

**Racing's response to the Horserace Betting Levy  
Board's Consultation paper on betting exchanges**

**September 2010**

## 1. INTRODUCTION

1.1. This paper sets out our analysis of the questions raised by the Levy Board's consultation of 6 July 2010 ("the Consultation"). In this paper we do not repeat the legislative context which is set out in the Consultation and have used the same definitions and terminology adopted by the Levy Board.

1.2. Our conclusions are as follows.

### **49<sup>th</sup> and earlier schemes**

- (a) That there is likely to be a significant group of customers of exchanges who are, as a matter of current law, liable to pay levy but who are not doing so.
- (b) The levy revenue which is due from these customers but has not been collected is potentially substantial.
- (c) The Levy Board may recover the potential levy liability by identifying those customers through obtaining disclosure orders from the Court against the exchanges requiring the requisite information to be provided to the Levy Board and then proceeding against those customers.

### **50<sup>th</sup> and subsequent schemes**

Future levy schemes can be amended to make the exchanges liable for the levy due from their customers in addition to their own primary levy liability.

## 2. SUMMARY

2.1. This submission is divided into the following sections.

- (a) Section 3 considers whether there are betting exchange users who are leviable bookmakers and concludes that, whilst this is a matter of evidence, it is very likely that there are.
- (b) Section 4 considers a number of issues which have been raised in respect of users on betting exchanges paying levy. These are (i) whether such users should be or should have been licensed; (ii) the relevance of the Treasury review in 2005; (iii) the implications of the *Sporting Options* case; (iv) if users of betting exchanges are liable to levy, whether the betting exchanges themselves can also be liable to pay levy; and (v) whether betting exchanges will move offshore if some of their users are required to pay levy. The conclusion in each case is that there is no reason why exchange users cannot be liable for levy.

- (c) Section 5 provides an analysis of the likely revenue available from seeking to pursue exchange users in this way.
- (d) Section 6 sets out a practical way forward under current levy arrangements for the Levy Board to seek to recover levy from exchange users, if necessary, disclosure of information from the exchanges, actions against the users and enforcement where required against funds held by the exchanges.
- (e) Section 7 sets out proposals for amending future levy schemes to facilitate the recovery from exchanges of levy in respect of the profits made by exchange users
- (f) The Annex contains our detailed comments on the arguments made in Section J of the Consultation.

### **3. ARE THERE BETTING EXCHANGE USERS WHO ARE LEVIABLE BOOKMAKERS?**

- 3.1. As the Consultation sets out, the Levy Board has a duty to assess and collect monetary contributions from bookmakers and "bookmaker" is defined in section 55 of the Betting, Gaming and Lotteries Act 1963 ("the 1963 Act").
- 3.2. As paragraph 32 of the Consultation indicates, the critical issues to consider are:-
  - (a) whether betting exchange customers are "receiving or negotiating" bets; and, if so,
  - (b) whether they are doing so as part of a "business"<sup>1</sup>.
- 3.3. If a betting exchange customer is a "bookmaker" then he will be liable to pay Levy, in accordance with the applicable Levy Scheme in relation to that part of his business which relates to "the effecting of betting transactions on horse races"<sup>2</sup>.
- 3.4. We consider each of the issues identified at paragraph 3.2 in turn. In doing so, we have postulated a particular hypothetical user who would, for the reasons stated below, be likely to fall at the extreme end of the spectrum of exchange activity and our analysis sets out to demonstrate that such a user would be carrying on a business of receiving or negotiating bets (and so be a "bookmaker" for levy purposes). Clearly, a user at the other end of the spectrum of exchange activities would not be carrying on such a business and so would not be liable to pay the levy. This paper does not seek to identify the level of exchange activity at which a liability to pay levy arises, i.e. the threshold of activity, above which, one might argue that a user is in business. This is something which can be determined only by a court in light of all the factual considerations.
- 3.5. The hypothetical user considered in this report makes a living from gambling by adopting techniques, which may include:

---

<sup>1</sup> Section 55 (1) of the 1963 Act

<sup>2</sup> Section 27(2)(a) of the 1963 Act

- (a) trading (namely, exploiting movements in the odds on an exchange – e.g. placing a "back" bet and then placing a related "lay" bet once the odds have shortened, or vice versa);
- (b) arbitrage (namely, "locking in" a profit by exploiting differences in odds on different platforms – e.g. placing a "back" bet with a high street bookmaker at particular odds and, simultaneously, placing a related "lay" bet on an exchange at shorter odds);
- (c) utilising "bots" (being software that exposes arbitraging opportunities, predicts movements in markets and uses other automated processes to enable a user to identify, and take, profit-making opportunities which may exist only for a short duration); and
- (d) being "shrewd" (similar to a "traditional" professional gambler, who studies form and seeks inside, or otherwise valuable, information which is not yet widely known so as to be able to identify mispricing of odds and/or value in the gambling markets generally),

which are used systematically to increase the user's chances of turning a profit. Our hypothetical user may use betting exchanges in conjunction with other betting products or platforms (e.g. traditional fixed odds bookmakers and/or sports spread betting operators), but the betting exchange will be the platform he uses the most. Furthermore, it will probably be the only platform through which he can place the "lay" bets required to effect techniques such as trading and arbitrage. We assume his betting exchange of choice is likely to be Betfair because of its liquidity and market share. This user will place "back" and "lay" bets via Betfair's platform with such frequency that he is likely to be liable to pay a transaction charge<sup>3</sup> (which is applicable to users placing or editing more than 1,000 bets per hour) and, for these reasons, our user is described in this report as a "high volume and profitable user" or "HVPU".

### ***Are betting exchange users "receiving or negotiating" bets?***

- 3.6. There is no specific guidance in the legislation or relevant case law which provides further explanation or guidance as to the meaning of "receiving or negotiating bets". They were words formulated in a different era when the only significant form of gambling on horse racing was with traditional bookmakers.
- 3.7. However, there is no reason to believe that the legislator was seeking to restrict the application of levy by these terms. They applied to all recognisable bookmakers extant at the time. The limiting factor in respect of the application of levy was whether the person was undertaking the betting activity in the course of business. For these reasons, the terms "receiving or negotiating" should be given a purposive and broad meaning to address the

---

<sup>3</sup> In addition to Betfair's commission (charged to all users and at reduced rates for frequent users) and possibly Betfair's data request charge (for users making more than 20 data requests per second) and/or Betfair's premium charge (for users whose account is in profit, have incurred total Betfair charges of less than 20% of gross profits and bet in more than 250 markets). See <http://sports.betfair.com/aboutUs/Betfair.Charges>

change in technology and business practices and should effectively mean simply "entering into" bets.

- 3.8. Thus all customers on an exchange (and indeed all punters using traditional bookmakers) would be "receiving or negotiating" bets for the purposes of this provision. Of course, that does not mean that they should all be considered to be bookmakers because they will not all be doing so in the course of business.
- 3.9. If, however, a more analytical approach is required, we would say as follows.

### **Receiving bets**

- 3.10. "Receiving bets" would seem likely to include a user who assumes the role that a bookmaker would traditionally assume, i.e. in offering "lay" bets and so accepting "back" bets placed by another. In this regard, notwithstanding that bets placed via the exchange are done so anonymously, the user will be acting as principal; since it will be the user who will have the liability to pay out should the back bet placed with him prove to be a winning bet.
- 3.11. That said, the Betfair model blurs the lines between the traditional activities of placing "stakes" and "receiving" bets as bookmaker. Both "backers" and "layers" deposit money with Betfair's trust company (The Sporting Exchange (Clients) Limited) and, if successful, might be said to receive winnings or, alternatively, the counterparty's stake. As a result, both "back" bets and "lay" bets are arguably "received". (Indeed, Betfair would seem to agree with this as they have stated<sup>4</sup> *"in reality, backing and laying are entirely interchangeable, and it's just a question of how good you are at maths. Laying on Betfair is betting an outcome will not happen, and layers enjoy no advantage over backers; and most Betfair customers make both back and lay bets."*)
- 3.12. Another way of analysing the question might be to say that a bet (being a bundle of contractual rights and obligations) is "received" by each of the counterparties to the bet since each receives from the other contractual rights (i.e. the right to be paid winnings or retain the stake) and obligations (i.e. the obligation to relinquish the stake or pay out winnings). As such, both parties to a bet made via an exchange can be seen to "receive" the bet from the other. Note that the terminology used for determining a bookmaker (i.e. the use of the word "receipt") is different from the terminology used (for both levy and duty purposes) when identifying a "backer" or a "layer"; in the latter case the terminology used is bets placed "with" or placed "by" a person (see sections 2 and 5 Betting and Gaming Duties Act 1981 and the definition of "Gross Profit" in the 49<sup>th</sup> Scheme). This would suggest that the draftsman was not seeking to distinguish between back and lay bets for the purposes of defining who is, and is not, a "bookmaker" (for both levy and duty purposes).
- 3.13. For these purposes, however, (i.e. an HVPU who places lay bets via an exchange) on the assumption that, in all cases, someone has to "receive" the bet (there needs, of course, to

---

<sup>4</sup> "Everything you thought you knew about the Levy and perhaps a few things you didn't" (<http://corporate.betfair.com/everything-you-thought-you-knew-about-the-levy-and-perhaps-a-few-things-you-didnt.pdf>)

have been both an "offer" and "acceptance" for a binding contract to have been created) and that it cannot be said that neither "backers" nor "layers" receive bets (note that, as set out in Betfair's terms and conditions, which are referred to below, Betfair does not receive bets as principal), any user who places a "lay" bet on an exchange as part of a "business" carried on by him (see below), would seem likely to fall within the 1963 Act definition of "bookmaker" on the basis that he is "receiving" bets (as, arguably, would a user placing a "back" bet for the reasons given above).

- 3.14. It should be noted that Betfair is a neutral party in this respect, since (whether or not it acts as the agent of its customers for these purposes), it does not, in these circumstances, receive bets as principal and so at least one of its customers (if not both) must "receive" each bet placed via the exchange. In this regard, note the following extracts from Betfair's terms and conditions<sup>5</sup> as they apply to "UK Registered Customers":

*"Subject to Clause 6.14, we do not accept bets ourselves, but we provide our customers with an automated facility for the placing of bets with each other."*

*"6.2 You agree to appoint the Company as your agent: (i) for the communication of your orders for bets; and (ii) for receipt of communications of acceptance of your orders for bets. To the extent that you use the Telephone Betting Service, you agree to appoint the Telephone Operator as your agent for the communication of your orders for bets with us."*

*"6.4 Subject to Clause 6.14 you do not bet with the Company, but only with other customers who use our service. You offer to bet at the Odds or Price you select or at better Odds or a better Price, which may be higher or lower, depending on whether you are Backing, Laying, Selling or Buying an outcome, without increasing your exposure, if that is to your advantage."*

*"6.5 An offer for a bet that you make on Betfair remains open for acceptance by any of our customers (unless properly cancelled by you in accordance with Clause 8 below). You may not nominate individuals to be counterparties to any of your offers for bets."*

### **Negotiating bets**

- 3.15. "Negotiating bets" might include a user who negotiates the odds and/or other terms of a bet which is placed either with or by him. The term "negotiating" could, therefore, apply to both "back" and "lay" bets.
- 3.16. This then begs the question as to whether or not an exchange customer actually "negotiates" the odds and/or other terms of bets (whether "back" or "lay" bets) placed via the exchange.
- 3.17. An exchange allows users wishing to place "back" or "lay" bets to choose the odds or price at which they wish to place their bets and the amount they wish to stake, subject to them having a sufficient "available to bet" balance with the exchange and subject to them not

---

<sup>5</sup> Extract taken from Betfair's terms and conditions as posted on [www.betfair.com](http://www.betfair.com) in January 2010. (Note that the current version of Betfair's terms and conditions, posted in July 2010, has deleted all the provisions we have quoted).

exceeding the exposure limit on their account. A user can cancel any bet offered until such time as that bet has been matched by a counterparty. This is, however, the limit of a user's ability to dictate the terms of the betting contract to be entered into, with the rest of the terms of each bet being prescribed in the exchange's terms and conditions in accordance with which all users' bets are struck.

- 3.18. As such, any "negotiation" which a user is able to enter into would seem to be limited to the odds offered and the amount staked. That said these two elements are the fundamental terms of a bet.
- 3.19. Where a user wishes to place, say, a "back" bet of £10 at 10.0, if someone has already offered an unmatched "lay" bet at the same odds and of at least the same amount, the "back" bet will be matched immediately and become binding. In those circumstances, one might consider little or no negotiation to have taken place.
- 3.20. Looking at the same bet from the perspective of the user offering the "lay" bet, however, one might reach a different conclusion. Assume that the user has offered lay bets of up to £1,000 at 9.0 earlier that day but only £600 has been matched with "backers" and, due to the odds moving, there seems little chance that the remaining £400 will be matched. Assume further that the user has previously placed bets elsewhere (whether or not via the exchange), such that he knows that he can "lay" £1,000 at 10.0 or less on the event in question and still make an overall profit<sup>6</sup>. As a result, he now cancels the 9.0 "lay" bet offer for the unmatched £400 and reposts his "lay" bet offer at 10.0. This "lay" bet offer is then matched by users wishing to place "back" bets at 10.0 (including the user first referred to in this example).
- 3.21. In the circumstances of the above example, could the user be said to have "negotiated" a bet? On the assumption that a High Street or racecourse bookmaker, in offering lay bets, could be said to be "negotiating" bets, the user would also seem to be negotiating bets. The user has initially offered odds, withdrawn those odds and re-offered different odds (as a High Street or racecourse bookmaker might do) and has set a limit as to how much any user wishing to place a "back" bet at the offered odds can stake (again, as the traditional bookmaker might do). Whilst, in contractual terms, the exchange user is making a series of "offers" via the exchange which are accepted when matched rather than "haggling" over the terms of each bet on a piecemeal basis, this process could still properly be described as a "negotiation".

