

Substantially in the form of form “C”

European Commission
Directorate-General for Competition
For the attention of the Antitrust Registry
1049 Bruxelles/Brussel
BELFIQUE/BELGIE

Comp-greffe-antitrust@ec.europa.eu

COMPLAINT

pursuant to Article 7 of regulation (EC) No 1/2003

Re: Alleged infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union and Articles 53 and 54 of the EEA Agreement.

1. The complainant

DataCell ehf. id.no. 460709-0160, Skúlagata 19, 101 Reykjavík, is a limited liability company incorporated under the laws of Iceland. (Hereinafter the complainant will alternatively be referred to as DataCell or as the “Complainant”)

DataCell offers data and software hosting services, ranging from the hosting of websites, physical and virtual servers to the operation of complete data centres. DataCell has also offered payment gateway services and has acted as a payment facilitator with the aim of enabling businesses, NGOs, humanitarian organisations and others which do and/or choose not to have their own merchant account to accept payment cards.

1.1 Corporate Group

DataCell is part of a group of 4 companies under common ownership, which together form an inter-supportive and a cohesive company group well equipped to serve and support international (as well as Icelandic) customers of variable needs:

1. Kerfisþróun ehf. id.no. 540409-0130, Skúlagötu 19, (“Kerfisþróun”), develops software and provides hosting of computer and software for the Icelandic market. Kerfisþróun has developed its own ERP software that are served either stand alone or on a SaaS model to over 3000 Icelandic customers, which constitutes a 25% market share for similar ERP applications in Iceland.

In addition, many of Kerfisþróun’s customers host their business applications at DataCell’s

data centre facilities and pay DataCell for these services with the use of International payment cards.

2. Backbone ehf. id.no. 540710-1120, Skúlagötu 19, Reykjavík, (“Backbone”), is an Internet infrastructure company focusing on operating physical lines necessary for local Internet connections in Iceland. Backbone has extensive plans to install fiber lines within Iceland to support DataCells’s data centre facilities as well as lines to and from the country.
3. iCell ehf id.no. 540710-1200, Skúlagötu 19, Reykjavík (“iCell”), is a retail Internet and wireless and telephone service provider which builds on DataCell’s data centre facilities and Backbones fiber infrastructure to offer and provide its services in Iceland.

DataCell is under equal ownership of Mr. Andreas Fink of Basel, Switzerland and Mr. Ólafur Sigurvinsson of Reykjavík Iceland. Mr. Fink has a controlling interest in a number of undertakings in Europe and the US. These are:

- (i) SMSRelay AG, Switzerland, a SMS Wholesale provider, (100%)
- (ii) Fink Consulting GmbH, Switzerland, Telecom and IT Consulting and Resale (100%)
- (iii) Alisanus GmbH, Switzerland, Management Company (100%)
- (iv) BebbiCell AG, Paging Operator, VoIP operator (40%)
- (v) Smart Telecom Ltd. UK company, (100%)
- (vi) IceCell Inc., US company, (100%)
- (vii) Global Networks Switzerland AG
- (viii) BebbiCell Inc. US company, (100%)

1.2 Contact person: Sveinn Andri Sveinsson, Attorney to the Supreme Court of Iceland, Partner in Reykjavík Law Firm, Borgartúni 25, 105 Reykjavík, Iceland (sveinnandri@icelaw.is).

2. The undertakings whose conduct and actions is the subject of this complaint

This Complaint relates to Visa Europe Ltd. (hereinafter Visa Europe or Visa), MasterCard Europe Spri (hereinafter MasterCard Europe or MC),

The complainant is a customer of Teller A/S of Denmark (through Teller’s licensee, Korta, in Iceland) under a merchant agreement and for a few days of Valitor of Iceland also). Both agreements were terminated without notice or warning Teller is a member/licensee of Visa Europe and MasterCard Europe as are Valitor and Borgun of Iceland. Valitor and Borgun are member firms and licensees as acquirers under the Visa and MasterCard networks through Visa Europe and MasterCard Europe. Both Valitor and Borgun are also licensed to acquire American Express, Diners and JCB card transactions. This complaint is not directed at the

acquiring companies in Iceland nor Teller in Denmark. By not including these companies in this complaint, the complainant is not excluding that they may have by their participation in the events recounted below contravened the competition rules. Due to their involvement in these events the complainant thinks it is appropriate to give account of these companies with the two which this complaint is directed at:

2.1 Visa Europe is a limited liability company incorporated under the laws England and Wales with registered office at 1 Sheldon Square, London W2 6TT.

