

**RACING'S SECOND SUBMISSION TO THE
HORSERACE BETTING LEVY BOARD'S
CONSULTATION PAPER ON BETTING
EXCHANGES**

23 NOVEMBER 2010

Second submission to the Horserace Betting Levy Board ("the Board") by the British Horseracing Authority, the Racecourse Association and the Horsemen's Group (together "Racing") in respect of the Consultation by the Board on Betting Exchanges ("the Consultation").

1. This submission is made by and on behalf of Racing pursuant to:
 - (a) the Consultation issued on 2 July 2010;
 - (b) the submission (the "First Racing Submission") in response to the Consultation made by Racing on 20 September 2010; and
 - (c) the press release ("the Press Release") issued by the Board on 9 November 2010 soliciting further representations from consultees.
2. The Board has received voluminous submissions in respect of the Consultation. In particular, Betfair Group plc ("Betfair") has provided no less than three submissions already to the Board in relation to the Consultation including one ("Betfair's Rejoinder") specifically addressing the First Racing Submission. In an appendix ("Appendix 1") which accompanies this submission, Racing responds to the points which Betfair raise.
3. Racing considers that it is sensible for the Board to have afforded to consultees, one additional round of submissions. However, Racing notes that the Press Release stated that "*this is intended to be a firm and final deadline*". Racing agrees and believes that it is imperative that the process be brought to an end. The Board must now move on to a decision.

The decision facing the Board

4. The matter which the Board has to decide is simple, that is whether:
 - (a) there is a significant likelihood that there is and has been¹ a sizeable cohort of customers of betting exchanges who should be and should have been paying what amounts in aggregate to a significant amount in levy but who are not currently and have not been doing so; and
 - (b) it would be worthwhile for the Board, having regard *inter alia* to the amount potentially at stake, to take steps to seek to recover the levy due from all or some of this cohort.
5. We will consider both in turn.

A cohort of customers

6. In terms of determining whether there are customers of betting exchanges who should be paying levy but who are not doing so, there are essentially two different tests.

¹ There is no reason why the Board cannot seek recovery from those it transpires should have, but have not been, paying levy for multiple past years.

7. Firstly, whether there are any exchange customers² who satisfy the definition of "bookmaker" in section 55 of the Betting, Gaming and Lotteries Act 1963 (the "1963 Act"), that is a person who:

"(a) *whether on his own account or as servant or agent to any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets or conducting pool betting operations; or*

(b) *by way of business in any manner holds himself out, or permits himself to be held out, as a person who receives or negotiates bets or conducts such operations"*

8. Secondly, whether there are any exchange customers who satisfy section 27(2)(a) of the 1963 Act, that is a person:

"... 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 of the bookmaker as relates to such betting transactions"

9. If an exchange customer meets both tests, he will be liable to pay levy on 10% of his Gross Profit (as defined by the current levy scheme).

10. In construing these provisions in the context of determining whether exchange customers may be liable for levy, there are a number of discrete issues. These can be conveniently divided into two categories as follows.

(a) There is the true construction of the terms "*on his own account or as servant or agent to any other person*", "*... receiving or negotiating bets*", "*carries on on his own account...*" and "*effecting of betting transactions*". It would appear that the differences between Racing on the one hand and Betfair on the other in respect of these terms are purely ones of construction. There is no significant dispute as to the actual facts as far as they relate to these terms. In Appendix 1, Racing addresses Betfair's Rejoinder in respect of these terms. Ultimately the construction of these provisions would be a matter not for Betfair or Racing or even the Board, but the Court, see paragraphs 4.6 and 4.7 of Appendix 1. However, for the reasons set out in that Appendix, Racing considers that it is indisputable that there is a strong likelihood that exchange users would come within these provisions.

(b) There is the true construction of the terms "*carries on ... the business of*", "*by way of business*" and "*carries on ... a business*", which Racing considers is essentially the same issue³. This issue depends very significantly – in the case

² Other than those who are already paying levy, that is licensed bookmakers.

³ It is to be noted that "business" is distinct from "trade", see paragraphs 2.33 to 2.37 of Appendix 1. HM Treasury in its review in 2004 erroneously conflated the two.

of each user – on the facts. Racing contends that three significant indicators of carrying on business in this regard are consistent profitability, a high level of betting activity beyond that possible by a recreational (that is non-business) customer or substantial investment in the betting operation.