---

<sup>6</sup> For a good explanation of successful trading techniques that can be adopted on an exchange, see Peter Webb's Racing Ahead article of August 2005 (entitled "Who needs a form book?") which can be accessed at <http://www.betangel.com/training/050801%20-%20Racing%20Ahead.pdf>. See also the series of articles by Peter Webb and others published in the Racing Post on 22 May, 26 June and 31 July.

### ***Are betting exchange users carrying on a business?***

- 3.22. The question of whether exchange users could be held to be carrying on a business for the purposes of the 1963 Act is a question of law and fact. We would not of course, contend that all users are carrying on a business. However, we would contend that there are likely to be HVPUs who would be held to be carrying on a business.

### ***The legal question***

- 3.23. Under section 55 of the 1963 Act, a person entering into bets is a "bookmaker" and thus can be subjected to levy only if:

*"he carries on, whether occasionally or regularly, the business of receiving or negotiating bets or conducting pool betting operations".*

- 3.24. It should be noted at the outset that a person may be held to be a "bookmaker" under the 1963 Act even if he carries on the business only "occasionally". This suggests that the test for carrying on a business is not a particularly high one and does not require a concerted or continuous practice before the test is met.
- 3.25. More generally, in order to answer the question of whether a betting exchange user is carrying on a "business" one has to consider the related case law, much of which has considered this question for tax-related purposes. Before embarking on such an analysis, an important distinction needs to be made: namely, the difference between carrying on a "trade" and carrying on a "business". These two words are not synonymous. A trade will always be a business; however the reverse is not always true.
- 3.26. Part of the importance in this distinction lies in the fact that it is well established that, for UK tax purposes, the winnings of a gambler (being a "punter" rather than a "bookmaker") are, in the majority of circumstances, not subject to UK tax.
- 3.27. Winnings are not subject to UK capital gains tax due to an express statutory exemption. Winnings are not subject to income tax, however, due to the courts finding that gamblers, even professional gamblers, do not, in isolation, carry on a "trade" of gambling. The leading case on this question is *Graham v Green* which was decided in 1925.
- 3.28. Professional gamblers (such as the taxpayer in *Graham v Green*, whose sole means of livelihood was betting on horses) were found by Rowlatt J not to be trading. He distinguished between gambling activities which might be described as "habitual" and "systematic" and activities which could be described as a "trade, adventure, profession or vocation".
- 3.29. The most telling comments in the judgement of Rowlatt J, however, include the observation that, were a gambler found to be trading, then income tax relief would have to be afforded to him in respect of his gambling losses which would give the "remarkable" result of making "the State a partner in his gambling".

- 3.30. There are, of course, far more (tax exempt) losing punters than there are (tax exempt) winning punters (the most successful winners being, of course, the bookmakers, who do pay tax on their profits). This is a significant factor in explaining why, notwithstanding the huge technology-powered leap forward in punters' betting activities since 1925, HMRC remains loath to re-open the question as to whether or not full-time gamblers who make their living from such activity may be operating a trade. When one considers that the same income tax principles apply to "day traders" (who pay capital gains tax on their profits rather than income tax), HMRC's concerns to retain the status quo come into even sharper focus. Note that these concerns of HMRC are very clearly articulated in the Freedom of Information Act papers referred to in paragraph 87 of the Consultation and quoted in paragraphs 4.7-4.23 below.
- 3.31. Whether or not a court today, perhaps unconcerned by the potential ramifications of having to afford losing gamblers income tax relief, would find a sophisticated internet-based professional gambler to be trading is an interesting one. Were a court to make such a finding, such a gambler would also certainly be carrying on a business. However, were a court not to find a professional gambler to be trading, that would not mean that such a gambler was not carrying on a business.
- 3.32. The point to make here, therefore, is that the question at hand is whether or not an exchange user is carrying on a business. "Business" is a wider term than "trade". The question of whether or not a professional gambler carries on a business has not been considered by the courts.
- 3.33. There are a number of areas of the UK tax code where it is clear that a taxpayer can be carrying on a business without carrying on a trade (e.g. companies with "investment business"<sup>7</sup>, such as real estate investment companies) and others in which the question as to whether a taxpayer is carrying on a "business" is fundamental to that person's tax treatment.
- 3.34. As a result, the courts have had to consider whether or not a taxpayer is carrying on a business and, in some cases, whether or not that business also constitutes a trade.
- 3.35. The courts have stated that "*business*" is a very wide word<sup>8</sup> and (again) "*business, of course, is a very wide word; it may mean business, I do not say in the nature of trade, but business for the acquisition of gain, or something of that kind, or it may mean merely an occupation or function*"<sup>9</sup>.
- 3.36. HMRC provide in their manuals that "*carrying on a business' takes its everyday meaning*"<sup>10</sup>. In HMRC's manuals it also states that "*receipt of any income will generally constitute*

---

<sup>7</sup> See Part 16 Corporation Tax Act 2009.

<sup>8</sup> Rowlatt J in *The Commissioners of Inland Revenue v The Marine Steam Turbine Co Ltd* [1920] 1 KB 193.

<sup>9</sup> Rowlatt J in *The Commissioners of Inland Revenue v The Korean Syndicate, Ltd* [1920] 1 KB 598.

<sup>10</sup> CH25200 – Information and inspection powers: Meaning of "carrying on a business".

evidence of a business"<sup>11</sup>. For VAT purposes, "business" and "economic activity" are considered to have the same meaning<sup>12</sup>.

- 3.37. In *American Leaf Blending*<sup>13</sup> a company had ceased trading but continued to own a property. The property was leased after the trade had ceased and the company received rents. Lord Diplock stated as follows: " *"Business" is a wider concept than "trade" "*. The company was held to be carrying on a business (but not a trade).
- 3.38. Lord Diplock continued "*The carrying on of a business, no doubt, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with long periods of quiescence in between*". This is, of course, consistent with the use of the word "occasionally" in section 55 of the 1963 Act as mentioned above.

### The factual question

- 3.39. In the case of a HVPU, there will be no shortage of activity or "busy-ness". As a result, as the HVPU is actively undertaking an activity and is making a living from that activity, one would think it unlikely that a court would find him not to be in business for want of positive activity. Indeed, the combination of this activity, and an income being derived from that activity, such that the user can make a living from it, would seem to suggest that a business is present.
- 3.40. Where HVPU's organise their gambling activities in a methodical way and incur liabilities (other than amounts staked as bets) in order to increase their chances of achieving overall profitability, this would also suggest that they are carrying on a business. As a result, HVPU's who rent terminals in trading rooms or racecourse boxes so as to give themselves a time-related advantage when betting on horseracing "in-running", are likely to be carrying on a business. (See also <http://www.centaurgalileo.com>, described as "the world's first regulated sports exchange traded fund". In the latter's description it states: "Emotionally charged counterparties provide opportunity for low risk/high reward profit taking. Patriots and sports fans are rarely price sensitive and often lack investment discipline. Galileo operates unemotionally and clinically in these markets.")
- 3.41. It is interesting to note that a poll conducted by Betfair as to "Why do you bet?" gave the following results<sup>14</sup>:

Fun	24.61%
Make sport more interesting	13.09%

---

<sup>11</sup> CTM03590 – Corporation Tax: small companies: whether trade or business carried on.

<sup>12</sup> See Revenue and Customs Brief 56/09.

<sup>13</sup> *American Leaf Blending Company Sdn Bhd v Director General of the Inland Revenue* [1978] 3 All ER 1185.

<sup>14</sup> <https://labs.betfair.com/Previous+Polls/>

<b>Primary income</b>	<b>17.67%</b>
<b>Supplementary income</b>	<b>42.80%</b>
Other	1.83%

(Emphasis added)

The fact that 17.67% of users polled volunteered that they use Betfair to generate their primary income would suggest they make their living from betting which would suggest that they are carrying on a business of receiving or negotiating bets. Similarly, those who bet to supplement their income by betting might also be carrying on a business of betting.

- 3.42. It is also interesting to note how HMRC reacts when it suspects that individuals are making a living using the internet in circumstances where there is no or little concern of tax leakage. Take, for example, the widely publicised example of HMRC investigating people who use ebay, the online auction site, not merely to buy and sell goods for personal use but on a more commercial basis. Although this situation can superficially be distinguished from betting on the basis that HMRC are willing to find that buyers and sellers on online auction sites are "trading" and, therefore, subject to income tax on their profits (since there is far less concern, as compared with betting, of having to afford taxpayers income tax relief in respect of losses), it is instructive to note the language that HMRC uses in its examples which serve to show when someone is, and is not, trading. HMRC has a page on its website "[Selling items online, through classified advertisements and at car boot sales](http://www.hmrc.gov.uk/guidance/selling/examples.htm)"<sup>15</sup> which gives 6 examples of when people buying and selling goods will be trading, liable for VAT and/or liable to pay CGT. In all of the examples (the first three of which are set out below), HMRC considers whether or not the person's activities show "commerciality". As explained above, a trade is a subset of a business (being a term which is wider than trade). As such, all of those persons who are found to be trading will, necessarily, be in business. Thus, if one applies the same tests to users of a betting exchange, then (putting the question of whether or not they are "trading" to one side and, instead, focusing on whether they may be in business which is all that needs to be established for the purposes of Levy liability) where an exchange user's activity shows sufficient "commerciality", that person will be in business. Exchange users who make 1000 bets per hour with Betfair (and so incur a transaction charge - see paragraph 3.5 above) and/or those who derive their primary or supplemental income from betting (see paragraph 3.39 above) are clearly acting in a commercial manner and, so, are in business.

#### *Examples*

*The following examples will help you work out if you are trading and liable for VAT or whether you have to declare a capital gain:*

---

<sup>15</sup> <http://www.hmrc.gov.uk/guidance/selling/examples.htm>

### Example 1

Gail is a full-time employee working for a stationery company. She pays her PAYE tax on this employment every month.

In her free time Gail makes cushions and uses most of them in her home. Occasionally she sells them to friends and work colleagues for an amount that just covers the cost of materials of £15. Sometimes she makes a loss. Any money she does make goes towards her holiday fund.

She decides to make extra cash by selling cushions on an Internet auction site and starts auctioning three or four to see how they go. They all sell for more than £50, a profit of at least £35 each.

She uses this money to buy more materials and within a month she is selling around ten cushions a week, always at a profit, and is considering setting up her own website.

**Gail's initial sales of cushions to friends are not classed as trading. It lacks commerciality and she does not set out to make a profit. The occasional sales are a by-product of her hobby. Once she begins to auction her cushions, she has moved into the realms of commerciality.**

**She is systematically selling her goods to make a profit. She will need to inform HMRC about her trade, and keep records of all her transactions. On the level of sales shown in the example the potential turnover of around £26,000 is well below the VAT annual threshold of £61,000 so Gail does not need to register for VAT.**

### Example 2

Ravi stays at home looking after his twin 18 month old daughters whilst his wife works full-time.

During a spring-clean, he finds his old collection of cricket magazines and Wisden books, and decides to get rid of them as they are taking up space.

He advertises all the items for sale in the classified section of a magazine and sells them for £80. Encouraged by this he has a rummage in his garage and finds a number of other items he can auction. In the next month, he sells five items for a total of £120. Later in the year, he sells his old car for £300. Over the next 12 months, Ravi sells another ten personal items in this way, for a total of £140.

**Ravi is not trading. There is nothing commercial about this. His original purchases were for personal use and he is selling items that he has owned for some time. None of his personal items were individually worth more than £6,000 when sold. These are exempt from CGT as 'chattels'.**

### Example 3

*Carmen is training to be an Occupational Therapist. She uses the Internet regularly and is registered on an Internet auction site. Occasionally she sells odd items: a book or CD. In her spare time, she enjoys car boot sales and antique auctions.*

*On one visit to a car boot sale, she spots a bronze statue, which she knows is quite valuable. She buys it for £5, and when she gets home she immediately goes online and puts it up for auction. Within an hour she sells it for £220, a profit of £215.*

*Over the next six months, Carmen finds three more bronzes by the same sculptor. She pays a total of £80 for them but sells them online for £700. She also purchases some First Editions of Sherlock Holmes stories for £80 and sells them through an auction for £540.*

***Carmen is clearly trading. The whole enterprise has an air of commerciality. She needs to inform HMRC of her activities, and she should be keeping a record of all her income and expenses to help her complete her first tax return. The level of sales will not exceed the VAT threshold of £61,000 so Carmen does not need to register for VAT.***

**(emphasis added)**

- 3.43. It is worth re-emphasising here why it is important to distinguish between a business and a trade (as explained in paragraphs 3.23 to 3.38 above) and the (ir)relevance, from a Levy perspective, of HMRC and the Treasury's concerns on the subject:
- (a) The levy liability of users of betting exchanges turns on whether those persons are in business.
  - (b) One can be carrying on a business without being found to be carrying on a trade (the latter term being merely a sub-set of the former). As such, not only could a court find that users of betting exchanges are simultaneously in business but not carrying on a trade but, more importantly, the question of whether or not such users might be carrying on a trade does not need to be addressed when considering levy liability.
  - (c) HMRC and the Treasury's concerns as to whether users of betting exchanges (or other "punters") may be carrying on a trade has no relevance to the Levy Board's obligation to fulfil its statutory duty.
- 3.44. In short, therefore, there would seem to be very strong arguments that the activities of a HVPU constitute a business. Furthermore, where liability to income tax is not being considered (of no relevance to the question of whether someone has a liability to pay the levy), the court may feel less reluctant to find that a HVPU is carrying on a trade. That said, it may feel no need to map out the various sub-categories of business and then pigeon-hole the HVPU's activities into one of them; it might merely conclude that his activities constitute a business without labelling the type of business being carried on.

