreement;⁷²
- Teller has stated that there are a number of circumstances whereby Teller can terminate merchant agreements, the request from the card schemes is one, but given that the card schemes have different rules, a demand from one card scheme to suspend services does not automatically trigger a suspension from another card scheme.⁷³
- Finally, DataCell has clarified that Valitor does not have a similar clause.⁷⁴

In view of the above it seems unlikely that a further investigation would establish that Teller's rule is the result of coordination between the card schemes.

6.2.3. *Alleged restriction arising from the card schemes' rules requiring a card payment facilitator agreement*

- (83) Visa has submitted that its preliminary investigation showed that DataCell signed a merchant agreement with Teller when in fact it was carrying out payment facilitation services for third parties. In its reply to the Commission's Article 7(1) letter DataCell claims that *"the provisions in the operating rules that entitle the payment card schemes to designate any service by merchant agreement holders to cardholders as a third party service, as such (by object) restricts competition."* DataCell argues that the card payment facilitation services to WikiLeaks and other non-profit organisations are part of its business and when DataCell accepts donations on behalf of third parties it is using the payment services for "own use"⁷⁵ and DataCell should not be required to conclude a special agreement in order to provide card payment facilitation services.⁷⁶
- (84) DataCell further argues that Visa and MasterCard apply these rules in a discriminatory manner, since *Fond de Défense de la Neutralité du Net* ("FDN2") is allowed to accept donations for WikiLeaks under a merchant agreement.⁷⁷

⁷¹ Visa's reply to the Commission's request for information of 28 May 2013, question 1.

⁷² MasterCard's reply to the Commission's request for information of 22 May 2013, question 1.

⁷³ Teller's reply to the Commission's request for information, question 5b.

⁷⁴ DataCell's reply to the Article 7(1) letter, paragraph 96.

⁷⁵ DataCell's submission of 26 November 2012, paragraph 46.

⁷⁶ E.g. DataCell's e-mail of 28 March 2012.

⁷⁷ DataCell's reply to the Commission's Article 7(1) letter, paragraph 41.

- (85) Although, as stated in the foregoing, it is unlikely that a further investigation will lead to the establishment of a restriction by *object* or *effect* the Commission has carried out a preliminary investigation into this matter by sending requests for information to Visa and MasterCard.
- (86) Both card schemes' rules forbid a merchant to accept payments for third parties. Visa's rules require that a company that wants to accept payments on behalf of third parties over the Internet enters into an agreement with an acquirer as "Internet Payment Service Provider". MasterCard's rules require an agreement as "payment facilitator" (in both cases referred to as "card payment facilitator agreement").
- (87) According to Visa these rules are necessary to identify the entity to which the payment is destined. There is otherwise a risk of confusion for cardholders who think they are making a payment to a merchant (WikiLeaks in this case) while the card statement shows a transaction to another entity (DataCell in this case). There is therefore a risk that the cardholder will dispute the transaction.⁷⁸
- (88) According to MasterCard, the requirement to enter into a card payment facilitator agreement is necessary due to the risk associated with allowing a party that does not have a direct contractual relationship with MasterCard to sign up merchants to accept MasterCard cards. To be able to protect its brand-image, MasterCard therefore requires that the card payment facilitator agreement foresees the procedure and conditions under which the acquirer can terminate the agreement.
- (89) The schemes' rules on payment facilitation are aimed at protecting consumers and brand image. As such, they may be seen as pursuing a legitimate interest. As long as these rules are applied in a transparent and non-discriminatory manner and are proportionate to the legitimate aim they pursue, they may be justified and therefore it appears unlikely that they would restrict competition by object.
- (90) DataCell's claim that these rules are applied in a discriminatory manner does not appear to be supported by the facts. FDN2 is a non-profit association that finances actions defending the neutrality of Internet and the freedom of expression.⁷⁹ According to its website, FDN2 currently supports five such projects: La Quadrature du Net, April, OVEI, Framasoft and WikiLeaks. It appears that when making a donation to FDN2 it is possible to indicate that the donation is intended for a certain cause sponsored by FDN2 (WikiLeaks or any of the others). Notwithstanding, it is clear to cardholders that the donation is made to FDN2, so that FDN2 does not fulfil the same function as DataCell, which simply provides a conduit for payments to Wikileaks.
- (91) FDN2 operates in the following way. When making a payment to FDN2, which is done on FDN2's own website, donors can indicate the particular project they wish to support, without however FDN2 guaranteeing that donations will be paid to a certain

⁷⁸ Visa's submission of 15 November 2013.