It should be noted at the outset that the legal test for being in "*business*" is not particularly high. This is for two reasons. Firstly, as a matter of tax law, the test for being in "*business*" is considerably lower than the test for carrying on a "*trade*". Secondly, the definition of "*bookmaker*" under section 55 of the 1963 Act provides that a person must merely carry on a business "*occasionally*" to be a bookmaker. Clearly the threshold at which one becomes a bookmaker is not overly onerous.

Nonetheless, the question of whether any particular customer is carrying on a "*business*" depends very significantly on the facts. Betfair asserts that Racing has "*no evidence*" that any customers of exchanges are carrying on a business in their activities on exchanges. This is not true. Racing's position on this is that there is evidence from which the inference must be drawn that there are customers of betting exchanges who are carrying on a business. The evidence (which Racing does not understand to be in dispute) in question is as follows.

- (i) Betfair standard terms and conditions provide that:
 - (a) certain customers who have been profitable overall throughout their entire history on Betfair pay a premium rate, which is approximately 20% of the profits made less the commission paid – thus demonstrating that some customers are consistently profitable;
 - (b) a customer will be charged "transaction charges" which apply only where he has placed or edited more than 1,000 bets in any one hour; and
 - (c) a customer will be charged for "data request charges" if he makes more than 20 data requests in any one second.

These latter two provisions demonstrate that there are some customers of Betfair who undertake a very high level of betting activity and have at least invested in the computer technology necessary to undertake such volume of transaction. Accordingly, taken together, these provisions are highly indicative of betting undertaken by customers in the course of business.

- (ii) It is well established that there are exchange customers who attend at racecourses who procure expensive facilities in order to transact "in running" betting on betting exchanges while at the course. It is also well established that there are exchange customers who rent terminals in trading rooms with near live television coverage of horse races and high speed internet access to transact *inter alia* "in running" betting on betting

exchanges.⁴ It is evident that these customers would not be willing to procure such facilities if they were not able to run their betting on exchanges as a profitable business. The website's of these trading rooms are revealing. Appendix 2 contains screenshots from some of these websites. Racing considers that it is inconceivable that regulars of these trading rooms could be considered anything other than "in business".

- (iii) The prospectus ("the Prospectus") relating to Betfair, published (after the initial closing date of the Consultation) in connection with its recent admission of shares to the London Stock Exchange's main market, states (on page 48) as follows:

"Heartland Customers are regular, well informed and sophisticated customers who understand and make use of the core Betting Exchange differentiators such as lay betting and trading capability.

Heartland Customers are motivated principally by the functionality and value offered by the Exchange Platform and typically are high volume customers who generate high levels of ARPU. Many of these customers can only use Betfair's Exchange Platform for their betting activities. The Directors estimate that Heartland Customers comprise approximately 20 per cent. of Core Betfair's customer base"

Further, the Prospectus stated (on page 50) as follows:

In the United Kingdom, Betfair believes that it has a substantial market share of the high value Heartland Customer segment. Betfair also believes that this customer segment has been significantly expanded by the Betting Exchange, as Heartland Customers would previously have been unable to easily engage in the trading and laying functionality that this segment typically utilises.

These passages suggest that it is very likely that there are consistently profitable in-business customers on Betfair. This is for the following reasons.

- (a) There are "regular" and "high volume customers".

⁴ In each case, such facilities give each punter an advantage over other exchange users watching television whose pictures appear a number of seconds after the live event, hence justifying the additional expense.

- (b) They are “well informed and sophisticated”, the traits obviously necessary to be consistently profitable
- (c) These customers generate high ARPU (average revenue per user). In this regard, it should be remembered that on any particular race the exchange will earn revenue from a customer if he makes net winnings on that race. Accordingly, high revenue from a customer indicates a successful customer.

Racing accepts that not all Heartland Customers will be carrying on a business. However, it would seem very likely, for the reasons stated above, that many will be. Given that Betfair states that some 20% of its core customer base are such Heartland Customers, that would suggest that there are significant numbers of customers carrying on a business.⁵

These matters of evidence plainly give rise to an overwhelming inference that there are customers on exchanges who are betting in the course of a business. It is true that the evidence is not conclusive. The overwhelming inference could have been rebutted for example if Betfair had advanced any of its underlying data which showed this to be the case. But Betfair has chosen not to do so. That in itself is indicative.

11. Notwithstanding the above, Betfair seeks to rely on other reviews – none of which has concerned the levy - which it says have concluded that there are no leviable bookmakers using exchanges. This is addressed in paragraph 4 of Appendix 1. In summary, Racing's position is as follows.