#### 4. OTHER ISSUES

4.1. In this section, we address a number of other issues which have been raised concerning whether users on betting exchanges are potentially subject to levy. The issues relate to the following contentions:

- (a) If there were such users, they would have had to have been licensed as bookmakers and since they were not licensed, the consequence would be that there were a significant number of users who were betting illegally and this is inherently unlikely;
- (b) A review into users on betting exchanges undertaken by the Treasury in 2004/5 concluded that users on exchanges were not bookmakers for the purposes of the 1963 Act.
- (c) That the judgment in the *Sporting Options* case means that levy cannot be imposed on or in respect of the profits made by users of betting exchanges.
- (d) That if users of exchanges are liable to levy, the betting exchanges themselves cannot also be liable to levy.
- (e) That if users of exchanges are liable to levy, the betting exchanges are likely to move offshore.

4.2. For the reasons set out below, all of these contentions are false.

##### **Issue 1 - Unlicensed layers**

4.3. It is true that before the Gambling Act 2005 came into force on 1 September 2007, both the levy and the requirement for bookmakers to hold a bookmaker's permit were dealt with by the 1963 Act and a "bookmaker" was both obliged to hold a bookmaker's permit and to pay the levy. If users of betting exchanges were bookmakers for the purposes of the levy, they required a bookmaker's permit and, without such a permit, if they undertook bookmaking activity, they were committing an offence.

4.4. We do not see what is inherently unlikely or unattractive about this proposition. It is true that as far as we are aware no investigating authority sought to identify or take any action against such users. Given that the legal and factual issues are complex, that the propriety of betting by such users is safeguarded by the exchanges themselves, the findings of the Treasury review (see below) and the lack of any initiative against such users by the Levy Board or any other party, it is not at all surprising that no investigating authority considered this to be a priority. Indeed, it would be surprising if any relevant investigating authority (presumably chiefly the police) was even aware that this was an issue. This is in no way to gainsay that such bookmaker users did (and do) exist. Furthermore (and as is referred to in paragraph 96 of the Consultation), for much of the relevant period it was Government policy that the Levy would be abolished and this remained the case until December 2006, by which time the Gambling Act had been passed.

- 4.5. In any case, things have moved on. When the Gambling Act 2005 ("the 2005 Act") came into force in 2007, the 1963 Act was repealed with the Levy-related provisions being saved<sup>16</sup>. Under the 2005 Act the test of whether or not a person is required to be licensed by the Gambling Commission turns on whether that person "*provides facilities for gambling*"<sup>17</sup>. Whilst we have sought to demonstrate in section 2 that there are betting exchange users who are "bookmakers" within the terms of the 1963 Act, it no longer follows that those same individuals require a licence under the Gambling Act since any exchange user who does nothing other than take advantage of the services offered by a betting exchange could not be said to himself be "providing facilities for gambling".<sup>18</sup>
- 4.6. Whether, if it were to be established that prior to the coming into force of the 2005 Act, there were users on exchanges who were bookmakers without bookmaker's permits and thus committing offences, any criminal proceedings ought to be brought against them is a matter for the Gambling Commission, the police and the Crown Prosecution Service. However, it would seem unlikely that any of these parties would consider that this was a good use of resources.

## Issue 2 - The Treasury review

- 4.7. In the many debates in relation to the issue of betting exchange users as leviable bookmakers, Betfair have regularly referred to the review by HM Treasury in 2004/5 of the "*Tax Treatment of Betting Exchanges and their Users*"<sup>19</sup> and in particular regularly quote the then Financial Secretary, John Healey MP's letter to Mark Davies of Betfair<sup>20</sup> which states "*We have looked more widely at whether there is a group of users on betting exchanges who are acting by way of business and are not currently being taxed. Whilst there are clearly differing levels of activity on exchanges and some users do bet in high volumes, there is not sufficient evidence to characterise these users as running a business as opposed to merely being high-volume gamblers, who have traditionally been outside the tax net*".
- 4.8. It is very important to note that this was a policy review by the Treasury conducted over five years ago and, as is clear from the various internal Treasury and other papers made available through a Freedom of Information Act request made by Betfair<sup>21</sup>, the Treasury's

---

<sup>16</sup> The 2005 Act (Horserace Betting Levy) Order 2007

<sup>17</sup> Section 33, the 2005 Act

<sup>18</sup> Note that section 33(3) GA05 may apply in those circumstances. Under this provision, if a person "*acts in the course of a business carried on by a person who holds an operating licence authorising the activity*" and "*the activity is carried out in accordance with the terms and conditions of the licence*" then he is not committing the offence of providing facilities for gambling. Although it is understood that this provision was originally designed to apply to individuals working with pools companies (so that they do not require an operating licence to carry out their activities), the drafting is obviously wider than this limited exception and could mean that an individual customer's requirement to hold an operating licence would be satisfied provided the exchange held a Gambling Commission Licence.

<sup>19</sup> See paragraphs 86-91 of the Consultation

<sup>20</sup> See paragraph 88 of the Consultation

<sup>21</sup> See paragraph 87 of the Consultation

eventual conclusion to both (i) retain the status quo in relation to the scope of general betting duty and (ii) its decision not to pursue existing users for general betting duty or income tax (under the then existing legislative machinery) was materially influenced by a range of policy considerations.

- 4.9. However the policy decision that clearly carried the most weight was the risk of (i) setting the thresholds relating to a new duty in a way whereby those gamblers who were net losers would be able to offset losses for income tax purposes and (ii) doing anything which might allow net losers (in a gambling context) and/or those speculators (on the financial markets) who make losses, being able to set those losses against trading profits for income tax purposes. As such, the Treasury's deliberations and conclusions (which were entirely focused on the tax treatment of exchanges and their customers and the policy reasons behind taxing all or any of those customers) have no relevance to the purely legal question of whether or not there are exchange customers who are acting as "bookmakers" for Levy purposes. In fact, a number of the HM Treasury documents suggest that the highest volume Betfair users probably were (in 2004/05) in business.
- 4.10. The documents obtained under the Freedom of Information Act 2000 (the "FoIA Bundle") were provided to the BHA by Betfair, pursuant to an offer made in a letter sent to Paul Roy by Edward Wray dated 16 June 2009.
- 4.11. Mr Wray states in the letter as follows:
- "These documents reveal that, after an exhaustive analysis, HMT concluded that layers on exchanges are not acting as bookmakers and that no exchange customer, regardless of the volume they bet on a daily, weekly or annual basis, can be deemed to be acting "in business" by virtue of their exchange betting."*
- 4.12. Mr Wray's letter to the BHA and John Healy's letter to Mark Davies might, at first glance, suggest that any action taken today against betting exchange users (whether by the Levy Board, in the context of Levy; or by HMRC, in the context of betting duty) would be likely to fail unless it could be shown that the activities of HVPU had changed sufficiently since the 2004/05 review such that they could now be described as being in business (whereas they previously could not).
- 4.13. On closer inspection of the documents in the FoIA Bundle, however, it is very clear that, even in 2004/05, the Treasury did not conclude that none of Betfair's users was in business. The conclusion of the Treasury's review was that, for reasons of Government policy, it did not want to change the current tax laws in a way such that HVPU would, in the future, be subject to taxes designed specifically for them. This is in no way relevant to the legal question as to whether or not HVPU are "bookmakers" who have a liability to pay the levy.
- 4.14. The following extract is taken from document 5 of the FoIA Bundle and is described as "Discussion Paper: taxing betting exchange users, HMT paper".

*"Do betting exchange users behave in a manner that could be described as being businesslike? The evidence we have seen shows that some*

*betting exchange users bet in very high volumes indeed, tens or even hundreds of thousands of bets a year. The turnover figures are in the millions of pounds although these net off to much smaller figures. Nevertheless, the most profitable users are making sums in the order of one hundred thousand pounds per year. We believe they are following strategies such as betting on the movement in odds and spotting mispricing in the market. We also believe some or all of such users employ computer programs such as "betting bots" to assist them in their strategies. Indeed, Betfair themselves run a "developers program" to enable software to be designed to allow users to interface more efficiently with the Betfair market.*

*We have struggled to find agreement on an adequate definition of what these betting exchange users are doing (given that they are not bookmaking in the accepted sense), perhaps we could call it "speculating on betting exchange markets".*

*My own view is that we could make a good prima facie case that certain betting exchange users are in business." [emphasis added]*

4.15. Save for the final and penultimate paragraphs, the above is a factual description of the activities of certain Betfair users. It is interesting to note that the author's personal opinion, as expressed in the final paragraph, is that HMRC could make a good case that some users are in business.

4.16. The document continues as follows:

*"If we were to determine that certain betting exchange users were in business, what would be the implication for income tax or other direct taxes? If we were to say certain users were in business and should pay GBD, it would be hard to resist the argument that they should pay income tax? The main concern of HMRC direct taxes is that any such move would allow a large number of losing gamblers to offset gambling losses against other taxable income."*

4.17. This paragraph illustrates clearly that the Treasury's objective was how to tax betting exchange users in the future; i.e. how their taxation policy should be structured. It also shows that HMRC's "main concern", in relation to how any future policy would be structured, was of users having to be afforded income tax relief in respect of losses.

4.18. The following extract is taken from document 7 of the FOIA Bundle: "Betting Exchanges – What should we do? HMT paper"

*"We would like to avoid the presentational awkwardness of being seen to tax punters – except perhaps those that look like they might be businesses – and we would like the bookies both to stay onshore and leave us alone"*

- 4.19. Again, the above extract illustrates clearly that the Treasury's deliberations related to issues of policy.
- 4.20. The following extract is taken from document 17 of the FoIA Bundle: "Designing a possible users' tax, HMT paper".

**"Introduction**

*Prior to meetings with direct taxes and [redacted word] in Treasury Solicitors, there were three options to tax betting exchange users on the table (no change not being a tax option);*

- *taxing users on a case by case basis as bookmakers;*
- *taxing users above a certain threshold as being in business;*
- *taxing users as professional gamblers.*

*Following our meetings, the following points either came out or were confirmed;*

*Direct taxes still do not want to see betting exchange users as being in business. They are not persuaded that betting exchange activity has enough of the characteristics of trading for tax purposes. To see users as trading would undermine many decades of established case law and could read across to other types of non-trading activity – day trading in the city, in particular. Ultimately, it could lead to significant revenue loss by allowing gambling and other speculative losses being offset against taxable income.*

*Given these concerns, direct taxes would prefer us not to find betting exchange users to be either bookmakers, in business or trading."*

**[emphasis added]**

- 4.21. Once again, the above extract illustrates clearly that the Treasury's aims were to decide how to shape future policy and that the direct tax team in HMRC were extremely concerned that users should not be taxed in a way that might require HMRC to afford them income tax relief in respect of losses.
- 4.22. The following extract is taken from document 21.B of the FoIA Bundle: "Extract from "submission to FST 22 June 2005: Betting""

*"4. We have come to the conclusion that the clearest gap in the current tax treatment is the existence of a small number of high-volume exchange users who pay no tax. As set out in our Budget submission, these users are not acting as bookmakers, but they do have some (although not all) of the features of a business: a systematic behaviour pattern, a high volume of activity and a reasonable expectation of making a business-like profit. To be clear: the betting exchange*

environment embraces a wide spectrum of gambling behaviours. The vast majority of users are recreational punters and these users can be high staking recreational punters, bookmakers and old fashioned "professional gamblers". But above even professional punters are a small group of very high volume users who for want of a better term are "trading" on the exchanges (see below). It is this group that raises the most serious questions about how the tax system should respond to them.

5. A key question is whether these users are doing anything different (except purely on a bigger scale) from other users on exchanges or other professional gamblers. We are confident that they are, although it is difficult to be completely certain. This is based around the notion of having a system of profit. Gamblers do not generally have a system of profit. Most recreational gamblers lose and even professional gamblers (like poker players or professional racing punters) operate by using knowledge or just judgement to try to bring the odds in their favour. In this sense, they are acting like ordinary gamblers except with greater skill. We do not think that these very high volume users are betting purely through knowledge or judgement – they are making too many bets for that. What they have is a general trading strategy, probably augmented by computer software programs (which are widely known about and advertised) to identify mispriced bets or movements in prices. The exchange model clearly favours such a strategy with its low margins and ability to make either the back or lay side of the bet – and Betfair actively market themselves at City traders.

6. On this basis, bringing these users into the tax net would improve equity and would reduce the gap between the tax burden on exchanges and that on bookmakers. If we were to set such a tax, we would need to decide on three main design issues: type of tax, scope and enforcement.