⁷⁹ Crédit Mutuel's reply to the Commission's request for information, Question 1a: "*L'association a pour but de financer toute action permettant de concourir à la mise en place effective, ou à la défense, d'une neutralité absolue des réseaux de télécommunications, et en particulier d'Internet, ou plus largement des libertés numériques et de la liberté d'expression.*"

project.⁸⁰ According to FDN2's articles of association, the governing council is required to "take account" of donors' wishes in deciding which associations and projects FDN2 will support.

- (92) In its reply to the Commission's letter under Article 7(1) of Regulation (EC) 773/2004, DataCell argued that FDN2 and DataCell were nevertheless in a similar position, since payment services provided under a merchant agreement are often used to collect donations on behalf of or for third parties. In this context DataCell referred to the testimony by Valitor's CEO in the proceedings before the District Court of Reykjavik, claiming that Valitor's CEO had admitted that merchant agreements were used as gateways to collect payments for third parties.⁸¹ However, this argument does not seem to be supported by the facts. The situation Valitor's CEO was asked about was one where a bookshop, Ida, sold a T-shirt to raise funds for a cancer charity. There is an important difference between DataCell on the one hand and FDN2 or Ida on the other: whereas DataCell accepted payments *on behalf of a third party* (WikiLeaks) in return for a remuneration, i.e. as a commercial activity, FDN2 is a charity association and Ida a bookstore that accept payments made *to themselves*; in the example relied on by DataCell, the customer was not "doing business" with the cancer charity, but was buying goods from Ida.
- (93) DataCell's argument that accepting payments for WikiLeaks is part of its own business does not seem relevant in this respect. DataCell accepts payments not *to itself* but *on behalf of a third party*, i.e. it engages in card payment facilitation services for third parties, in exchange for remuneration. This analysis does not change because DataCell claims that it is its business to do so.
- (94) DataCell added that the Icelandic Supreme Court has, in its view, established that the collection of donations does not amount to accepting payments on behalf of third parties and the card schemes have suspended services without any justification.⁸² However, this interpretation does not seem correct. The Icelandic Supreme Court's key finding was that before Valitor effectively started to provide services to DataCell on the basis of their agreement, the acquirer was in possession of information that DataCell was going to use its agreement exclusively for the purpose of accepting payments on behalf of WikiLeaks. Valitor could therefore not afterwards invoke this fact as a reason to suspend the contract between it and DataCell. The judgment of the Court did not deal with whether accepting donations for third parties should be carried out on the basis of a payment facilitation contract or a merchant agreement, but with whether Valitor was in possession of sufficient information about DataCell's use of the merchant agreement before it entered into effect.
- (95) Since the Commission's preliminary investigation did not show that Visa applied the rules on the category of contract to be used for specific services in a discriminatory manner it appears unlikely that a further investigation would lead to the establishment of an infringement of competition rules. It is therefore not necessary to

⁸⁰ See FDN2's Articles of association, Article 9.

⁸¹ DataCell's reply to Article 7(1) letter, paragraph 43, with reference to Annex II.

⁸² DataCell's submission of 30 May 2013, page 3.

assess whether it is likely that Visa or MasterCard are associations of undertakings in the meaning of Article 101 of the Treaty or Article 53 of the EEA Agreement.

6.3. Likelihood of establishing an infringement of Article 102 of the Treaty and 54 of the EEA Agreement

6.3.1. Preliminary remarks

- (96) To establish an infringement of Article 102 of the Treaty or Article 54 of the EEA Agreement, first, the undertaking in question must be found to enjoy a dominant position on the relevant market and second an abuse has to be identified. For the reasons explained below, it seems unlikely that a further investigation would establish an abuse. It is accordingly not necessary to assess whether Visa, alone or together with MasterCard, can be classified as a dominant undertaking or to define the relevant market.
- (97) DataCell alleges that the card schemes' abuse consists in (i) refusal to supply payment services and (ii) discrimination against DataCell.