Visa Europe is owned and governed by its members/shareholders and operates as a licensee of Visa Inc USA under an exclusive, perpetual and irrevocable license. Only financial undertakings are eligible as owners/members of Visa Europe.

2.2 MasterCard Europe Sprl. develops and offers payment solutions and processing payments for financial institutions, banks, businesses, cardholders, and merchants. It also markets cards and guarantees payment through its systems, and tracks consumer behaviour and buying trends. Address: Chaussée de Tervuren, 198 A Waterloo, 1410, Belgium. (Source: MasterCard Europe's website).

MasterCard Europe Sprl operates as a subsidiary of MasterCard Incorporated.

2.3 Teller A/S Lautrupbjerg 10 DK-2750 Ballerup Denmark.

Teller A/S is a part of the Nets Group in Scandinavia which was formed through the merger of PBS International A/S of Denmark with BBS and Teller A/S, which both were Norwegian companies. Teller is now a subsidiary of Nets. Teller is both a member of Visa Europe and MasterCard Europe as a licensed acquirer.

2.4 Korta (officially named Kortabjónustan ehf. id.no 430602-3650, Skipholt 50b, Reykjavík, Iceland operates under a license from Teller offering businesses in Iceland access to the acquiring services of Teller.

2.5 Valitor hf. is a licensee of acquiring services in the name of all the major international payment card networks. It also presents itself as a company offering complete solutions to merchants.

2.6 Borgun hf. is a licensee of acquiring services in the name of all the major international payment card networks. It also presents itself as a company offering complete solutions to merchants. (Before the times of dual and multi acquiring, Valitor was the sole franchisee of Visa in Iceland and Borgun (called Kreditkort at that time) held the MC franchise).

3. The conduct which is subject of the complaint

On 18 October 2010, DataCell concluded a merchant agreement with Teller through its licensee Korta which enabled DataCell to accept international payment cards of the Visa MasterCard and the JCB networks, hereinafter “the Merchant Agreement”). The Merchant Agreement is enclosed as document 5. When entering into this Agreement it was made fully clear to Korta/Teller that DataCell intended to accept donations for the WikiLeaks project and in the agreement Sunshine Press is expressly mentioned.

On 7 December 2010, Teller notified the complainant by e-mail that the payment card acceptance services provided by Teller to DataCell was being suspended due to orders by Visa Europe. DataCell’s merchant account with Teller was closed the day after. Teller informed DataCell that the suspension would be for one week and that Visa Europe had requested a “due diligence investigation be made in order to protect the Visa brand and to ensure that neither Teller A/S nor Visa Europe run the risk by facilitating payments for the funding of the WikiLeaks website”. Then Teller added: “For the same reason Teller has suspended the payments of MasterCard.”

The due diligence investigation was subsequently carried out by Teller in Iceland. The results of that investigation were that Sunshine Press had not acted “in contravention of Visa’s rules or national legislation in Iceland.” However, Teller’s conclusion was that DataCell had acted contrary to Visa rules by facilitating donations to third parties. (See attached e-mails from Teller to DataCell’s counsel in Denmark, dated 22 December and 30 December 2010, enclosed as *documents 7 and 9*). In both messages Teller informs DataCell that in order to be able to resume service to DataCell the company would need a special certification from Visa Europe.

Following the closure of the merchant account with Teller, DataCell asked about the possibility of opening an account with an acquirer in Switzerland but got the answer that that would not be possible. As in the case of Teller, the reason given was the obstruction from Visa and MasterCard. (See document 5).

On 9 June 2011 DataCell sent a letter to Teller, MasterCard Europe and Visa Europe (document 11) indicating the seriousness of the situation and requesting that the terminated /cancelled Merchant Agreement be reinstated. This letter did not yield any results.

DataCell applied for merchant agreements with Valitor and Borgun on 12 June 2011 (documents 12 and 13). A merchant agreement with Valitor was signed 15 June. However, on 8 July DataCell received an e-mail from Valitor (document 15) notifying that the agreement had been terminated due to violations of the acquirers terms and due to the fact that the international card organisations do not allow the services that Datacell provides to WikiLeaks and which was not mentioned in the application.