#### Type of tax

7. We need to decide whether to bring high-volume users' profits into income tax or general betting duty. We've discussed this with HMRC colleagues and the clear view is that we should make it subject to general betting duty. Subjecting users to income tax would contradict our long-held position that gamblers cannot be "in business" for direct tax purposes. We maintain this position because of the risk that losing gamblers (which is the majority) could seek to claim business status to offset their gambling losses against other taxable earnings, which remains a very big concern. Another argument is that these high volume users are participating in a betting market and that the other commercial operators in this market pay GBD. It would be consistent to argue that these people should pay GBD as well. **[emphasis added]**

### Scope

8. *There are three main questions:*

*(a) What thresholds do we set to ensure that ordinary punters on exchanges don't pay the tax;*

*(b) Does the tax just apply to users' profits on exchanges or on their total net profit across betting platforms; and*

*(c) Do we extend the tax to people betting on other platforms, e.g. with bookmakers and spread betters, or to professional poker players?"*

- 4.23. The culmination of the Treasury's review was to retain the status quo; being something that, as is clear from some of the extracts set out above, was not (initially at least) their desired result. As the extracts above suggest (and other documents in the FoIA Bundle reinforce), there was a clear desire to tax high volume exchange users but the various pragmatic concerns raised in relation to how such a tax on users would operate could not be dealt with adequately. These concerns included: the amount of tax likely to be collected from users; the costs to HMRC of collecting that tax; how one would define users who would be subject to the new tax (i.e. how, and at what level, thresholds would be set); whether the exchanges should collect the tax or whether it should be collected via self-assessment; whether the new tax should relate solely to exchange activity or whether it should apply across all betting platforms; whether HMT might encounter arguments as to the tax being discriminatory, etc. However, the main concern that is repeated a number of times and is expressed very clearly, is that of HMRC's reluctance to accept any new regime which might result in it having to give income tax relief in respect of gambling losses or losses incurred by speculators on the financial markets.

### **Issue 3 - the *Sporting Options* case**

- 4.24. Paragraphs 49-60 of the Consultation make extensive reference to the *Sporting Options* case. Olswang acted for Sporting Options in that case where the company was successful in its judicial review of the Levy Board in respect of the 42<sup>nd</sup> Levy Scheme.

### **The judgement**

- 4.25. In his judgment, Mr Justice Hooper held that there was an obligation on the Levy Board to ensure that a proper consultation with those liable to be adversely affected by the proposal had taken place. He stated:

*"That consultation may, for certain groups, be effected through the Committee. However, neither the Board nor the Committee saw the Committee's task as being one which involved making representations to the Board on behalf of bookmakers not represented on the Committee. Furthermore the Board knew that the Committee did not represent the views of the betting exchanges."*

4.26. The Judge then went on to consider whether any appropriate consultation had taken place. He noted in particular that:

- (a) The full proposals regarding the 42<sup>nd</sup> Scheme – including the financial projections - were not sent to either Betfair or Sporting Options.
- (b) The only significant consultation with Sporting Options was a meeting on 28 October 2002. The Judge accepted that given that Mr Griffiths (the Managing Director of Sporting Options) knew about the proposals only on 20 October 2002, that gave him inadequate time. Moreover, there was no evidence that the substance of that meeting was ever conveyed to the Levy Board.
- (c) Mr Griffiths had stated in his witness statement that had he had more time to prepare:

*"I would have been able to calculate the economic impact these proposals would have on the business of Sporting Options by reference to our past performance.*

*If I had been provided with the reasons for the proposed change in the Levy, I would have been able to consider and address them and suggest alternative options which may have achieved the same ends without causing such harm to the business of Sporting Options.*

*I would have pointed out that the Levy Scheme proposed discriminated against betting exchanges compared to traditional bookmakers.*

*I would have pointed to the particularly severe impact of the proposed Levy Scheme on new entrants in the market."*

- (d) The Judge stated that *"many of the points raised by Mr Griffiths ... have considerable merit"*.

4.27. On this basis, the Judge held that the "procedural defects were not cured by what did take place". He also held that the failures on the part of the Levy Board in respect of consultation were materially unfair to Sporting Options.

### **Substantive grounds for challenge and issues**

4.28. Sporting Options also brought a substantive challenge to the decision by the Levy Board to adopt the 42<sup>nd</sup> Scheme. The main substantive grounds for the challenge were as follows.

- (a) Under the 42<sup>nd</sup> Scheme, levy was assessed on exchanges not on their own income or profits, but on the profits made by a particular class of users of their services – that is their profitable layers. Sporting Options submitted that there was no relationship between the income or profits of the exchanges and the

profits of profitable layers and that the levy assessed in this way was thus arbitrary and unreasonable.

- (b) Sporting Options submitted that the selection of the class of traders to pay levy was itself arbitrary because losses on back bets were not taken into account. Accordingly, an exchange may have been liable for levy in respect of its customers when they may not in fact have made any profit.
- (c) Sporting Options contended that the 42<sup>nd</sup> Scheme would cause particular prejudice to betting exchanges which were new entrants into the market. This was because small exchanges were particularly vulnerable to having to pay a disproportionate levy liability under the 42<sup>nd</sup> Scheme because they are more likely to be used by infrequent customers, who might make a large, one-off profit laying a bet. In addition, new exchanges had to charge highly competitive levels of commission to build up a significant customer base and create liquidity which meant it was practically impossible for the smaller exchanges to pass on their levy liability to customers.
- (d) Sporting Options submitted that under the 42<sup>nd</sup> scheme it was possible for users of an exchange to seek to abuse the system so as to increase the exchange's liability to pay the levy, without increasing the exchange's gross profit. Such abuse would be undetectable by the exchange. Sporting Options argued that to adopt a scheme which would allow such abuse was irrational.
- (e) Sporting Options submitted that the 42<sup>nd</sup> scheme discriminated without justification against betting exchanges as follows.
- (f) Betting exchanges were being less favourably treated than traditional bookmakers, who were to be charged the levy on the basis of 10% of their own gross profits. Traditional bookmakers were thus to pay levy on a basis that was by definition proportionate to their profits, at a reasonable level, predictable, and not vulnerable to abuse.
- (g) If a customer used more than one exchange as a layer, he could not offset losses he made on one exchange against profits he made on another. By contrast, a bookmaker with a chain of shops could offset losses made in one shop against profits made in another.

4.29. In the event, none of these grounds was successful. It is true that the Judge did state as follows.

*"Miss Rose [counsel for Sporting Options] submits that the decision of the Board was substantively irrational and that there was a breach of both domestic law and the EC Treaty. The argument on substantive irrationality which is tied up with the other grounds, is obviously a strong one, but, given my conclusions, I do not need to resolve these issues and could not on the material available to the Board."*

- 4.30. The Judge did not identify which of the grounds of substantive challenge he considered to be strong. In reality, as he observed, the substantive grounds were closely tied to the procedural complaints, where he found for the Claimant. Absent such procedural grounds, we are doubtful that the challenge would have been successful.

### **The consequence of the judgment**

- 4.31. The Judge gave declaratory relief, the effect of which was that exchanges pay levy on the basis of the 41<sup>st</sup> Scheme, that is 10% of commission received, and ordered that the Levy Board pay the costs of Sporting Options in bringing the claim. In all the levy schemes adopted since the 42<sup>nd</sup> Scheme, the same provisions as regard exchanges as in the 41<sup>st</sup> Scheme have been adopted.

### **Future schemes**

- 4.32. It is clear that the basis for the success of the judicial review in respect of the 42<sup>nd</sup> Scheme was entirely procedural. There is no reason to believe that the procedural errors – in particular the failure to conduct proper consultations with potentially affected parties – would be repeated in future. Indeed, Betfair now enjoys a seat on the Bookmakers' Committee, essentially ensuring that it is properly consulted on any proposed levy scheme. Nonetheless, if it is proposed that there be a significant change in the way that levy payable by betting exchanges is to be calculated, it would plainly be sensible to ensure that the highest standards of consultation with any potentially affected party are met and that otherwise the process is conducted entirely properly.
- 4.33. It is true that as stated above the Judge in addition indicated sympathy with the substantive challenge advanced by Sporting Options although he made no determination in this regard. Nevertheless, the test for bringing a successful substantive challenge to a decision of a public body remains very high.
- 4.34. We are confident that if any future levy scheme sought to assess Levy on some part or the whole of the profits made by exchange users, provided that the issues referred to at paragraph 4.28 above (to the extent that they arise in respect of any such future scheme) are properly addressed by a cogent consultation and properly considered by the Bookmakers' Committee and the Levy Board in the passage of that scheme, the merits of any challenge mounted by way of judicial review would be insubstantial and the prospects of such a challenge being successful would be extremely remote.

### **Conclusion**

- 4.35. The first matter to note is that the judgment could have no conceivable impact on the recovery of levy directly from the users of exchanges<sup>22</sup> which we believe is likely currently to be due. Even in theory, the judgment could affect only any amendment to a future levy scheme.

---

<sup>22</sup> A practical approach to achieving this is set out at section 6 below,

4.36. But even here, whilst the *Sporting Options* case considered a number of issues regarding the application of the 1963 Act to betting exchanges, it would be wrong to draw any conclusions from the judgment in relation to the questions posed by the Consultation. The basis of the judge's decision was that there had been insufficient consultation with betting exchanges prior to the Levy Board's adoption of the 42<sup>nd</sup> Levy Scheme. The judge did not find that requiring exchanges to pay levy of 10% of their commission and, in addition, 10% of the gross win from the lay bets of their profitable layers was unreasonable *per se*. Provided that the Bookmakers' Committee consults properly with the betting exchanges, we can see no reason why the Bookmakers' Committee should not be able validly to recommend a scheme which requires a greater contribution from betting exchange activity as part of delivering an increase in the total levy yield.

**Issue 4 - If betting exchange users are bookmakers, the exchanges themselves cannot be bookmakers**

4.37. It is sometimes suggested (indeed there is a hint of this in the Consultation itself) that if exchange users are bookmakers under the 1963 Act, the exchanges themselves cannot be bookmakers and so no levy can be imposed on them. This is false. There is no reason why both parties cannot be held to be bookmakers.

4.38. As stated above, a liability to pay the levy arises out of a combination of two tests:

- (a) section 55(1) - that is whether or not a person is a "bookmaker"; and
- (b) section 27(2)(a) – that is whether that person is a "bookmaker who carries on on his own account a business which includes the effecting of betting transactions on horse races and only in respect of so much of the business as relates to such betting transactions...".

4.39. The definition of "bookmaker" makes it very clear that both persons acting as principal and persons acting as "servant or agent" are included in the definition.

4.40. Note, once again, Betfair's terms and conditions (set out in paragraph 3.14 above):

*"6.2 You agree to appoint the Company as your agent: (i) for the communication of your orders for bets; and (ii) for receipt of communications of acceptance of your orders for bets. To the extent that you use the Telephone Betting Service, you agree to appoint the Telephone Operator as your agent for the communication of your orders for bets with us."*

4.41. When an exchange receives a bet (which is precisely what its platform is designed to do) it does so (at least) as servant since the identity of the counterparty is not then known.

4.42. The subject matter of the business which needs to be carried on for a levy liability to arise pursuant to section 27(2)(a) is the "effecting of betting transactions" (emphasis added).

4.43. Note, once again, Betfair's terms and conditions:

*"Subject to Clause 6.14, we do not accept bets ourselves, but we provide our customers with an automated facility for the placing of bets with each other."*

- 4.44. A betting exchange is an online platform for the effecting of betting transactions. It facilitates betting transactions such that both the counterparties to the bet and the facilitator can both be said to be "effecting betting transactions". A betting exchange clearly carries on such activity as a business on its own account.
- 4.45. It should be noted (particularly due to the fact that, at paragraph 108 of the Consultation, the opposite argument would seem to be made) that the words "on his own account" in Section 27(2)(a) clearly relate to the carrying on of the business in question. Any suggestion that these words should be interpreted to mean that the business in question must be a business of effecting betting transactions as principal is to completely ignore the context.
- 4.46. The levy legislation (as is the case with the general betting duty legislation<sup>23</sup>) can clearly result in separate liabilities arising in relation to the same winning betting transaction; one for the counterparty who wins the bet and the other for the person providing the facilities that allow that counterparty to communicate the contractual offer or acceptance to the losing counterparty.
- 4.47. Even though both betting exchanges and traditional bookmakers are "bookmakers" within the terms of the 1963 Act, it does not follow that both categories of bookmaker should be paying 10% of their gross win by way of levy (or indeed that gross win should be the basis of calculation in both cases). The legislation enables differentiation and categorisation of different forms of activity and for a scheme to set out a different formulation for each. Spread betting operators and racecourse bookmakers are also "bookmakers" under the 1963 Act but pay levy on a different basis. Traditional bookmakers earn profits by successfully managing their book of liabilities and that is their revenue stream from taking bets on British horseracing.
- 4.48. Betting exchanges do not take any risk on the overwhelming majority of their transactions<sup>24</sup> but earn their revenue (commission and other charges) from providing the platform which enables their customers to transact with each other. Whilst it is therefore correct that it is this revenue stream which should be the basis for exchanges' levy payments it does not mean that they should pay 10% of this revenue just because traditional bookmakers pay 10% of their revenue as levy. Accordingly, it would be open for the Bookmakers' Committee to recommend and for the Levy Board to adopt a Levy Scheme which required betting exchanges to pay by way of levy a greater share of their commission and other income than 10%.

---

<sup>23</sup> A bookmaker laying a bet via a betting exchange and the exchange itself can both have a liability to general betting duty in respect of the same bet; the former pursuant to section 2 and the latter pursuant to section 5AB of the Betting and Gaming Duties Act 1981.

<sup>24</sup> For example, Section 5.1 of Betfair's terms and conditions (current in January 2010) provides that multiple bets may be accepted by Betfair as principal counterparty.

## **Issue 5 – exchanges will move offshore**

4.49. We understand that some have suggested that if the Levy Board seeks to obtain a greater levy contribution from betting exchanges and/or their users, some of the betting exchanges will then move offshore, outside the levy net. We would respond to that concern as follows:

- (a) The Levy Board has a statutory duty to collect levy and should not shirk from discharging that duty because of fears that exchanges may seek to avoid their levy responsibilities.
- (b) Whilst it is true that Betfair, for example, is already to a significant extent operated through Malta and has the power, under its terms and conditions, to move location without notice, its "bookmaker" customers (who provide a substantial proportion of its liquidity) would remain in the United Kingdom and therefore remain vulnerable to proceedings of the kind outlined in section 6 below. Moreover, the ability of the Levy Board to obtain disclosure orders against exchanges (see section 6 below) would remain even if outside the jurisdiction<sup>25</sup>.