6.3.2. Alleged refusal to supply

- (98) It must be noted at the outset that the Commission starts from the position that generally speaking, any undertaking, whether dominant or not, should have a right to choose its business partners and that refusal to supply, even if it is the act of an undertaking holding a dominant position, does not *in itself* constitute an abuse.⁸³ Intervention on competition law grounds therefore requires careful consideration where the application of Article 102 would lead to the imposition of an obligation to supply on the dominant undertaking.
- (99) The European Court of Justice has established strict criteria that have to be fulfilled to find that a refusal to supply amounts to an abuse of a dominant position. In particular, an essential criterion for finding that a refusal by a dominant undertaking to supply a customer active on a neighbouring market constitutes an abuse is if it risks eliminating effective competition on that neighbouring market.⁸⁴
- (100) It seems unlikely that a further investigation would establish that the card schemes' refusal to provide payment services to WikiLeaks have eliminated effective competition on the market for card payment facilitation services.
- (101) The card schemes' refusal to provide payment services to DataCell effectively prevented DataCell from providing card payment facilitation services to WikiLeaks, however it did not prevent DataCell from offering such services to other third parties.

⁸³ Joined Cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) v Commission (Magill)* [1995] ECR I-743, paragraph 49; Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039, paragraph 34; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraph 319.

⁸⁴ Joined cases 6/73 and 7/73 *Istituto Chemioterapico Italiano (ICI) S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECR 223, paragraph 25, Joined Cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) v Commission (Magill)* [1995] ECR I-743, paragraph 56, Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraphs 331, 332.

Card payment facilitation services to WikiLeaks are not a relevant market on their own (see Section 6.1.5).

- (102) It seems that DataCell could have and still can become a card payment facilitator if it submits to the card schemes' rules and enters into a card payment facilitator agreement with an acquirer.
- (103) It equally seems unlikely that the card schemes' aim was to eliminate all competition by DataCell on the market for card payment facilitation services. Typically competition problems arise when the dominant undertaking competes on the "downstream" market with the buyer whom it refuses to supply. DataCell has not suggested that it could be considered an actual or potential competitor of the payment card schemes, however DataCell has suggested that it competes with acquirers on the downstream market for card payment facilitation services.⁸⁵ Therefore, the schemes' conduct is to be assessed as to whether it amounts to an attempt to exclude a competitor (in this case DataCell) from the market for card payment facilitation services.
- (104) Theoretically, as DataCell points out, the card schemes could have an interest in foreclosing the market for card payment facilitation services to protect the interest of their member acquiring banks on this market. However, it seems that the main aim was to prevent payments to WikiLeaks and not to exclude DataCell from the market for card payment facilitation services (subject to DataCell entering into the appropriate type of agreement with the card schemes). The fact that the card schemes never objected to DataCell providing card payment facilitation to other third parties than WikiLeaks appears to contradict any argument that the card schemes' actions sought to foreclose DataCell from the market for card payment facilitation services.

6.3.3. *Alleged discrimination*

- (105) An undertaking in a dominant position may abuse that position if it applies dissimilar conditions to equivalent transactions with other trading partner, thereby placing them at a competitive disadvantage. This prohibition aims at preventing distortion of competition in markets that are upstream or downstream to the market where the undertaking is dominant.
- (106) DataCell claims that it has been discriminated against by comparison with FDN2 in respect of provision of card payment facilitation services to WikiLeaks.
- (107) As explained in Section 6.2.3, there is an important technical difference between DataCell and FDN2. Whereas DataCell accepted payments *on behalf of a third party* (WikiLeaks) under a merchant agreement, FDN2 is a charitable association that accepts payments made *to itself*.
- (108) Moreover, DataCell and FDN2 do not appear to be competitors. FDN2 is a charitable association and does not offer services on the market for card payment facilitation services in exchange for remuneration. FDN2 is therefore not to be considered a competitor to DataCell, which offers card payment facilitation services (to WikiLeaks) in return for remuneration. It follows that even if there were to be a discriminatory treatment of DataCell in comparison to FDN2, as DataCell alleges,

⁸⁵ See Section 6.1.4.

such treatment would not discriminate between two competitors and would therefore not be such so as to distort competition on the card payment facilitation market.