Based on the events recounted above and communications and messages which the complainant has received from Teller and Valitor since the fateful day of December 7th 2010 it is clear that Visa Europe and MasterCard Europe do not intend to allow member firms / licensees within their respective organisation to enter into merchant agreements with the complainant. In the opinion of the complainant the initiative as regards the actions taken against him comes from Visa Europe. The role of MasterCard is not as conspicuous, but at least, by not objecting to the termination by Teller and Valitor of the merchant agreements it must be deemed that MC has participated as a silent partner in these actions and must be deemed to be equally responsible for the alleged infringements of the competition rules. As concerns the latest termination by Valitor of its merchant agreement with the complainant which means that holders of American Express cards, as well as Diners, Discover and JCB cards are prevented from using their cards to pay to the complainant then it is too early to tell how these organisation view the closure.

The complainant submits that the refusal by Visa Europe and MasterCard Europe to grant him 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. The complainant submits that the reason(s) given by the payment card networks for refusing services to him do not constitute an **objective justification under competition law:**

- (I) The provision of payment gateways whereby the holder of a merchant agreement uses its merchant account to accept payments or donations made by the use of payment cards to businesses or non-profit organisations which do not have their own merchant account, and then passes these donations/payments on to the organization or company in question, according to the agreed terms between the parties, **constitutes an altogether normal business practice.**

Were Visa Europe and MasterCard Europe to continue to maintain that DataCell needs to get some special approval or certification from them in order to operate its payment gateway and to offer payment gateway services to undertakings that do not have their own merchant account so that they may be able to receive payments made with international payment cards, then the complainant submits (i) that their respective member rules do not contain any requirement that such service must be certified or approved by the payment card network operator in question and (ii) that if such a condition were to be found in the member rules, regulation or bylaws of these organizations then such a condition would in itself constitute an infringement of Article 101(1) TFEU and Art. 53(1) EEA, (cf *the Morgan Stanley case*) and of Art. 102 TFEU and Art. 54 EEA. In this connection, as Teller has itself concluded, the operations of DataCell in Iceland are fully compliant with Icelandic law. In short, a refusal by Visa and MasterCard to allow DataCell to hold a merchant account for the purposes of servicing parties which do not have their own merchant account by reference to the

need for some special certification from the respective payment card schemes, cannot be deemed do constitute an objective justification.

- (II) 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.
- (III) When DataCell entered into the Merchant Agreement with Teller and Korta it was made clear to Korta that DataCell would use its merchant account to receive donations for WikiLeaks/Sunshine Press. The same was done in the case of Valitor.
- (IV) When DataCell applied for a merchant agreement with Valitor and Borgun in Iceland the central payment clearance authority in Iceland which the Central Bank of Iceland runs and operates, cleared the application without any reservations. The complainant points also out that the Financial Supervisory Authority in Iceland has not objected to DataCell's operations.
- (V) DataCell emphasises that to its knowledge neither the WikiLeaks organisation, Sunshine Press nor any of their spokesmen or any who have taken part in preparing or processing whistleblowing material on behalf of Wikileaks and which WikiLeaks has been or is being provided with, have been indighted, prosecuted or summoned for breach of any civil law, any criminal law provisions or violatoins of "ordre public" in any EEA country for such participation and for such work. To mention particularly the laws on privacy and data protection, then, to the knowledge of DataCell, neither Sunshine Press, WikiLeaks are or have been subject to any official investgation for breach or the suspicion of breacing any such rules within any jurisdiction within the EEA. The complainant notes also that the card companies have not named any instances of any legal action or investigations of the above kind.

As concerns jurisdictions outside the EEA, then, to the knowldege of the complainant, neither the Wikileaks organisation as such, Sunshine Press or any of their spokesmen or any who have taken part in preparing or processing whistleblowing material on behalf of WikiLeaks and which has been provided to Wikileaks have been subejct to official indightments, prosecutions, judgemnts or summons for breach of any cecil law, any criminal law provisions or violatoins of "ordre public" or the equivalent therof.