4.50. For these reasons, we believe that levy should be pursued against exchange users and the threat of moving abroad is to a significant degree illusory. (In any event, the issue of offshore operators is currently under review by the Government, which issued a consultation on 22 March 2010).

## **5. POTENTIAL LEVY LIABILITY OF LEVIABLE BETTING EXCHANGE USERS**

5.1. This section considers the following questions:

- (a) how much, if any, levy derives from Betfair's non-UK customers?
- (b) how much additional levy derives from the additional charges that Betfair charges to its high volume users?
- (c) how does the interposition of Betfair Malta in Betfair's exchange structure affect Betfair's overall levy liability?
- (d) how many of Betfair's users might be "bookmakers"?
- (e) what might be the annual levy liability for Betfair users who are "bookmakers"?

5.2. In this section references to "Betfair Exchange" are references to Betfair Limited, being the company that owns and operates the UK-based exchange and the company with whom UK-based customers contract by agreeing to the terms and conditions. References to "Betfair Malta" are references to Betfair International (a partnership registered in Malta), being the counterparty which non-UK based customers contract with by agreeing to the

---

<sup>25</sup> See *Lockton Companies International v Persons Unknown* – decision of Eady J 23 November 2009

terms and conditions. References to the "Betfair Group" are to all of the companies referred to in Betfair Group Limited's consolidated accounts<sup>26</sup>.

### **Betfair's accounts**

- 5.3. The consolidated accounts of Betfair Group Limited, state that the Betfair Group paid the following amounts of "UK Horseracing Levy (statutory and voluntary)":
- (a) year to 30 April 2009: £7,317,000
  - (b) year to 30 April 2008: £6,880,000
- 5.4. The amount of general betting duty payable by Betfair is included (with levy, data rights payments and other betting taxes) in "cost of sales" of £48,566,000. No breakdown of these items is given other than in respect of the levy.<sup>27</sup>
- 5.5. The same accounts also provide the following information:
- (a) the "revenue from non-UK customers now accounts for 49% of total revenues (2008: 44%)";
  - (b) over 2.5m registered users (2008:1.7m);
  - (c) Betfair's combined products "*now handle, on average, 6.4m matched trades a day*".
- 5.6. We understand that Betfair made what it described as a "voluntary contribution" of between £1.25m and £1.3m in 2009 (and that Betfair has since decided not to make any further such contributions and is instead diverting similar amounts to its own marketing and promotional activity).
- 5.7. As a result, the Group's levy contribution would appear to be approximately:
- (a) £6m statutory; and
  - (b) £1.3m voluntary.
- 5.8. The table below sets out Betfair's levy contributions since 2003:

---

<sup>26</sup> The references to Betfair Group companies relate to the position as set out in Betfair's terms and conditions current in January 2010.

<sup>27</sup> This doesn't seem unusual, in that neither William Hill nor Ladbrokes give a breakdown of these amounts in their accounts.

Year ending 30 April	Group Company	No. of registered users	% revenue from non-UK customers	UK Horseracing Levy Payment
2003 <sup>28</sup>	The Sporting Exchange Limited	-	-	2,515,000
2004 <sup>29</sup>	The Sporting Exchange Limited	-	-	3,897,000
2005	The Sporting Exchange Limited	-	26%	5,155,000
2006	The Sporting Exchange Limited	-	32%	5,310,000
2007	The Sporting Exchange Limited	1.2m <sup>30</sup>	38%	5,898,000
2008	Betfair Group Limited	1.7m	44%	6,880,000
2009	Betfair Group Limited	2.5m	49%	7,317,000 <sup>31</sup>

#### How much, if any, levy derives from Betfair's non-UK customers?

- 5.9. Betfair's structure operates such that all UK-based customers (whether backing or laying), place their bets directly via the exchange operated by Betfair Exchange. All non-UK based customers, however, place their bets with a fixed odds bookmaker, Betfair Malta, which accepts bets as principal. Betfair Malta then places an identical bet (again as principal) on to the exchange operated by Betfair Exchange<sup>32</sup>.
- 5.10. Pursuant to the 48<sup>th</sup> Levy scheme (in operation until 1 April 2010) Betfair Exchange, being a "bookmaker" (for the 1963 Act and levy purposes)<sup>33</sup> established in Great Britain, is liable (as

<sup>28</sup> 2003 was the year when section 5AB of the GBDA 1981 was introduced, being the section which charges betting exchanges 15% of the commission that they charge to their customers. It was also the year in which the 41<sup>st</sup> Levy Scheme (1 April 02/03) was introduced including a requirement that betting exchanges pay 10% of their gross profits derived from British horse racing as levy.

<sup>29</sup> 2004 was the year during which Betfair Malta was set up, following which all bets from non-UK customers were placed with Betfair Malta (acting as principal counterparty) with Betfair Malta then placing an identical bet onto the (UK) exchange once that bet could be matched.

<sup>30</sup> 433,000 of which are described as "active".

<sup>31</sup> 2009 is the first year where levy payments are described as including both "statutory" and "voluntary" levy. The "voluntary" levy payment representing (so Betfair claims) the levy that would arise were Betfair Malta (being the entity through which bets from all non-UK customers are routed) based in the UK (and so within the scope of the levy). Put another way, the "voluntary" levy represents 10% of the commission charged by Betfair to its non-UK based customers on British horseracing bets whilst the "statutory" levy is 10% of the commission charged by Betfair to its UK-based customers on British horseracing bets.

<sup>32</sup> This is clear from Betfair's terms and conditions. See condition 6.4 of the "General Terms and Conditions" and condition 6.3 of the "Terms And Conditions For Betting By Non-UK Customers" (current in January 2010).

<sup>33</sup> Since Betfair carries on a "business of receiving or negotiating bets" albeit that it may do it "as servant or agent" to their customers.

a betting exchange) to pay an amount of levy equal to 10% of the commission that it derives from bets placed on British horseracing.<sup>34</sup> Betfair Malta, being a “bookmaker” based outside of Great Britain is outside of the scope of the levy.

- 5.11. Let us assume that relevant “back” and “lay” bets of a UK customer and a non-UK customer are matched on the exchange.
- 5.12. Where the UK customer wins, the commission derived from that winning bet (whether “back” or “lay”) will give rise to a levy liability. The commission in question will be charged to the UK customer by Betfair Exchange (with whom the customer contracts by accepting the terms and conditions).
- 5.13. Where the non-UK customer wins, the commission charged to him will be charged by Betfair Malta (with whom the customer contracts by accepting the terms and conditions). No levy will be due on that commission since Betfair Malta is outside of Great Britain. There will be a second step, however; namely, Betfair Malta placing an identical bet onto the exchange. Were Betfair Exchange to charge Betfair Malta commission on the latter’s winning bets, a levy liability would arise.
- 5.14. This then begs the question as to what, if anything, Betfair Exchange does charge Betfair Malta on winning bets. The terms and conditions do not shed any light on this. Whilst there is no legal compulsion for Betfair Exchange to charge Betfair Malta an amount for this service (which might be described as the matching of hedge bets enabling Betfair Malta to have both zero net liability and zero profit), Betfair Exchange will need to account for UK corporation tax (under the UK’s transfer pricing rules) on the basis that an arm’s length price is charged on the services being supplied by it to Betfair Malta. The transfer pricing rules only require companies to account for corporation tax on the basis that an arm’s length amount applies (i.e. it is imputed for tax purposes only), they do not require such an amount *actually* to be paid or provided for. Notwithstanding this, most companies generally *do* make such payments or provide for them by creating an intercompany loan balance.
- 5.15. Assuming that Betfair Exchange does charge Betfair Malta an amount for winning bets, it would not necessarily be the same amount charged to customers. Whatever the quantum, however, any amount actually paid or provided for would (to the extent that such amount related to bets on British horseracing) trigger a (statutory) levy liability. This is because Betfair Malta will be party to winning bets and, under the 48<sup>th</sup> Levy Scheme, *“gross profits... in the case of Betting Exchanges... means the amounts that the Betting Exchange charges the parties to all bets winning or otherwise...”*. This is a wide definition and, unlike the section charging betting exchanges to general betting duty, does not use the word “commission”.

---

<sup>34</sup> Under the 48<sup>th</sup> Levy Scheme, *“gross profits... in the case of Betting Exchange... means the amounts that the Betting Exchange charges the parties to all bets winning or otherwise...”*.

**How much additional Levy derives from the additional charges that Betfair charges to its high volume users?**

- 5.16. Another interesting question is whether Betfair accounts for the levy on the additional charges that it makes to its high volume users.
- 5.17. In other words, when Betfair makes one or more of its:
- (a) transaction charges;
  - (b) data request charges; and
  - (c) premium charges,

to one of its high volume users<sup>35</sup>, does it then consider (a) what proportion of commission already charged to that user derives from British horseracing (being that which, we assume, is already included in Betfair's levy calculation); and thereafter (b) take the same proportion of the additional charges being imposed and include that amount in the amount of commission that is subject to the levy?<sup>36</sup>

**How does the interposition of Betfair Malta in Betfair's Exchange structure affect Betfair's overall Levy liability?**

- 5.18. The answer should be that the difference between (a) the amount that Betfair Malta charges its customers on winning bets and (b) the amount (if any; we assume zero) that Betfair Exchange charges Betfair Malta on the related bets (which, were it being charged, would make up part of Betfair Exchange's £6m Levy liability), falls outside the scope of the levy.
- 5.19. Although the scope of the current Levy Scheme does not differentiate between UK and non-UK customers, the structure that Betfair has adopted ensures that, in practice, all<sup>37</sup> of the commission derived from the winning horserace bets of non-UK customers falls outside the scope of the Levy.
- 5.20. It is very difficult to verify how much levy is being "lost" in this way (the amount being "lost" being the difference between (we assume) the "statutory" element of Betfair's 2009 Levy contribution and the amount that would have arisen had all bets (UK and non-UK) been placed directly into the exchange without Betfair Malta being interposed in the structure). That said, there is no obvious reason to doubt Betfair's claims that the amount that they pay as "voluntary levy" represents this "lost" amount.

---

<sup>35</sup> See the "Betfair charges" information sheet at [www.betfair.com](http://www.betfair.com).

<sup>36</sup> We note that, in "Betfair's response to submission of British Horseracing re 50<sup>th</sup> Levy Scheme" of 10 August 2010 it states, at footnote 9, as follows: "Betfair makes statutory Levy payments based on 10% of its income deriving from Transaction Charges and the Premium Charge, as they relate to UK customers."

<sup>37</sup> Again this assumes that either (i) Betfair Exchange charges Betfair Malta nil for being able to place bets onto the exchange; or (ii) that they do make such charges but don't account for Levy on them.

- 5.21. Although 49% of the Group's income now derives from non-UK custom, it is probably a fair assumption that, of that 49%, the proportion that derives from British horseracing is far lower than the proportion of the 51% (representing UK custom) that derives from British horseracing. As a result Betfair's £6m Levy liability from UK users and a £1.3m "voluntary" levy liability from non-UK users does not seem obviously untenable. Having said that, the Levy Board would seem to have no way of knowing for sure.
- 5.22. So as to verify this amount the Levy Board would need to know the following: (i) the amount (if any) paid or provided for by Betfair Malta to Betfair Exchange as actual commission / quasi commission; (ii) of that amount, how much relates to bets on British horseracing; and, most importantly, (iii) the amount of commission received by Betfair Malta that relates to British horseracing.

**How many of Betfair's users might be leviable "bookmakers"?**

- 5.23. We know that Betfair has 2.5m registered users. Betfair claim that only 0.5% are likely to be subject to the "premium charge" (being the charge which tops up the amount of commission charged to their more successful users on their overall (i.e. "net") winnings to 20%). 0.5% of 2.5m users is 12,500 users.
- 5.24. We also know that UK customers account for 51% of total revenues.
- 5.25. On the assumption that any customer having to pay any of the Betfair's increased charges (the "premium charge" being one of them) is likely to be in business (and so a "bookmaker" for levy purposes) then, if one assumes that there is an even distribution of such customers as between the UK and the rest of the world, then this would suggest that Betfair has at least 6,375 users (51% of 12,500) who are UK "bookmakers" for levy purposes<sup>38</sup>.
- 5.26. The following are questions which we suggest the Levy Board may want to ask Betfair (assuming the information is not apparent from Betfair's levy returns):
- (a) Does Betfair UK pay levy on any of premium, transaction or data charges? If so, how?<sup>36</sup>
  - (b) Did Betfair Malta pay a voluntary levy contribution on any of premium, transaction or data charges? If so, how?
  - (c) Does Betfair Malta make any payment to Betfair UK (perhaps in line with its transfer pricing obligations) in connection with bets matched by Betfair Malta via Betfair UK's exchange? If so, to the extent that the bets matched are on British horseracing, does Betfair UK pay levy on the corresponding amount?
  - (d) Of the total winnings earned by Betfair UK's customers and subject to commission, how much relates to British horseracing?

---

<sup>38</sup> Note that for a "bookmaker" to have a Levy liability they need to be in Great Britain rather than the UK, but this gives an idea of the number of users involved.

- (e) Of the total winnings earned by Betfair Malta's customers and subject to commission, how much relates to British horseracing?
- (f) How many customers pay: (a) premium charges; (b) transaction charges; and (c) data charges and how many pay a combination of these three? How does this break down between Betfair UK and Malta?
- (g) Of the total winnings earned by Betfair UK's customers and subject to commission, how much of those winnings is represented by those of Betfair UK's customers who pay premium or other additional charges?
- (h) Of the total winnings earned by Betfair Malta's customers and subject to commission, how much of those winnings is represented by those of Betfair Malta's customers who pay premium or other additional charges?

