

### The Belgian Competition Authority issues a decision following the first application of its unique settlement procedure in article 102 cases (Stanleybet / Nationale Loterij)

**Belgium, Unilateral practices, Abuse of dominance, Settlement, Access to information, Services**

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#### I. The Parties

Nationale Loterij NV ('NL') was founded in 1934 and organises public lotteries in Belgium ever since. [1] NL holds a legal monopoly on this market [2]. In addition, NL competes with other companies on the Belgian sports betting market.

Stanleybet Belgium NV, Stanley International Betting Ltd., Savegas S.A., World Football Association S.P.R.L and Samenwerkende Nevenmaatschappij Belgische PMU S.C.R.L. ('Stanleybet *et al.*') are NL's competitors on the Belgian sports betting market.

#### II. The Facts

From 2013 onwards NL extended its gambling services to sports betting under the name *Scoore!*. NL distributes *Scoore!* via physical channels, such as press shops (offline) and digital channels (online). Soon after the launch of *Scoore!*, Stanleybet *et al.* lodged a complaint with the Belgian Competition Authority ('BCA') with regard to NL's actions during the launch of *Scoore!*. In two decisions - rendered on the same day - the BCA dismissed most of the complaints, except two (regarding the cross-use of customers' data and a survey concerning its competitors; see *infra*). NL settled for 1,190,000 EUR. This was the BCA's first application of the Belgian settlement procedure for an abuse of dominance, a procedure that does not exist on EU level.

#### III. The Decisions

**Relevant markets.** The BCA finds that two distinct markets have to be taken into account. Firstly, the market of public lotteries in Belgium, which is considered as 'a market on its own.' [3] As NL

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holds a legal monopoly on this market it is considered to have a dominant position. Secondly, the Belgian sports betting market is scrutinized. A distinction is made between the physical and the non-physical distribution of sports betting [4]. With regard to the former a sub-distinction is made between the distribution of sports betting via betting offices and distribution via press shops. The BCA concludes that NL's allegedly abusive conduct is related to the offer of sports betting via physical distributors. However, a formal market definition is not given by the BCA with regards to the offer of sports betting.

**A dominant position and a neighbouring market.** As a preliminary point, the BCA holds that it is not forbidden for an undertaking holding a monopoly on one market to expand its business to other activities. However, the BCA warns that such a diversification must be scrutinized thoroughly as the incumbent undertaking (*in casu* NL) could use advantages obtained under its legal monopoly (*in casu* on the market for public lotteries) to enter a competitive market (*in casu* the sports betting market) under more favourable conditions than its competitors. With a rather general reference to *TeliaSonera* [5] the BCA considers that Article 102 TFEU [6] can be applied in specific circumstances to such a case and that it is able to sanction conduct on a non-dominated market that is neighbouring a dominated one, when this conduct has effects on the non-dominated market.

**Complaint.** Stanleybet et al. complained about several actions undertaken by NL in support of the launch of *Scoore!*. We will limit ourselves to the discussion of the most interesting allegations [7].

**The cross-use of distributors' data.** It was argued that NL, while entering the sports betting market, cross-used data which it obtained in the context of its legal monopoly. Firstly, NL invited some of the best-selling press shops in order to present *Scoore!* to them. The complainants argued that the selection of those shops was made by using data NL obtained in the context of its legal monopoly. The BCA dismissed this complaint.

The BCA acknowledges that this selection was made on the basis of non-public information (the average weekly turnover of lottery products), but held (i) that without the use of these data NL would presumably have invited all press shops. Next to that, (ii) the BCA holds that the *use of non-public data by a dominant undertaking* may constitute an abuse only when (ii.a) the data is obtained outside the context of competition on the merits; and (ii.b) when these data is non-reproducible by competitors against reasonable financial conditions and within a reasonable period. The BCA holds that condition ii.b is not fulfilled and as a consequence that no abuse is present. Competitors could use other criteria (such as the location of the press shops) to make an equivalent selection of press shops, against reasonable financial conditions and within a reasonable period.

**The cross-use of customers' data.** The BCA came to a different conclusion regarding the second type of conduct that is criticised by Stanleybet *et al.* NL sent, prior to the launch of *Scoore!*, a single personalised e-mail to many of its lottery customers, whose personal data was stored in an Interactive Gaming System database ('the IGS database'), in order to promote *Scoore!* [8]. The BCA applied the same test as described above. It held that the IGS database was (i) obtained in the context of a monopoly and (ii) that it is non-reproducible by competitors against reasonable financial conditions and within a reasonable period, taking into account the nature and the scope of the database.

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In the eyes of the BCA such a practice may constitute an abuse of dominance when it has a competition distorting effect on the market. The demonstration of a *potential* competition distorting effect, by which competitors that are as-efficient could be foreclosed is sufficient. The BCA concludes that such potential effect is present. It holds that even though NL only has a market share of 15-20% on the sports betting market one year after *Scooore!*'s launch, this finding should be put in perspective as various other sports betting license holders have even smaller market shares. It holds that as those smaller undertakings do not have the same brand awareness, nor the same financial means as NL [9], there is a risk of market foreclosure or marginalisation of those undertakings, or at least the competition between NL and its competitors could be distorted on the sports betting market.