- (VI) There are no structural or ownership connections between DataCell, or any companies owned directly or indirectly by its owners, and WikiLeaks and Sunshine Press (the corporate part of the WikiLeaks organisation). Nor are there any managerial, governance or board representation connections or links between DataCell or

companies owned directly or indirectly by DataCell's owners and Sunshine Press or any other entity connected to Sunshine Press or any persons who represent WikiLeaks and/or work for WikiLeaks /Sunshine Press. DataCell undertook to accept donations to the WikiLeaks project through its payment gateway as part of a general services agreement between DataCell and Sunshine Press. The relationship between DataCell and Sunshine Press/WikiLeaks is a pure business relationship.

- (VII) As far as known to the complainant, Visa and MasterCard have not prevented their member firms or licensees from supplying payment card acceptance services to customers of theirs who openly support and cooperate with WikiLeaks.
- (VIII) If the card companies were to maintain that their refusal to supply DataCell is justified by the need to protect the image of their brands, then the complainant submits that such an explanation could not amount to or qualify as an objective justification. Failure by the payment card networks to operate any systematic scrutiny or control of which parties and entities benefit from the services of the payment card networks with the view of excluding them from direct or indirect access the networks were they to be found to engage in legally or morally questionable activities means that any reference to brand protection by the card companies when justifying their refusal cannot be deemed to be an objective justification. Due to the lack of transparency and absence of any data from the card networks as to the application of their rules (if they have at all) in order to protect their brands means that the burden of proving, that an exclusion of DataCell from it services on the grounds of brand protection does not constitute a discrimination on their behalf, rests with the card companies.
- (IX) Finally, the complainant notes that the refusal of the card networks to offer him acquiring services are not based on any efficiency arguments.

4. The Relevant Market(s)

4.1 The relevant product markets

We suggest that the relevant products markets may be defined as follows:

- (a) the upstream market for payment card network services, i.e. services provided by the operators of payment card networks such as Visa and MasterCard to various financial institutions.
- (b) the downstream market for acquiring services, i.e. services provided by financial institutions (acquiring firms) to merchants, enabling them to accept international payment cards.

(c) a 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 which enables businesses, NGOs, humanitarian organisations and others which do not have their own merchant account to accept payments by payment cards .

The complainant further suggests that the member firms and licensees of Visa and MC, Teller, Valitor and Borgun are competitors (or at least potential competitors) on this market. On its home page Teller describes its services *inter alia* in the following way:

“Merchant solutions: “Payment and information services that make it easier and more efficient for companies to accept payment for their products and services.” Secure exchange of payments between merchants and customers. Delivering solutions for shops and payment modules for Internet shops.” “Efficient exchange of payments across borders between Nordic countries”. “Additional services and services that can help streamline payment processes and provide merchants more payment options.”

“Nets is a leading supplier of merchant solutions in all Nordic markets. Our solutions meet the needs of all categories of merchants; from small shops to pan-Nordic enterprises and retail chains. Nets’ merchant solutions consist of a wide range of products and services, e.g. payment terminals, e-commerce modules for web shops, gift cards, loyalty cards and other value adding services which can be integrated with our customers’ business processes. Nets offers multi-channel solutions for optimized customer processes. Our customers have full flexibility in choosing financial acquirer (Our emphasis) (Nets is the paternal company of Teller and is a Principal Member of Visa Europe)

(d) a market for data hosting services, i.e. services ranging from the hosting of websites, physical and virtual servers to the operation of complete data centres. The complainant notes that Teller advertises: *“Products and services for acquirers: System solutions, data handling, terminal management, certificate and interchange management.”* Valitor simply advertises on its webpage: *“VALITOR has a powerful web software department which is able to tailor web solutions according to your needs”*

An increasingly important under-market or sub-market of data hosting services and data center operation services (rackspace etc) are such services but run on green and renewable energy resources. Cloud computing and operation of data and computer application systems for individuals and businesses has developed fast in the past few years and the demand for these services is growing rapidly. Data centres are, however, very energy demanding and their need for energy can be likened to that of heavy industry. At the same time their users (customers) are becoming more and more conscious of the environmental impact /carbon footprint left by the energy consumption of these centres and computer companies (See for instance the webpage www.rackspace.com, 2009 Rackspace Green Survey). Demand for data centres which run on “green energy” i.e. use renewable energy resources is therefore growing rapidly. Close to 100% of all electricity produced in Iceland comes from geothermal and hydropower resources. Switzerland ranks among the top scorers in this regard in Europe with approx. 60% of its energy coming from renewable sources. Two data centres are already operated in Iceland, VernGlobal (www.vernglobal.com) and Thor Data (www.thordc.com) Both are exclusively run on renewable energy resources and market

themselves as such marketing themselves based on Iceland's unique features (100% green energy and low cooling costs). The customers of data centres are individuals and businesses alike.