**What might be the annual levy contribution for Betfair users who are “bookmakers”?**

- 5.27. As explained above, Betfair currently pays approximately £6m of statutory Levy. As levy is payable at the rate of 10% of its commission, this relates to £60m of commission.
- 5.28. Betfair's commission is generally charged at between 2% and 5% (although it can be as high as 20%). Betfair's average commission rate is generally stated to be 3%.
- 5.29. At 3% of net winnings, £60m of commission, translates into £2bn of gross commissionable winnings on British horseracing from UK customers.
- 5.30. Whilst it is clearly a ludicrous suggestion, were all of Betfair's UK customers “bookmakers” for levy purposes (i.e. carrying on a business of receiving or negotiating bets), their combined levy liability would be between £200m (being 10% of £2bn) and zero. Zero is a theoretical possibility since levy is payable on a bookmaker's "Gross Profit" (broadly winnings less losses) for a Levy period (being a year) and it would be possible (in theory) for every customer to have equal winnings and equal losses (i.e. a "net" zero position) over the course of that year.
- 5.31. In contrast, Betfair's commission is payable by reference to a user's net winnings on a particular market; i.e. a user could make a profit on one market and a loss on another (perhaps on the same day) and will have a commission liability on the former without any relief being granted to him for the loss suffered on the latter (although note that Betfair also operates a relatively complicated points system, whereby discounted rates are granted by reference to amounts staked - regardless of whether bets are winning or losing bets – and so generating losses does reduce the amount of commission payable although at a much reduced rate).
- 5.32. As a result, a Betfair user could have net winnings subject to commission in a year of 100 (generating commission of 3) and losses (not subject to commission) in a year of 40. The total commission generated from this user is 3 (i.e. 3% of 100) whilst the total levy liability of the user would be 6 (10% of 60).

- 5.33. Looking at it in this way is, however, perhaps less useful than considering two users betting against one another. Assume one user (User A) has the results set out above, whilst his counterpart (User B) has losses of 100 and winnings of 40; i.e. a net loss of 60. Betfair's total commission generated from the two users is 4.2 (i.e. 3% of 140). The total Levy liability of the users, however, remains 6 (10% of User A's net winnings of 60).
- 5.34. Put another way, whilst Betfair's commission is calculated on net winnings on each market, they are more akin – when looking at commission generated over the course of a one year levy period – to a "gross" figure. In contrast, levy liabilities are calculated on a true "net" position over the year.
- 5.35. We assume that, at least, those of Betfair's customers who pay one or more of the transaction charges, data charges and premium charges are in business and so are "bookmakers" for levy purposes. In terms of the proportion of Betfair's customers that they represent, these customers are likely to represent a small minority (see above). However, in terms of the proportionate amount of liquidity that they provide to the exchange (being the relevant factor for these purposes) they will inevitably represent a much larger percentage.
- 5.36. We suspect that 20% would be a very conservative estimate of the amount of Betfair's liquidity that those leviable "bookmaker" users are responsible for and therefore generate commission of £400m (i.e. 20% of £2bn).
- 5.37. We have established that Betfair's commission is calculated on something more akin to a gross basis for our purposes whilst levy is calculated on a net basis. As such taking a 20% levy liability on £200m (i.e. Levy of £40m) is clearly not appropriate. However, since we know that these "bookmakers" are not only high volume traders but also profitable ones (i.e. profitable on a "net" basis), they are likely to be found towards the more profitable end of the spectrum of users. The difficulty, however, is gauging where the ends of the spectrum are located (the mid-point being "net" zero, with some form of distribution curve placing winners and losers either side of that "net" zero line).
- 5.38. Looking, once again, at those 0.5% of users who pay the "premium charge", it is instructive to note that a person who, whilst he has an account with Betfair, wins 100 and loses 85 (i.e. is a net winner of 15), is on the cusp of the premium charge; i.e. once he becomes more successful he will have to start paying the premium charge.<sup>39</sup> This is because the (standard) commission that he generates (3% of 100 = 3) represents 20% of his net overall winnings (3 being 20% of 15). *(This is, in fact, an inaccurate over-simplification since Betfair take into account not only the actual commission but also the "implied commission" – explained in the Betfair charges document. However, it serves to give an indication of the possible amount of levy at stake).*

---

<sup>39</sup> This actually ignores transaction and data charges, so he could in fact be more successful than this and not pay the premium charge because the transaction and data charges he is liable to pay top up his overall commission to 20% or more of net overall winnings.

5.39. If such a user has net winnings of 15 (giving a Levy liability of 1.5) from gross winnings of 100 (generating commission of 3), then this might suggest:

- (a) that the ends of the spectrum of winners and losers (referred to above) extends beyond 15% from the median "net" zero line (15% of £2bn, being £300m) and those who pay the premium charge are located between the 15% mark and the net winners' end of the spectrum; or, put another way,
- (b) that those users at the more successful end of the "winning spectrum" should be generating around an amount of Levy which is at least 50% of the amount of commission that they generate (1.5 of Levy being 50% of the 3 of commission).

5.40. This would suggest that these users (representing 20% of liquidity) might collectively have a levy liability in the region of £6m.

5.41. If the proportion of users in "business" represent more than 20% of liquidity (our conservative assumption), then this £6m figure would increase, potentially substantially.

<b>Business users - % of liquidity</b>	<b>Potential levy liability</b>
20%	£6m
40%	£12m
60%	£18m
80%	£24m

5.42. Furthermore, any exchange users who are leviable bookmakers will potentially owe levy for previous years too.

**6. WHAT ACTION COULD THE LEVY BOARD TAKE TO RECOVER LEVY FROM LEVIABLE BOOKMAKER USERS?**

6.1. We believe that there are practical and effective means available for the Levy Board to identify leviable bookmakers and take action against them to recover the levy due. We would envisage that this would proceed in three steps as follows.

- (a) Obtaining information direct from the betting exchanges regarding the identities and other relevant information concerning those customers who are potentially leviable bookmakers, if necessary by the use of *Norwich Pharmacal* disclosure orders.
- (b) Bringing proceedings against the exchange users who are potentially leviable bookmakers, if necessary by test cases to establish the principles of who is and who is not a leviable bookmaker under the 1963 Act. Where possible, the Levy Board should seek to settle any such claim with the exchange users.

- (c) Enforcing any award made in such proceedings against the exchange users, if necessary and where practicable by bringing garnishee proceedings against the exchanges holding money on account on behalf of the users.

6.2. We consider each step in turn.

### Disclosure

- 6.3. Most if not all of the information necessary to bring a claim for levy against users who are potentially leviable bookmakers, such as their identities, their profits and level of betting activity, is likely to be available from the betting exchanges. In the first instance, the Levy Board should ask the betting exchanges for such information relating to all users who could sensibly be considered – by reference to their profitability and level of betting – leviable bookmakers. The exchanges are likely to refuse to provide such information in the absence of any court order, not least because of legal duties owed to the users.
- 6.4. It is then likely that the Levy Board would be able to obtain a disclosure order, known as a *Norwich Pharmacal* order, against the exchange for this information.
- 6.5. *Norwich Pharmacal* orders are orders which require an intermediary to disclose to a putative claimant information regarding an ultimate defendant. There are three conditions which must be satisfied for the court to exercise the power to grant *Norwich Pharmacal* relief:
  - (a) A wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer. Originally, *Norwich Pharmacal* orders were limited to revealing those who had committed tortious acts<sup>40</sup> but now they have been expanded to include those who have committed equitable wrongs<sup>41</sup>, criminal acts<sup>42</sup> and even where no wrongdoing is proved at all<sup>43</sup>. In any event, there is plainly an arguable legal wrong here, the failure to pay the levy by the exchange users.
  - (b) There must be the need for an order to enable action to be brought against the ultimate wrongdoer. Plainly there is no other obvious means by which the Levy Board could identify users who may be liable for levy other than by disclosure orders against the exchanges.
  - (c) The person against whom the order is sought must be mixed up in so as to have facilitated the wrongdoing, and be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued. This would again appear straightforward. Were it not for the existence and operation of the exchange, the wrongdoing in question (the failure to pay the Levy) would not

---

<sup>40</sup> *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

<sup>41</sup> *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29.

<sup>42</sup> *Ibid.*

<sup>43</sup> *P v T Ltd* [1997] 1 WLR 1309 where Scott VC held that an employee dismissed on the basis of allegations which were never put to him was entitled to an order requiring disclosure of the allegations and the source despite the fact that he could not show that the defendant had committed any wrongdoing (there being the possibility of a qualified privilege defence to any defamation claim). The judge nonetheless held that the case cried out for an order to be made.

arise as the bookmakers would not be able to engage in betting activity in this way. Internet intermediaries have been held by the courts to be sufficiently mixed up in respect of the publication of defamatory matters to justify the granting of *Norwich Pharmacal* orders against them, and by analogy the same principle should apply against the exchanges.

- 6.6. An application for a *Norwich Pharmacal* order against an exchange would most appropriately be made by the Levy Board, and would need to be supported by evidence both of the existence of wrongdoing (i.e. the failure to pay the Levy) and the presence on the exchange of the wrongdoers.

### **Proceedings**

- 6.7. Once the requisite information has been obtained from the exchanges, it will be for the Levy Board to approach the users which it considers are or may be liable for levy and seek to recover this. If the users refuse, it may be necessary to bring proceedings against the users.
- 6.8. Given that there may be a relatively large number of users, such proceedings may have to be carefully coordinated and organised to ensure that they are undertaken in the most cost-effective manner. This may include bringing one or more test cases to establish the central principles regarding the liability of exchange users to levy.
- 6.9. If successful in these actions, the Levy Board should be entitled to recover their reasonable legal costs incurred in bringing them from the users in question.

### **Enforcement**

- 6.10. If the proceedings are successful, the Levy Board should obtain judgment awards against the exchange users in question in respect of the levy due. If this is not paid voluntarily by the users, the Levy Board will have to consider how to enforce these awards.
- 6.11. There are a variety of mechanisms available to enforce a judgment award. One particularly relevant one in this context may be the use of third party debt orders (formerly known as "garnishee orders") made against the exchanges themselves for funds they hold on behalf of their customers.
- 6.12. CPR 72.2 provides as follows:

*"Upon the application of a judgment creditor, the court may make an order (a 'final third party debt order') requiring a third party to pay to the judgment creditor –*

*(a) the amount of any debt due or accruing due to the judgment debtor from the third party; or*

*(b) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application."*

- 6.13. The procedure is that an application is made to a judge on the papers. If he is satisfied that an order should be made he will firstly make an "interim third party debt order". This will prevent the third party from making any payment to the debtor. On service of the interim order, the third party (assuming as here it is not a bank or building society) must notify the court and the judgment creditor in writing within seven days of being served with the order, if it claims:
- (a) not to owe any money to the judgment debtor; or
  - (b) to owe less than the amount specified in the order
- 6.14. Subject to this, the court will then at a hearing make a final third party debt order which requires the third party to pay the money over to the claimant. We can see no reason why a judge would refuse a third party debt order against exchanges in these circumstances.
- 6.15. Moreover, in the context of proceedings brought by the Levy Board against exchange customers to recover levy due, in order to make the process as cost effective and efficient as possible, one would imagine that at each stage the applications (certainly in respect of seeking the *Norwich Pharmacal* and third party debt orders) would be made compendiously against numerous customers in a single application.

## **7. AMENDING FUTURE LEVY SCHEMES**

- 7.1. An alternative (but not mutually exclusive) method to recovering the levy from exchange users is by way of amending a future levy scheme to facilitate the recovery of levy from the exchanges in respect of the profits made by their customers. This would be on the basis that the exchanges are in the best position to recover the levy due from their customers and that this should thus be part of the exchanges' own levy liability.
- 7.2. It is outside the scope of this submission to consider the form of such levy arrangements in detail. However, briefly, we would suggest that such a scheme, in addition to providing for exchanges to pay levy on their commission and other income, would also provide for the exchange to be liable to pay levy on the profits made by any profitable user (taking into account both lay and back bets) in the levy year in question (other than any user which was itself registered to pay levy). It would be up to the exchanges to determine means of recovering this levy from their users, if they should choose to do so.
- 7.3. It should be noted here for clarity that for any future levy scheme, if the scheme so provided, the users of an exchange in respect of whose profits an exchange itself could be determined for levy need not be merely:
- (a) the HVPUs referred to above or (if different) those profitable users operating in the course of business but could include for example all profitable users. This is because under this approach, it is the exchange (which is clearly a leviable bookmaker) - and not its users - which is being assessed for levy and there is a broad discretion under the 1963 Act in respect of any levy scheme as to how the levy payable by any category of bookmaker is to be determined (so the levy payable by exchanges could be lawfully determined by reference to HVPUs or all profitable users or indeed countless other ways). Determining levy by reference to

all profitable users would have the significant advantages of not only increasing levy yield but also avoiding any definitional issues as to which users can be said to be operating in the course of business; and

- (b) users to the extent that they are layers (as was the situation with the ill-fated 42nd scheme) but could include users to the extent that they are backers and layers taken together - this would have the significant advantage of avoiding the situation in the 42nd scheme that the exchange could be required to pay levy in respect of a user who was profitable as a layer but loss-making overall.

- 7.4. Having regard to the decision of Mr Justice Hooper in *Sporting Options*, we are confident that such a scheme would be lawful.
- 7.5. Such a scheme may of course only be effected by the Bookmakers' Committee recommending and the Levy Board adopting such a scheme or by the Secretary of State determining such a scheme.

