

DataCell press release:

DataCell files a complaint with the European Commission

14 Jul 2011

The closure by Visa and MasterCard of DataCell's access to the payment card networks in order to stop donations to WikiLeaks violates the competition rules of the European Community.

Earlier this week DataCell Ltd in Iceland has filed a complaint against the international card companies, Visa Europe and MasterCard Europe, for infringement of the antitrust rules of the EU.

DataCell operates a datacenter in Iceland and offers hosting and computer application services to individuals and businesses all over the world. The location of a datacenter in Iceland means that it is entirely powered by renewable energy resources. Due to the huge energy demand of datacenters the source of their energy plays an increasingly important role when individuals and businesses choose data hosting services.

It can be said that responsibility to our surroundings, politically, socially and environmentally, brought WikiLeaks to DataCell. DataCell offered payment gateway services to WikiLeaks through DataCell's merchant account with a licensee of Visa and MasterCard in Denmark and through this gateway DataCell received donations for WikiLeaks. In December 2010, after only 7 weeks of operation the Danish licensee terminated its order of the card companies, and thereby the gateway for donations to WikiLeaks was closed.

WikiLeaks is not a business organisation, but DataCell is. Together VISA and MasterCard have over 96 % of the payment card market in Europe and when these organizations deny businesses which rely on selling their services online, access to their networks they contravene the antitrust rules of the European Union, both as regards the ban on restrictive business practices and the one that prohibits the abuse of market dominance:

Article 101(1) of the Treaty on the Functioning of the European Union states:

“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- a. directly or indirectly fix purchase or selling prices or any other trading conditions;
- b. limit or control production, markets, technical development, or investment;
- c. share markets or sources of supply;

- d. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- e. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

Article 102 of the Treaty reads:

“The abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it as incompatible with the internal market insofar as it may affect trade between Member States shall be prohibited.“ Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

In its complaint to the Commission DataCell stresses that the card companies have not come up with any objective justification for their refusal to do business with DataCell.

DataCell points out in particular:

- i. The provision of payment gateway services whereby the holder of a merchant account uses it to accept donations or payments on behalf of businesses or non-profit organisations which do not have their own merchant account is an accepted and a normal business practice.
- ii. When DataCell applied for a merchant agreement with members of the payment card networks in Iceland the Central Bank of Iceland cleared the application without any reservation. Before, the Danish licensee had found DataCell’s operation to be wholly compliant with Icelandic law. (Being a member of the EEA, Iceland’s law in the field of payment services have to comply with EU law).
- iii. Neither WikiLeaks nor any of their spokesmen or any who have taken part in preparing or processing whistle blowing material on behalf of Wikileaks, have been indicted, prosecuted or summoned for breach of any civil law, any criminal law provisions or violations of ”ordre public” in any EEA country.
- iv. As concerns jurisdictions outside the EEA, neither WikiLeaks nor any of their spokesmen or any who have taken part in preparing or processing whistle blowing material on behalf of WikiLeaks have been subject to official indictments, prosecutions, judgements or summons for breach of any civil law, any criminal law provisions or violations of ”ordre public”.

The above is a summary.

European Commission

Overview of EC Antitrust provisions

http://ec.europa.eu/competition/antitrust/overview_en.html

Covers two prohibition rules set out in the *Treaty on the Functioning of the European Union*

- 1) **Article 101** First, agreements between two or more firms which restrict competition are prohibited by Article 101 of the Treaty, subject to some limited exceptions. This provision covers a wide variety of behaviours. The most obvious example of illegal conduct infringing Article 101 is a cartel between competitors (which may involve price-fixing or market sharing); For more information on cartels see the cartels section.

- 2) **Article 102** Second, firms in a dominant position may not abuse that position (Article 102 of the Treaty). This is for example the case for predatory pricing aiming at eliminating competitors from the market.

All national competition authorities are empowered to apply fully the provisions of the Treaty in order to ensure that competition is not distorted or restricted. National courts may also apply these prohibitions so as to protect the individual rights conferred to citizens by the Treaty.