**Cross-subsidisation.** The complainants held that NL cross-subsidized and used tangible means (promo material, *etc.*) and intangible means (use of the same platform for lotteries and sports betting, *etc.*) stemming from its monopoly activity to promote *Scooore!*. The BCA refers to the Court of First Instance's *UFEX* judgment and the Commission's Guidelines on art. 102 TFEU [10] to hold that cross-subsidisation is not abusive as such. Only when cross-subsidies are used to apply predatory prices in the non-dominated market or when commercial practices are applied that lead to a sustainable distortion of that market, which wouldn't have occurred without the subsidies, an abuse is present. The BCA holds that NL has separate accounts for both the public lotteries and the sports betting activities, while reserving a considerable compensation for the use of some means stemming from its monopoly activities. It also hints towards the absence of predatory pricing. Therefore, the BCA judged that it is unlikely to find an abuse. The BCA decided not to perform an in-depth investigation.

**NL's survey concerning its competitors.** In 2011 NL organised a survey among its physical distributors in an attempt to observe the sports betting market conditions. Turnover figures and commission fees of sports betting organisers were demanded (not all requests were answered). After the launch of *Scooore!* additional requests were sent on an occasional basis. The BCA holds that by obtaining this information NL had decreased the uncertainty about its competitors conduct and therefore potentially distorted competition. The BCA also notes that it cannot be excluded that absent the gathering of this sensitive information NL might have offered its products on better terms. Consequently, this conduct is qualified as an abuse of dominance.

#### IV. Comments

The decisions are interesting as they deal with the question by which means a legal monopolist is allowed to expand its activities into competitive neighbouring markets.

It is notable that, on the one hand, NL is allowed to cross-use data it has on its *distributors* (public lottery turnover), as its competitors have the possibility to use other criteria to obtain an equivalent result. While, on the other hand, it is not allowed to cross-use the database it has on *customers*, as this database is considered not to be reasonably reproducible by its competitors. One can question this finding and wonder which concrete benchmark was applied to come to this conclusion.

We are looking forward to subsequent cases following on this decision. Especially regarding the use of (big) data by dominant firms as some questions still remain unanswered. A key question will be whether the BCA considers the mere cross-use of databases - obtained outside the context of

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competition on the merits (which is on itself a vague concept) - by a dominant undertaking as abusive if an as efficient competitor cannot reproduce the concerned database against reasonable financial conditions and in a reasonable time (unclear practical implementation of this benchmark)? Or does it consider only the cross-use of *legal* monopolistic databases to be abusive?

[1] NL distributes, for example, the products *Euromillions* and *Lotto* in Belgium.

[2] In exchange for this monopoly NL pays an annual 'monopoly rent' to the Belgian State. An agreement concerning the activities and the tasks of NL is closed every five years between NL and the Belgian State.

[3] Reference is made to Decision n° 00-D-50 (5 March 2001) of the French Competition Authority which states: "*pure games of chance that are offered on the public lotteries market are not substitutable with partially controllable games of chance (like horse betting), nor with pure games of chance offered in casino's, as these have a limited geographical availability*" (adaptation and translation by the author).

[4] The BCA elaborates on the difference between physical distribution and non-physical distribution (internet based distribution). It states that the "*presentation of the possible bets, the navigation and the interactivity offered by the internet enables players to choose faster and easier the events and the type of betting game on which they want to make bets*" (translation by the author.) Another difference is that internet based bets can be made 24/7 whereas bets made in a physical distribution center depend on the opening hours of the these facilities. A sociological component is also briefly discussed: online bets are mainly placed by younger players, who are mostly men and which mostly have an urban profile.

[5] CJEU, 17 February 2011, Case C-52/09, *TeliaSoneira Sverige*, para. 85-86.

[6] Art. IV.2 of the Belgian Code of Economic Law is equivalent to art. 102 TFEU.

[7] Apart from the ones we'll discuss, it is *inter alia* argued that NL needlessly held two sports betting licenses, thereby foreclosing a potential new competitor, as the Belgian legislation provides for a quatum of 34 sports betting licenses that may be granted (dismissed). It was also argued, under art. 101 TFEU / art. IV.1§1 of the Belgian Code of Economic Law that NL encouraged press shops to close agreements with NL containing exclusivity and non-compete clauses (dismissed). In addition, *Stanleybet et al.* complained about the fact that NL used its brand awareness and image (gained in the context of its legal monopoly) to support the launch and marketing of *Scoore!* on the competitive sports betting market (dismissed - complainants were already present on the Belgian sports betting market for a long time, with increasing success, and well-known themselves).

[8] The e-mail was sent to persons with a subscription on the NL's newsletter (due to technical problems not all persons were reached). The database contains names, addresses, date of birth, sex, ... For some customers even information regarding the amount of money put on their gambling account, the type of gambling games played, the playing habits *etc.*

[9] The BCA uses the odd wording 'NL or other big international players' - so this other big international players would not be foreclosed?.

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[10] Court of First Instance, 7 June 2006, Case T-613/97, *Union française de l'express (UFEX), DHL International SA, Federal express international (France) SNC and CRIE SA v Commission*; Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45 of 24.2.2009, 7.

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