**OLSWANG**

**17 September 2010**

## Annex

### Extract from Section J of the Consultation including our comments as to the various arguments made.

#### J. Possible lines of analysis

##### Introduction

101. *The purpose of this section of the Consultation Document is to set out lines of analysis for the alternative positions: (1) that customers of betting exchanges can properly be regarded as leviable bookmakers; or (2) that they cannot. Consultees are encouraged to put forward their own representations, supported by whatever sources they consider appropriate. It is hoped that the headline points and issues raised below will be a helpful reference-point for identifying topics and points of agreement, disagreement, divergence and amplification.*

We consider that it is clear that customers of betting exchanges can properly be regarded as leviable bookmakers. This is broadly for the reasons set out in the paragraphs under the section entitled "(1) Exchange Customers are leviable" below but subject to the comments that we make below the paragraphs in that section.

In fact we doubt whether this question is a subject appropriate for consultation. Whether any particular customer of a betting exchange is or is not a leviable bookmaker is a legal question for a court and not something which any consultation response can alter. As to whether the HBLB should pursue such customers, it is the HBLB's statutory duty to collect the levy from those persons who are liable to pay it and, as such, the HBLB should perform its statutory duty and seek to collect the levy from those customers of betting exchanges who have such a liability.

For the reasons set out in section 6 of our main response to the consultation (our "Submission") there are appropriate legal means at the HBLB's disposal both to determine which customers of betting exchanges have such a liability and to collect such amounts.

102. *The key questions on which responses to this Consultation Document are invited are therefore as follows:*

- (1) With which of the two lines of analysis set out below would you agree, and why?*
- (2) Are there any particular points that you would add or subtract, and if so why?*
- (3) In the context of analysing these issues is there anything arising out of the points made in the earlier sections of this Consultation Document on which you wish to comment?*

Our comments in respect of (1) to (3) above are made below the appropriate paragraph that follows. As will be clear, we consider that it is very likely that there are customers of betting exchanges who can properly be regarded as leviable bookmakers. However, we would not necessarily advance our analysis as set out in the Consultation. For our analysis, see section 3 of our Submission.

**(1) Exchange Customers are leviable**

103. *Under this line of analysis, a customer of a betting exchange can properly be seen as a leviable bookmaker for the purposes of section 27(2)(a) of the 1963 Act and Betting Activity 1.4 of the 49<sup>th</sup> Scheme, for the following main reasons.*

We agree that certain customers of a betting exchange can properly be seen as leviable bookmakers.

104. *First, a person or entity may conduct activities on a betting exchange which are (i) in the nature of business activities and (ii) carried on their own account: see section 27(2)(a) and section 55(1). Each of these is necessary, but not sufficient. They engage questions of fact, and cannot be said to be incapable of being met in the case of exchange customers. There is room for different views as to how to approach and apply these questions and it is necessary to grapple with those questions.*

Save for the final sentence, we agree with the comments made in paragraph 104.

We agree with the comments made in the first sentence above for the reasons set out in section 3 of our Submission.

In relation to the second sentence above we would go further and say (rather than saying that the necessary tests "cannot be said to be incapable of being met") we consider that, in respect of those profitable exchanges customers who use the exchanges in the most systematic of ways, it is very likely that the necessary tests would be met and, as such, these users are leviable bookmakers.

We disagree with the comments in the final sentence. This is a legal question (to be taken on the basis of the relevant facts) and it is for the HBLB to discharge its statutory duty and seek to recover the levy from those who have a liability to pay it.

105. *Secondly, the position can be seen to be as follows, that: (i) the betting exchange is acting as a broker, providing a platform where the backer and layer bet direct with each other; (ii) the layer therefore receives the bet from the backer; (iii) the layer calculates the odds; (iv) the layer undertakes the risks; and (v) as it has been said, the layer can "be the bookie" (see section F, paragraph 47 above).*

This seems to be an overly complex analysis. The terms here “broker” and “bookie” are not defined terms in the 1963 Act and it is not clear to us how this analysis assists. To the extent that this paragraph is directed towards the meaning of “receiving or negotiating” in the 1963 Act, as far as we are concerned, the better and more likely analysis is that these are meant as broad terms and would incorporate all the activity of users on a betting exchange, whether backing or laying (see paragraphs 3.6-3.21 of our Submission).

106. *Thirdly, the activities of the layer, at least, can be seen to be one of "receiving" bets and, if necessary, as "negotiating" bets – though either characterisation would suffice (section 55(1)). They can in turn be seen, as they would also need to be, as "effecting" betting transactions: section 27(2)(a).*

Again, we consider this to be overly complex. See our comments above. In addition, we would note, however, that the activities of a backer can equally be seen to be one of receiving and negotiating bets. This is for the reasons explained in paragraphs 3.6-3.21 of our Submission.

107. *Fourthly, this analysis is supported by the way in which traditional bookmakers (e.g. Ladbrokes or William Hill) are treated as leviable bookmakers in respect of their ('hedging') activities when using betting exchanges. In relation to those activities, such entities are treated as covered by section 27(2)(a) and Betting Activity 1.4 of the 49<sup>th</sup> Scheme. That establishes the principle. It cannot be explained by the fact that the traditional bookmaker is a leviable bookmaker in relation to its activities off the Exchange. That does not suffice: the Levy is payable "only in respect of so much of the business of the bookmaker as relates to such betting transactions" (section 27(2)(a)). Putting it another way, if a customer of a betting exchange cannot be a leviable bookmaker then it is very difficult to see how the traditional bookmakers could properly be leviable in relation to their activities on the exchange. Betting Activity 1.4 of the 49<sup>th</sup> Scheme would not be applicable to anyone.*

We agree with the comments made in paragraph 107, although we would not in fact attach much importance to the treatment of "traditional" bookmakers. It is true that that treatment would be inexplicable if the activity of customers on an exchange was not receiving or negotiating bets. However, we believe that it is clear that this activity does constitute receiving or negotiating bets and would be so regardless of the treatment of traditional bookmakers.

We would add that the subjective reasons for traditional bookmakers using betting exchanges is irrelevant. As such, whether such a bookmaker is hedging, making bets on a proprietary basis (i.e. betting on its own account) or merely offering its odds to customers of the exchange generally, the levy analysis should not differ. Note that (unlike for general betting duty) a traditional bookmaker will be within the scope of the levy for both lay and back bets when those bets are made via a betting exchange (see the definition of "Gross Profit" in the 49<sup>th</sup> Levy Scheme).

For the reasons explained in paragraphs 4.37 to 4.48 of our Submission and the comments set out below, we would add that both the Exchange and any "bookmaker" (within the section 55(1) definition) using the Exchange can potentially have a levy liability in respect of the same winning bet.

108. *Fifthly, it is no answer to say that the betting exchanges have themselves been recognised as leviable bookmakers. That position has never been directly tested in Court. Parliament has recognised that a "betting transaction" can involve "one or more of the parties ... acting as a bookmaker" (section 55(1)). Levying a traditional bookmaker under Betting Activity 1.4 (see above) would be such an example. It is true that "bookmaker" can include someone acting "whether on his own account or as servant or agent to any other person" (section 55(1)). It is also true that the leviable bookmaker must be acting "on his own account" (section 27(2)(a)). If the correct analysis is that the betting exchange is acting as broker (see above) and therefore as agent for the layer, then it would follow that the betting exchange is a bookmaker (section 55(1)) but not a leviable bookmaker (section 27(2)(a)). Betting Activities 1.6 or 3.1 of the 49<sup>th</sup> Scheme would not be capable of application. If that is the consequence, so be it. But once it is recognised that the exchange is mere broker or agent, questions arise as to whether there is anyone who is a leviable bookmaker if – for example – the layer on the exchange is not carrying on a business, or is located overseas. The correct analysis may be that there is no leviable bookmaker in those situations.*

We do not entirely agree with the comments made in paragraph 108.

The comments suggest that both a traditional bookmaker and an exchange can each be a "bookmaker" (within the section 55(1) definition) in respect of the same bet. That is plainly correct.

The comments might also be taken to suggest that, for the purposes of section 27(2)(a), since a leviable bookmaker must be acting "on his own account" an exchange and a traditional bookmaker cannot both have a potential levy liability in respect of the same bet; i.e. the comments suggest that, although they might both be "bookmakers", only one can be a "leviable bookmaker". To the extent that this is what is being suggested, we do not agree.

Were this to be the case, a liability arising from Betting Activities 1.4 and either 1.6 or 3.1 simultaneously might be considered to be ultra vires section 27(2)(a).

The words "on his own account" relate to the carrying on of the business rather than the effecting of betting transactions (as principal). As a result, since both the exchange and the traditional bookmakers are each: (i) carrying on a business on their own account; and (ii) that business includes "effecting betting transactions on horse races" they will both be capable of falling within section 27(2)(a) simultaneously.

The correct analysis, therefore, is that:

(i) since it is unquestionably in business, the exchange will always be potentially liable to pay levy in respect of all bets made via the exchange; and

(ii) depending upon whether a particular customer is receiving or negotiating a bet as part of a business (i.e. depending on whether it is a "bookmaker" for levy purposes), that customer will also be potentially liable to pay levy in respect of bets made via the exchange.

109. *Sixthly*, it is no answer to say that betting exchanges have, and their customers have not, been recognised as licensed bookmakers for the purposes of the bookmaker's permit under section 2 of the 1963 Act. That position was never tested, still less in the context of consideration of the special position of evolving categories of business users of the exchanges. The true position is that there has been licensable bookmaking activity by betting exchange customers alongside their leviable bookmaking activity, which was not recognised as it could and should have been. The fact that it was not does not undermine the need to apply the law correctly, once the question is squarely faced. In the context of licensing, the Gambling Act 2005 stepped in and repealed section 2 of the 1963 Act. The 2005 Act makes express provision for licensing of a "betting intermediary" (section 13, section 65(2)(e)). That provision was intended to apply to betting exchanges, who do not "partake in the bet" (see Explanatory Notes §66). The reform of the statutory provisions in the context of betting exchanges underlines the difficulty in applying the established statutory concepts (like "bookmaker"). Moreover, insofar as illumination is to be had from the licensing regime, it lies in the most recent proposal for a special category of licence for business customers of betting exchanges, whether or not they were already licensable.

For the reasons set out in paragraphs 4.3 to 4.6 of our Submission, we consider that, in determining whether any particular person has a liability to pay the levy, the question of whether or not that person should have held a bookmaker's permit under the 1963 Act or should be licensed for the purposes of the Gambling Act 2005 is irrelevant.

110. *Seventhly*, still less is it an answer to say that general betting duty has been payable by betting exchanges and not their customers. General betting duty is the subject of a distinct statutory scheme (the 1981 Act) which has been specifically amended to deal with betting exchanges. It is true that if betting exchange customers are bookmakers then there would be a bet made with a bookmaker such as would for that reason have attracted betting duty, for example as at 2000. Be that as it may, the policy decision that was made was to provide for duty to be payable by betting exchanges within the definition of bet-brokers (Finance Act 2001, inserting section 5C) and then by means of special provision (Finance Act 2003, inserting section 5AB). The question, in that statutory scheme, as to whether there is a bet with a bookmaker (section 5B(2)(b)) is academic because it is overridden by the bet having been made by means of facilities provided by a betting exchange (section 5B(4)). Indeed, were the betting exchange bookmaker – and not the customer – far more straightforward provision could and would have been made.

We completely disagree with the comments made in paragraph 110. The analysis is incorrect for two separate reasons.

Unless stated to the contrary, statutory references below are to the Betting and Gaming Duties Act 1981 (as amended) or "BGDA".

(i) The analysis of section 5B is incorrect - traditional bookmakers and exchanges CAN each have a general betting duty liability in respect of the same bet

Contrary to what you suggest, it is entirely possible for two different persons to each have a general betting duty liability in respect of the same bet. This includes a bookmaker placing a lay bet via an exchange and the exchange itself.

You refer above to a "traditional bookmaker (e.g. Ladbrokes or William Hill)" (a "Traditional Bookmaker"). Consider a Traditional Bookmaker who places a lay bet via an exchange.

Pursuant to section 2 BGDA, where a Traditional Bookmaker is a "bookmaker" (within the definition of 12(4) BGDA) which is "in the UK", that bookmaker will be subject to general betting duty on its "net stake receipts" ("net stake receipts" are broadly stakes received less winnings paid out, as determined in accordance with section 5 BGDA).

Where a person provides betting exchange facilities enabling counterparties to a bet to place a bet with one another, general betting duty is payable pursuant to section 5AB BGDA 1981, on the commission charged to the counterparties to the bet for the use of the exchange facilities. Where a liability arises under section 5AB BGDA 1981, it is the person who provides the facilities who has the liability (per section 5B(4)) or, alternatively, the person who arranges for the facilities to be provided (per section 5AB(5)).

Section 5B(4) does not cause the section 5AB liability to somehow "override" the section 2 liability in the way you suggest. Both liabilities (i.e. the section 2 liability and the section 5AB liability) remain payable simultaneously.

As such, the bet in question will make up part of the betting activity in relation to which the relevant person will have a general betting duty liability; i.e. (a) the Traditional Bookmaker will potentially have a general betting duty liability pursuant to section 2 on the basis that the bet placed via the exchange will be taken into account in determining its net stake receipts; and (b) the exchange will have a general betting duty liability pursuant to section 5AB on the commission that the exchange charges the counterparties to the bet for providing the facilities.

Note that section 5B(4) does not mention section 2 at all. As such, there is nothing in the legislation that prevents a liability arising under section 2 where a liability arises under

section 5AB; hence both the section 2 liability and section 5AB liability coexist in respect of the same bet.