6.4. Objective justification

- (109) DataCell argues that the card schemes cannot suspend card payment services without an objective justification.
- (110) The card schemes argue that their actions *vis-à-vis* WikiLeaks were justified by the need to protect brand image and [REDACTED]. The justifications invoked of protecting brand image and [REDACTED] were made only in relation to payments to WikiLeaks.
- (111) The card schemes also justify the suspension of payment services to DataCell on the basis of DataCell's breach of the card schemes' rules applicable to card payment facilitators. As stated above, it appears reasonable that the card schemes retain a certain control over the use of their cards. The card schemes' rules requiring that a company that wishes to accept payments on behalf of third parties over the Internet enters into an agreement with an acquirer as "Internet Payment Service Provider" (Visa) or "payment facilitator" (MasterCard) appears proportionate to the risks identified by the card schemes.

6.5. Likelihood of establishing the involvement of American Express

- (112) DataCell has extended its complaint against Visa and MasterCard to Amex because "[b]y its failure to react on the actions of Visa and MasterCard against DataCell, Amex de facto participated in an infringement of the competition rules of the EU".
- (113) However, it seems unlikely that a further investigation would lead to the establishment of an infringement of the competition rules on behalf of Amex.
- (114) First, the merchant agreement with Teller did not enable DataCell to accept payment with Amex and DataCell's ability to accept payment with Amex cards was therefore not affected by the suspension of payment services by Teller.
- (115) Second, under the merchant agreement with Valitor, DataCell could accept card payments by Amex cards. However, Valitor terminated the merchant agreement on the initiative of Visa, without notifying Amex.⁸⁶ Under EU competition law, an undertaking cannot be held responsible for the conduct of other undertakings without being itself involved in the conduct concerned. In this case Amex was merely informed about the alleged anticompetitive behaviour after it had taken place. Press reports on these actions also post-date Visa's and MasterCard's actions. Considering this, and the fact that Amex has said that it did not influence Valitor's decision to cease payment services, the lack of reaction on behalf of Amex alone cannot be construed as evidence of Amex's involvement in any alleged agreement by Visa and MasterCard to suspend or cancel DataCell's merchant agreement.

⁸⁶ DataCell's reply to the Commission's Article 7(1) letter, paragraph 95.

- (116) Lastly, as to the alleged infringement arising from Teller's general rules according to which Teller can suspend payment services for all payment cards in case one card company asks it to do so, DataCell has stated that these rules do not apply to cards issued by Amex.⁸⁷

6.6. The impact on the functioning of the internal market

- (117) As explained in Section 2.2.2.1 of the Article 7(1) letter sent to DataCell on 25 October 2012, it appears unlikely that DataCell was foreclosed from the market for card payment facilitation services. The card schemes' rules forbid a card payment facilitator to accept payments for third parties under a merchant agreement. To offer such services a party has to enter into a card payment facilitator agreement with an acquirer.
- (118) DataCell acknowledges that it has not sought to conclude a card payment facilitation agreement.⁸⁸ According to DataCell collection of donations is part of DataCell's business⁸⁹ and the card schemes' operating rules do not oblige DataCell to apply as a card payment facilitator to be able to collect donations for third parties.⁹⁰
- (119) DataCell thus seems to have chosen to contest the card schemes' rules by not observing them. However, if DataCell had entered into a card payment facilitator agreement it would have been allowed to offer card payment facilitation services on this market, at least to organisations other than WikiLeaks. To enter into such an agreement would not have prevented it from contesting the lawfulness of the schemes' refusal to allow card payment facilitation services to WikiLeaks.
- (120) As explained in Section 6.1.5, WikiLeaks is not a market on its own. The market concerned by the complaint is the market for card payment facilitation services. Although WikiLeaks may have been an important client to DataCell, the alleged infringement primarily concerns one client.
- (121) Moreover, the conduct complained about has effectively ceased. In 2013, the Icelandic Supreme Court ordered Valitor to resume payment services to DataCell. DataCell has since been accepting donations on behalf of WikiLeaks under the merchant agreement in place with Valitor. While Visa maintains its objections in principle, it does not prevent Valitor from complying with its legal obligations to provide payment services to DataCell, and MasterCard no longer objects to its cards being used for payments to WikiLeaks. It does not appear therefore that DataCell faces any subsisting obstacle to providing payment services to WikiLeaks.
- (122) In view of all the above considerations, the impact on the functioning of the internal market appears limited.

⁸⁷ DataCell's reply to the Commission's Article 7(1) letter, paragraph 95.

⁸⁸ DataCell's reply to the Commission's Article 7(1) letter, paragraph 46.

⁸⁹ DataCell's reply to the Commission's Article 7(1) letter, paragraph 47.