The complainant would like to point out that his renewable energy policy and business model coincides with the EU's commitment to reduce markedly the use of fossil fuels in Europe in the coming decade. From the website of DG Energy: *"In December 2008 EU leaders adopted a comprehensive package of measures to reduce the EU's contribution to global warming and ensure reliable and sufficient supplies of energy. The most far-reaching reform ever of European energy policy, the package aims to make Europe the world leader in renewable energy and low-carbon technologies."* The EFTA States are fully part of the internal market for energy in Europe.

4.2 The relevant geographical market

Visa Europe's license from Visa Inc. covers the territory of all the contracting parties to the EEA Agreement. The Complainant assumes that the license of MasterCard Europe covers the same territory. The Visa Europe and MasterCard Europe networks span therefore the whole of the EEA. These franchises control what undertakings are allowed to acquire payments made with cards issued by members of their respective networks/brands and under what terms and conditions. DataCell as a company engaged in offering and selling IT technology and services on line over the internet requires the kind of cross-border acquiring services for payment card transaction which the MasterCard Europe and Visa Europe control within the EEA. The acquiring services of Teller are available from all over Europe. (Teller advertises that it has clients in 20 countries). Valitor and Borgun as members of the MasterCard and Visa networks would, but for the refusal of Visa Europe and MasterCard Europe, be in a position to service DataCell both as concerns local acquiring and cross border acquiring of all the major payment card brands in use. EU/EEA regulations in the field of payment services and the SEPA framework separate the EU/EEA payment card market in various respects from the rest of the world. In the opinion of the complainant the relevant geographical in the case is therefore at least EEA wide.

5. The market position of Visa Europe and MasterCard Europe

Visa Europe's share of the payment card market is 67,6% in the Europe for the year 2010, measured as share of purchase value of transaction with general purpose payment cards. The market share of MasterCard was 27.7%¹ in this category. (Figures for the EEA are not available to the Complainant but there is no reason to believe that this figure is lower for the EEA than Europe). Visa's market share in Europe has been stable over the past 10 years at least. The same applies to MC. Visa has an ownership structure where all the major financial

¹ Source: The Nilson Report, June 2011

undertakings in Europe are shareholders, all shareholders are also issuers and/or acquirers of Visa card transactions. Other members are exclusively financial undertakings who are also licensed acquiring firms and/or issuers of cards. The interlocked and intertwined interest of all these parties (some 4000 of them) to the interests of the Visa payment card schemes contributes to a position of unassailable market dominance of Visa Europe throughout the EEA area.

MasterCard Europe is a subsidiary of MasterCard Inc USA. Licensees to issue payment cards and to acquirers of payment card transactions are within the MasterCard franchise exclusively granted to financial institutions. The Complainant suggests that the conditions under the antitrust rules for a finding of collective dominance are present in the case of Visa Europe and MasterCard Europe, i.e. on the relevant geographical market. The complainant submits that the concerted action undertaken by VISA and MasterCard to exclude DataCell from obtaining services within their respective payment card systems is further evidence of that Visa and MasterCard hold a position of collective market dominance on the market for payment card network services within the EEA. The market share of VISA is around 68%. MasterCard holds approx. 28% of the same market. This makes the two organisations collectively super-dominant with a combined market share around 95%. This combined market share of close to 100% means that the collective dominance of Visa and MC in Europe is one of super-dominance and with that comes the special responsibility not to distort competition on any market which is dependent on access to the respective payment card systems. If the Commission does not concur with the complainant that Visa Europe and MasterCard Europe are collectively dominant then the dominance falls to Visa Europe alone.