Note further that in section 5AB(4) it is clearly stated that where there is both a provider of exchange facilities and a person who arranges such facilities, the latter has the section 5AB general betting duty liability "and the other person shall not". Hence, it is clear that where the draftsman wishes one person to have a liability and another person not to have a liability, he says so expressly. Note that the draftsman does not do so in section 5B(4).

Note the following extract from HMRC's Notice 451: General Betting Duty

"8.5 How do I account for duty when using a betting exchange?

General betting duty is charged on bets (other than on-course bets) made with a bookmaker in the United Kingdom. If you are a bookmaker, it makes no difference whether you take bets in a shop, over the phone, online, or through a betting exchange. Bets that you take, as a bookmaker, through a betting exchange are no different from other bets that you take, you must still include these bets in your duty calculation."

[http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&pageLabel=pageExcise\\_ShowContent&propertyType=document&id=HMCE\\_CL\\_000255#P349\\_34718](http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&pageLabel=pageExcise_ShowContent&propertyType=document&id=HMCE_CL_000255#P349_34718)

The above extract makes it clear that HMRC also considers that bets taken by a bookmaker (within the definition of 12(4) BGDA) via a betting exchange are to be taken into account when determining that bookmaker's liability to general betting duty.

(Note that only "lay" bets (and not "back" bets) are taken into account in determining the net stake receipts of a bookmaker (within the definition of 12(4) BGDA) for general betting duty purposes. This is because such bookmakers only have a liability to pay general betting duty on bets "made with him" (and not bets made by him) – see sections 2 and 5 BGDA. Contrast the position for levy purposes where bookmakers (within section 55(1) of the 1963 Act) are within the scope of the levy in respect of "bets placed with him" and, when they are "entered into by him via one or more Betting Exchanges", bets "entered into by him" – see the definition of "Gross Profit" in the 48<sup>th</sup> Scheme. As a result, a bookmaker is within the scope of the levy in respect of all lay bets (including those made via a betting exchange) and is only within the scope of the levy in respect of back bets when they are placed via a betting exchange).

(ii) Your general betting duty analysis is incorrect in that it suggests that users of betting exchanges cannot have a liability to general betting duty

As explained above, a bookmaker (within the definition of 12(4) BGDA) and an exchange can each have a general betting duty liability in respect of the same bet.

The definition of "bookmaker" for general betting duty purposes (section 12(4) BGDA) and the definition of bookmaker for levy purposes (section 55(1) of the 1963 Act) are very similar in that they each refer to persons receiving or negotiating bets as part of a business.

As such, were an exchange user to be a "bookmaker" for levy purposes, he would almost certainly also be a bookmaker for general betting duty purposes. As a result, were that bookmaker to be "in the UK" for general betting duty purposes, he will have a general betting duty liability.

The only reason why users of exchanges are not found to be liable to general betting duty, therefore, is because HMRC choose not to pursue them for such amounts. One reason for this is that HMRC are concerned that a finding that such a user is operating a "business" might also result in that user operating a "trade". The ramifications of such a finding for HMRC are discussed in paragraphs 3.27-3.29 of our Submission. The extracts from the FoIA bundle referred to in paragraphs 4.16, 4.20 and 4.22 of our Submission corroborate this.

In short, therefore, customers of exchanges who are found liable to pay the levy will almost certainly also be liable to pay general betting duty (the only doubt arising as a consequence of the slight difference in the definition of "bookmaker" for levy and general betting duty purposes).

### Conclusion

As a question of law, it is entirely possible for a user of an exchange and the exchange itself to each have a liability to both the levy and general betting duty in respect of the same bet.

## **(2) Exchange Customers are non-leviable**

111. *Under this line of analysis, a customer of a betting exchange cannot properly be seen as a leviable bookmaker for the purposes of section 27(2)(a) of the 1963 Act and Betting Activity 1.4 of the 48<sup>th</sup> Scheme, for the following main reasons.*

We disagree with the statement in paragraph 111 for the reasons explained above. Moreover, it is worth pointing out the scope of what is being contended. That is that regardless of the factual position, in no circumstances can customers of exchanges be liable for levy. That cannot possibly be correct.

112. *First, there is a difficulty with a necessary premise: that there are customers of a betting exchange who are carrying on a business (section 27(2)(a)). That is ultimately a question of fact which would need to be demonstrated and in truth cannot be. Leaving aside that fatal initial objection, the following further points arise.*

We disagree with the statement that the facts are not capable of being demonstrated. It is not stated why this is the case. It is plainly wrong. It is true that this depends on the facts. But it is easy to imagine the factual circumstances in which it could be established that exchange customers are carrying on a business (see our Submission, paragraphs 3.22 to 3.44).

Moreover, we believe (as explained in our Submission) that (a) there are good grounds for believing that such customers exist and (b) the means are available for the HBLB to obtain the requisite information from the exchanges to establish this.

For these reasons, we disagree that this is a "fatal initial objection". Indeed in our view, to be clear, if that were to be the approach of the HBLB, it would be capable of being subject to a successful challenge by way of judicial review since it is not a view lawfully open to it.

It is for the HBLB to fulfil its statutory duty by collecting levy from those with a liability to pay it.

Ultimately it will be for a court to determine whether or not a particular betting exchange user receives or negotiates bets in the course of a business.

113. *Secondly, the true and proper focus is on the betting exchange as the leviable bookmaker, and not the customer. The customer is not 'making the book', or 'selling the bet'. It is the betting exchange which is the business which makes the arrangements for the bets. It receives, negotiates and "effects" them. It exercises responsibility and control. Bookmaking is not defined by risk or the action of laying. The laying customer does not deal directly with the backing customer, still less arrange for the bet. Moreover, it is artificial and unsatisfactory to focus on the 'layer' on the exchange. In the context of a two-horse race, both parties to the bet are effectively both laying and backing.*

We disagree with the statement in paragraph 113.

We comment below, sentence by sentence:

*".. the true and proper focus is on the betting exchange as the leviable bookmaker, and not the customer."*

As explained above (in the comments to paragraphs 108 and 110) both a bookmaker and the operator of a betting exchange can have a levy liability simultaneously in respect of the same bet.

*"The customer is not 'making the book', or 'selling the bet'. "*

The 1963 Act contains no references to 'making the book' or 'selling the bet'. These concepts are entirely irrelevant in determining a person's liability to pay the levy.

*"It is the betting exchange which is the business which makes the arrangements for the bets. It receives, negotiates and "effects" them. It exercises responsibility and control. Bookmaking is not defined by risk or the action of laying."*

The concepts of "effect[ing]" a bet or "exercis[ing] responsibility and control " are not referred to in the 1963 Act.

*"The laying customer does not deal directly with the backing customer, still less arrange for the bet."*

Once again, the concepts of "dealing directly" and "arranging for the bet" are not referred to in the 1963 Act and, as such, these concepts are entirely irrelevant in determining a person's liability to pay the levy. The key (and only) relevant questions, vis a vis the customers of a betting exchange, are whether they are "receiving or negotiating bets" as part of a "business" carried on by them on their own account (section 55(1) of the 1963 Act) and whether they are "effecting betting transactions on horse races" (section 27(2)(a) of the 1963 Act). For the reasons we have given, we consider that there are exchange customers who meet these criteria.

*"Moreover, it is artificial and unsatisfactory to focus on the 'layer' on the exchange. In the context of a two-horse race, both parties to the bet are effectively both laying and backing."*

We agree with this. We believe that "receiving or negotiating bets" is to be construed broadly (and if necessarily purposively) and covers all activity by customers on an exchange.

114. *Thirdly, it is no accident that the position is well-established that it is the exchange who is the leviable bookmaker, and required the bookmaker's permit. As explained in the Sporting Options judgment (see §12), the position had originally been controversial, but it was recognised and resolved. It was rightly recognised that the betting exchange is itself in the business of "receiving or negotiating bets" (section 55(1)); "effecting ... betting transactions" and "on [its] own account" (section 27(2)(a)). Were it otherwise, Betting Activities 1.6, 3.1 and 3.2 would be ultra vires.*

For the reasons stated above, we do not disagree with the suggestion that the betting exchange should be leviable. We do, however, disagree with the suggestion that only one or other of the betting exchange and its customers should be leviable (again, for the reasons stated above). They both may be.

As stated above, the need for a bookmaker's permit or an operating licence under the 1963 Act or the Gambling Act 2005 is not relevant. It is no more than a "red herring".

115. *Fourthly, it would be a surprising position to find that customers of the betting exchange are themselves leviable bookmakers. One logical consequence of that approach to the statutory scheme is that there would have been persons who were committing criminal offences from the time when betting exchanges began to operate, up until the change of licensing legislation in 2005. That is because it was an offence for a person to "act as a bookmaker on his own account" without holding a bookmaker's permit (section 2(1) of the 1963 Act, prior to its repeal). That was never the view, for good reason.*

We disagree. We don't see why this would be a "surprising position". It does not follow that because something is unlawful it is unlikely to be the case.

116. *Fifthly, if the focus is to be put on the customer there is the unavoidable question-mark as to whether the betting exchange could itself continue to be a leviable bookmaker. Parliament has recognised that a "betting transaction" can involve "one or more of the parties ... acting as a bookmaker" (section 55(1)). But that is doubtless because "bookmaker" can include someone acting "whether on his own account or as servant or agent to any other person" (section 55(1)). However, the leviable bookmaker must be acting "on his own account" (section 27(2)(a)). If it is to be said that the betting exchange is broker and agent, then it could not itself be leviable. That will leave very many betting transactions as involving no leviable bookmaker: e.g. where the layer on the exchange is not carrying on a business.*

For the reasons stated above, we disagree with the suggestion that only one or other of the betting exchange and its customers should be leviable. It certainly is not "doubtless" that Parliament recognised that a "betting transaction" can involve "one or more of the parties ... acting as a bookmaker" because "bookmaker" can include someone acting "whether on his own account or as servant or agent to any other person". But that is not in fact the real question. The real question is whether the exchange and the customer can both come within the definition of a leviable bookmaker under the 1963 Act. The answer is that they can.

As you have suggested, Betting Activities 1.4 and 3.1 can clearly result in levy liabilities arising for the betting exchange operator and the betting exchange customer in respect of the same bet.

117. *Sixthly, it is no answer to say that traditional bookmakers (e.g. Ladbrokes) are treated as leviable bookmakers in respect of their activities when laying on betting exchanges. That has happened because the traditional bookmaker is recognised as a bookmaker in relation to its other activities. Presumably, that is thought to suffice, perhaps together with the fact that its activities on the exchange "relate to ... betting transactions" (section 27(2)(a)). If, on reflection, that is wrong because the traditional bookmaker is not in the business of "effecting ... betting transactions" when it acts as an exchange customer, so be it. The correct analysis may be that only the exchange is a leviable bookmaker in those situations, and Betting Activity 1.4 of the 49<sup>th</sup> Levy Scheme would not be capable of application.*

For the reasons stated above, we disagree with the suggestion that only one or other of the betting exchange and its customers should be leviable.

118. *Seventhly, it is instructive to consider the position of general betting duty. There is a proper parallel to be drawn between the issues which arise in relation to the Levy and those which arise in relation to general betting duty. Questions which arise include whether the focus should be on the exchange or its customers, or both, and which customers. Concerns have included the suggested loss of betting duty through the growth of exchanges and the activities of their customers. This has been carefully considered over the years. The customers of the exchanges have not been equated with the bookmaker for general betting duty purposes, including in clarificatory legislation (the Finance Acts) in which Parliament responded to the special position of betting exchanges by making express provision. The legislative design is as revealing as the policy choice. The statutory amendments arose precisely because there was no bet "with" the betting exchange so duty was not payable by it as the bookmaker. Had the betting exchange customer been a bookmaker, since there was a bet "with" that person, betting duty would have arisen payable by that person. But that was rightly never regarded as plausible, still less desirable.*

We re-iterate the point that there is a very significant difference between determining future policy and determining whether persons have a current liability (to pay the levy or general betting duty) under existing legislation.

Dealing with the issues on a sentence by sentence basis:

*".. it is instructive to consider the position of general betting duty. There is a proper parallel to be drawn between the issues which arise in relation to the Levy and those which arise in relation to general betting duty. Questions which arise include whether the focus should be on the exchange or its customers, or both, and which customers."*

We agree that the position of general betting duty is instructive, but for entirely different reasons. As we have established, separate general betting duty liabilities can arise simultaneously to a bookmaker placing a lay bet on a betting exchange and to the betting exchange itself. The same result can apply for levy purposes (however, to reach this result – in the same way as for general betting duty - the levy legislation needs to be interpreted correctly).

*"Concerns have included the suggested loss of betting duty through the growth of exchanges and the activities of their customers. This has been carefully considered over the years."*

As discussed above, HMRC's policy decision not to change the general betting duty rules in a manner which would result in the customers of betting exchanges having a separate section of general betting duty aimed specifically at them does not mean that the existing section (section 2 BGDA 1981) does not apply to these customers negotiating or receiving bets as part of a business.

The customers of the exchanges have not been equated with the bookmaker for general betting duty purposes, including in clarificatory legislation (the Finance Acts) in which Parliament responded to the special position of betting exchanges by making express provision. The legislative design is as revealing as the policy choice. The statutory amendments arose precisely because there was no bet "with" the betting exchange so duty was not payable by it as the bookmaker. Had the betting exchange customer been a bookmaker, since there was a bet "with" that person, betting duty would have arisen payable by that person. But that was rightly never regarded as plausible, still less desirable.

Once again, these comments misunderstand the general betting duty legislation. Finance Act 2003 (which introduced section 5AB BGDA 1981) was not "clarificatory". It created a new section specifically to take betting exchanges out of the bet broker provisions (section 5C BGDA) and to create a new provision whereby betting exchanges would be subject to duty on the commission that they charge to their customers.