⁹⁰ DataCell's reply to the Commission's Article 7(1) letter, paragraph 53.

6.7. The scope of the investigation required

- (123) In its reply to the Commission's Article 7 (1) letter DataCell further developed a number of factual issues. In order to clarify these further issues the Commission has undertaken a preliminary investigation into the allegations by sending requests for information to the parties concerned and third parties. After this preliminary investigation the Commission has come to the conclusion that the likelihood of finding an infringement appears very limited. A further in-depth investigation would require considerable resources and would be disproportionate in view of the limited likelihood of establishing the existence of an infringement and the limited potential impact of the alleged infringement on the functioning of the internal market.
- (124) An in-depth investigation into all the allegations of infringements of Article 101 of the Treaty or Article 53 of the EEA Agreement would, among other things, require the Commission to make an extensive investigation into acquirers' practices with respect to the application of the card schemes' rules, taking into account that practices vary between the different brands and between the different Member States. An in-depth investigation into the allegations of infringements of Article 102 of the Treaty or Article 54 of the EEA Agreement would, among other things, require the Commission to make an extensive investigation into the legal and economic conditions of the market in order to address DataCell's extensive arguments about the relevant product and geographic market.

6.8. Public interest in an investigation

- (125) In response to the Commission's Article 7(1) letter, DataCell raised that the Commission should consider that the European Parliament, in the context of the Commission's "Green Paper – Towards an integrated European Market for card, Internet and mobile payments", has considered it to be in the public interest to define objective rules describing the circumstances and procedures under which card payment schemes may unilaterally refuse acceptance.⁹¹
- (126) However, in view of the above considerations it is unlikely that a further investigation would establish an infringement of the competition rules. In any event, such a further investigation into the specific facts of the present matter does not appear suitable to address possible public interest concerns regarding card schemes' rules with respect to unilateral refusals to provide payment services. Even if an investigation did lead to the finding of an infringement of the EU competition rules, which, as explained above is unlikely, the Commission could only require the undertakings concerned to bring such an infringement to an end, by the imposition of proportionate behavioural or structural remedies. This does not mean that the Commission could require the card schemes to adopt or define detailed and specific rules that would be applicable generally to unilateral refusals to provide payment services, thus substituting for any legislative action that might be taken pursuant to the Green Paper.

⁹¹ DataCell's reply to the Commission's Article 7(1) letter, paragraphs 19-20.

7. CONCLUSION

- (127) In view of the above considerations, the Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringements and consequently rejects the complaint pursuant to Article 7(2) of Regulation (EC) 773/2004.

8. PROCEDURE

8.1. Involvement of the EFTA Surveillance Authority

- (128) DataCell claims that the EFTA Surveillance Authority ("ESA") should be heard before the Commission rejects the complaint. It is correct that Protocol 23 concerning the Cooperation between the Surveillance Authorities (Article 58) stipulates that the competent surveillance authority (in this case the Commission) shall consult the other surveillance authority (in this case ESA) before taking certain decisions (see Article 3). However, Protocol 23 does not impose such an obligation on the Commission in relation to the rejection of a complaint pursuant to Article 7(2) of Commission Regulation (EC) 773/2004.

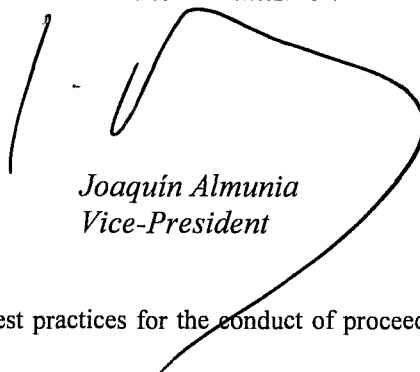
8.2. Possibility to challenge this Decision

- (129) An action challenging this Decision may be brought before the General Court of the European Union in accordance with Article 263 of the Treaty.

8.3. Confidentiality

- (130) The Commission reserves the right to send a copy of this Decision to Visa and MasterCard. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website.⁹² If you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would inform DG Competition, Unit D1 (e-mail: COMP-D1-MAIL@ec.europa.eu). Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can be published on the Commission's website or sent to Visa or MasterCard.
- (131) The published version of the Decision may conceal your identity upon your request and only if this is necessary for the protection of your legitimate interests.

For the Commission



*Joaquín Almunia
Vice-President*

⁹² See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.