6. Infringements of Articles 101 and 102 of the Treaty and Articles 53(1) and 54 EEA

It is the complainants claim that VISA Europe and MasterCard Europe individually and together have violated the competition rules of the TFEU and the EEA.

6.1 Abuse of dominant position

There can be little doubt that VISA Europe and MasterCard Europe must be regarded as being collectively dominant on the market of payment card acceptance services in the EEA area (or failing that, that Visa is market dominant). The refusal by Teller, Valitor and Borgun to deal with DataCell is imputable to this dominant position of the card companies, Visa and MC. The Complainant submits that the orders directed to the three acquiring companies mentioned in the complaint whether that was done directly or indirectly by reference to the relevant provisions of the membership rules, constitute an abuse of dominance in the meaning of Article 102 TFEU and Art. 54 EEA . The abuses of the card franchises consist inter alia of:

imposing unfair trading conditions:

- (i) By applying their respective membership rules in such a way as to compel their licensees / members, Teller, Valitor and Borgun, to terminate their merchant agreements with DataCell (without any objective justification having been established) while other acquirers within their respective networks are allowed to service operators of gateways for payment card payments which are competitors or potential competitors of DataCell.
- (ii) By refusing to allow Teller, Valitor, Borgun and other acquirers of payment card transactions within their respective networks to enter into and maintain merchant agreements with DataCell due to DataCell's services to WikiLeaks and without being able to present any objective justification for such a refusal;

limiting production, markets and technical development to the prejudice of consumers:

- (i) By applying (and having in place) such provisions in their respective membership rules on which arbitrary, disproportional, unfair, unreasonable and discriminating decisions as concerns the operations of their member firms (in this case banks and other financial undertakings licensed to acquire payment card payments), may be based. Compliance forced under threat of revoking a license without the member in question having the right under the same rules to object to such decisions or having the option to have the reasonableness and justifiability of such actions tested before an impartial party;
- (ii) By excluding a new market entrant from establishing his business and getting a market foothold (DataCell) by refusing to allow their member firms to do business with DataCell and thereby depriving consumers and businesses and the customers of those businesses of services and as defined under points 4.1.c) and 4.1.d) above as well as distorting competition and thereby the development of important new markets and technologies to the detriment of consumers, inter alia reducing the choice of consumers;

discrimination of customers (applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage):

By refusing to supply DataCell (through Teller and other Visa members and MasterCard members), Visa Europe and MasterCard Europe are discriminating between customers and distorting competition in the downstream markets, cf. above. The discrimination of DataCell places the company at a serious competitive disadvantage *vis-à-vis* its competitors, amongst who are, to an increasing extent, acquiring firms like Teller and others who are all members of one or both of the two dominant payment card organisations. In fact, DataCell is not only prevented from supplying payment card processing services to WikiLeaks/Sunshine Press and

others who seek payment gateway services but is also effectively prevented from carrying out its core business, namely the provision of data center services, hosting services and software development services. The hosting and development services of DataCell are and can only be provided over the internet / on line to customers abroad and in practice it is close to impossible to carry out this kind of business if customers are not able to pay for the services rendered by means of an international payment card;

exploitation of super-dominance.

The complainant further submits that the by ordering and forcing Teller and Valitor to terminate the merchant agreements with the complainant without prior notice and without any breach of the contract having been established constitutes abuse in the meaning of Art 102(a) TFEU and Art 54(a) EEA due to the blatant unfairness and exploitative nature of the action.

6.2 Agreements or concerted practices restrictive of competition

The Complainant submits that by their conduct and actions as described above Visa Europe and MasterCard Europe have infringed Article 101(1) TFEU and Art. 54(1) EEA.

DataCell claims that the termination of the service under the merchant agreement as of 7 December 2007 and the subsequent de facto refusal to allow Teller and Korta to reactivate that agreement and to allow Valitor to maintain a merchant agreement with the complainant reflects the existence of one or more anti-competitive agreements, decisions by associations of undertakings or concerted practices by Visa Europe and MasterCard Europe as associations of undertakings which are contrary to Art. 101(1) TFEU and Art. 53(1) EEA. 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 then such provisions, in the opinion of the complainant, contravene said provisions of the TFEU and the EEA.

In fact, the identical and simultaneous application by Visa and MasterCard of their respective membership rules in order to prevent the complainant from obtaining payment card acceptance services not only reflect the existence of anti-competitive agreements or practices by each association but point also to the existence of a horizontal agreement or concerted practice between Visa Europe and MasterCard Europe.

The agreements, decisions or concerted practices in question have led to the foreclosure of DataCell from the markets it had operated on and where it intended to expand operations.

6.3 More on legal assessment

The refusal by Visa and MC to deal with the complainant is likely to remove him from the relevant downstream markets defined above. If the refusal will be allowed to continue it will certainly have serious adverse effect for DataCell as a viable competitor on the increasingly important market of computer hosting services and data center operations run on renewable energy resources. Such a consequence and such development would be contrary to the Community Interest as defined and set out by the European Parliament the Council and the Commission. As already mentioned the demand for services of the kind that DataCell offers which in Iceland are exclusively run on renewable energy resources can be identified as a sub-market of the general market of computer hosting services and data center operation services. Decreased competition in the market of “green” datacenter services will harm consumers, affect consumer welfare as well as reduce the choice of consumers.

As touched upon above under “objective justifications” the complainant notes that the card companies have not put forward any efficiency or other arguments related to the economics of their operations. That does however not mean that the aim of their actions is not to protect their market position in the acquiring market. It is clear that the development of payment gateway services which has been brought about by advance in computer, IT and digital technology will mean that the card companies will have fewer acquires and thereby lose revenue. In its member rules MasterCard under clause 7.2.2.2 defines a so called Type II third party processor as *“any TPP that the Corporation does not deem to be a Type I TPP. A II TPP must comply with the applicable Standards, including these MSP Rules.”* With a definition like that it is clear that the card companies can totally control and dictate who can participate on the acquiring market and on markets downstream thereof. The complainant submits that if a provision of this kind does not as such violate the competition rules, then its application in the case of the complainant under the circumstances of this case, must be deemed to be restrictive of competition in the meaning of Art 101(1) TFEU and, when applied by dominant undertakings, an abuse in the meaning of Art. 102 TFEU.

6.4 Causal link between the abuse and the competitive harm.

As mentioned above (relevant product market) DataCell offers services on two markets that are downstream of the acquiring service market and the payment card network market in the EEA. Access to the upstream market of acquiring services to merchants is indispensable to any company offering data centre and hosting services and any company offering payment gateway services over the internet. Visa Europe and MasterCard Europe through their by-laws and membership rules can apparently control and dictate with whom companies licensed to collect payment card transaction may do business with, without having to establish any objective justification for such actions. This they have done in the case of DataCell and by acting together in this respect Visa Europe and MasterCard Europe as jointly super-dominant undertakings on the market of payment card networks in the EEA

have abused that market position. It is evident from the facts as set out in this Complaint that the purpose of Visa and MC towards was to cut DataCell off from any acquiring services within their respective networks. The complainant submits therefore that there can be little doubt as to the causal link between the abuse and harm to competition that results from the abuse.

7. Effect on Trade between Member States

The Complainant submits the alleged infringements of the implicated undertakings affect trade within the internal market in the meaning of Articles 101 and 102 of the TFEU.

The infringements have prevented the Complainant as an undertaking incorporated and established in Iceland, from obtaining and maintaining a merchant agreement with Teller A/S, a company incorporated in Denmark, Valitor hf. and Borgun hf. and in fact with all undertakings within the EEA area which operate as Visa card and or MasterCard card transaction acquires under licence agreements with these networks.

The by-laws and membership regulations of Visa Europe and MasterCard Europe, the application of which have in this case resulted in the foreclosure of DataCell from the relevant markets, with the consequential harm to consumers, within the EEA area, extend to and are enforced on all membership companies of these organisations.

The abusive conduct and the competition restrictive actions by Visa and MC above have also prevented DataCell from selling its services throughout the world, (and hence the EEA area). By their actions Visa Europe and MasterCard Europe have disrupted the normal pattern of trade within the internal market, the EEA area, not only as concerns the services offered by the complainant but also as regards the services and operations which Visa Europe, MasterCard Europe and their member organisations engage in.

8. Legitimate Interest

The alleged infringements of the competition rules of the Treaty on the Functioning of the European Union and of the EEA Agreement set out in this complaint concern the complainant directly and his operations. He has therefore a legitimate interest in bringing this matter before the Commission.

9. Jurisdiction as concerns the application of Articles 53 and 54 EEA

The Complainant addresses this complaint to the European Commission (and not the EFTA Surveillance Authority) by reference to Article 56 of the EEA Agreement. As concerns the

allege infringements of Article 53 of the EEA agreement then there can be little doubt that the turnover of Visa Europe and MasterCard within the territory of the EFTA States does not reach 33% of total EEA turnover of these undertakings. As concerns the application of Article 54 EEA then the market dominance of Visa and MC related to a geographical market defined as comprising the whole of the EEA and thereby both the territories of the EFTA States and Member States of the EU.

10. Actions which the Complainant urges DG IV to take in respect of the alleged infringements:

10.1 Request for interim measures

Article 8 of Regulation 1/2003 stipulates that “In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures. The complainant submits that in the view of the facts as set out above, the market position of Visa Europe and MasterCard, the market power the respective organisations wield, individually and collectively, that the complainant has established that there is a prima facie case for that Visa Europe (and MasterCard as collectively dominant with Visa) has infringed Article 102 of the Treaty as well as Article 101(1) of the Treaty through their machinations and the corresponding provisions of the EEA Agreement. The complainant further submits that the infringements “are causing serious and irreparable damage to [it] and which is intolerable for the public interest” considering the blatant abuse of market power the Visa (and MasterCard) are guilty of as the facts of this case show. The complainant therefore urges the European Commission to order Visa Europe and MasterCard Europe to lift their ban on entering into and maintaining merchant agreements with DataCell.

10.2. In addition, and independently of whether the European Commission deems that the conditions for ordering interim measures in this case are fulfilled, the complainant expects the Directorate General for Competition to investigate the alleged infringements and to confirm that Visa Europe and MasterCard Europe have by their conduct as described above, infringed the provisions of the Treaty on the Functioning of the European Union as well as the corresponding provisions of the EEA Agreement referred to above and to apply appropriate fines for these infringements.

10.3. In the event that the Commission does not agree with the complainant that the facts as set out above implicate MasterCard as participating in the conduct alleged to be contrary to Articles 101 and 102 of the Treaty and/or does not deem MasterCard Europe to be collectively dominant with Visa Europe on the respective market(s), then the complainant submits that facts as set out above and the market position of Visa Europe as individually market dominant justifies a recourse to the interim measure requested above and/or the appropriate investigation and a finding of abuse of market dominance.

11. Final remarks

There can be little doubt that market power that Visa Europe and MasterCard Europe wield on the European market is an overwhelming one, both on terms of market shares, economic power and the controlling reign they hold over their member firms and licensees. With such power comes the special responsibility not to distort competition by their actions and conduct. The activities of Visa and MC comprise all of Europe and as such they affect the pattern of competition, not only at the network level and on the relevant downstream markets but throughout all markets which depend on payment card services including that of our client. An arbitrary decision taken by Visa and MC whereby a firm is excluded in a discriminatory manner from competing and operating on an important IT and ICT market, which at the same time is capable of distorting the effective application of renewable energy resources within an territory of the EEA Agreement does, in the opinion of the complainant, justify and even make an intervention by the EU Commission necessary in this case.

While the advances in IT and ICT technology and the free flow of information which these advances have made possible and which in turn has led to better democratic procedures and increased transparency all over the world, only a handful, probably only two or three, international organizations which control, the payment card systems, hold the key to the utilization of the IT and ICT technologies as business tools and as platforms for new services and products. These organizations can therefore dictate who can do business over the internet /the World Wide Web. With that comes great responsibility which in the opinion of the complainant, Visa and MC have abused in his case.

12. No proceedings before national competition authorities or national courts

The complainant has neither formally nor informally approached any national competition authorities nor has he initiated legal proceedings in connection to the alleged infringements of antitrust rules. If such action were to be undertaken by the complainant he will immediately advise the Commission thereof.

The undersigned hereby declares that the information given in this form and in the Annexes thereto is given entirely in good faith.

Reykjavík, July 12th 2011

On behalf of DataCell ehf.

Sveinn Andri Sveinsson,

Attorney to the Supreme Court of Iceland

Powers of Attorney are enclosed as well as attachments as listed in a document accompanying this complaint.