- (a) The Board must make its own assessment as to whether there are any such customers on the basis of the evidence advanced. It cannot substitute its judgement with that of another body.
- (b) In fact, none of the reviews relied on by Betfair concerned the levy.
- (c) In particular, the HM Treasury review of 2005 merely concluded that it was not worthwhile pursuing exchange customers for betting duty. This conclusion – in 2005 - was reached in particular having regard to broader policy decisions regarding tax. It is no basis whatsoever for concluding that in 2010 there are no customers on exchanges who should be paying levy.

For these reasons, the Board should give little or no weight to these reviews. It must make its own decision and must do so on the evidence and having regard to the submissions before it.

⁵ The Prospectus also states (page 50) “the Heartland Customer segment outside the United Kingdom” is “relatively small”. Thus it is evident that these Heartland Customers are predominantly located in the United Kingdom and, if carrying on a business, should be paying levy.

Whether it is worthwhile for the Board to seek to recover levy from exchange customers

12. The Board must ask itself whether it is worthwhile pursuing customers on exchanges who owe levy. In this regard, it would seem sensible for the Board to put to itself four issues.
- (a) *The amount at stake.* That is, how much in levy could be raised from these customers. In the First Racing Submission, Racing gave an estimate of what this might be. The necessary information is, however, almost entirely solely within the domain of Betfair and the other exchanges. Betfair has attacked the methodology used by Racing to come to this figure⁶. However, at no point has it substituted its own figures. Betfair would clearly do so if in fact the amounts at stake were modest. Bearing this in mind and having regard to the fact that the Board would be able to recoup from exchange customers for multiple years in the past where there has been no payment of amounts due, Racing believes that the overwhelming likelihood is that the amounts potentially at stake are very great indeed.
- (b) *Recovery.* This relates to difficulties occasioned to the Board in recovering the amounts due in levy from exchange customers. In the First Racing Submission, there was set out a simple procedure for obtaining the requisite information from Betfair and the other exchanges by way of making an application for a *Norwich Pharmacal* order from the court, assessing the information, instituting proceedings against exchange customers determined to owe levy and if necessary recovering those amounts from the exchanges themselves under the usual enforcement provisions of the court rules. These are all relatively straightforward steps. Moreover, they are sequential. So, for example, if contrary to every current indication it transpired after obtaining the requisite information from the exchanges that there were no or few customers who could be said to owe levy, no further steps need be taken. All the Board need do initially is seek the information and it can then review the position. In this regard it may be fairly said that if the exchanges resist the provision of the information, it is likely to be because it would reveal that there are customers who should be paying levy.
- (c) *The litigation threat.* In its various submissions (and in other contexts), Betfair repeatedly makes threats of litigation if the Board seeks to take steps to recover levy from its customers. Racing would therefore expect Betfair to resist for example the application for a *Norwich Pharmacal* order against it (although as stated above, Racing believes that the Board should be further emboldened by such a response that this is likely to be because there are exchange customers who owe levy which the company is trying to protect). However, Racing considers that the chances of obtaining such an order remain extremely high. As

⁶ It should be noted that Betfair is particularly vulnerable to any approach by the Board which sought to recover levy from its customers. The Prospectus refers to the "Heartland Customers" of Betfair who "are regular, well informed and sophisticated customers who understand and make use of the core Betting Exchange differentiators such as lay betting and trading capability". They provide high revenue to Betfair and are plainly critical to the company's success. It seems likely that those customers liable to pay levy will come almost entirely from these Heartland Customers. See also the extracts from the Prospectus quoted in paragraph 2.46 of Appendix 1.

was set out in the First Racing Submission, all the Board would need to show is that:

- (i) it is arguable⁷ that a legal wrong has been committed, in this case that there are grounds for believing that there are exchange customers who should be paying levy but who are not doing so;
- (ii) the disclosure of the information is necessary to enable action to be taken against the ultimate wrong-doer: in this case that is indisputable, Betfair having offered no alternative method as to how the relevant customers could be identified by the Board other than by the disclosure of the relevant information; and
- (iii) the exchange has to be sufficiently mixed up in the wrong-doing. Given that Internet intermediaries (for example webmail hosts) are invariably held to be sufficiently mixed up in the wrong-doing to justify the granting of such orders, there can be no doubt that an exchange would be similarly so. Indeed, Betfair does not deny this.

Betfair also suggests that any such approach would be unlawful because it is discriminatory, it appears because a similar approach is not being taken against customers of traditional bookmakers who may also be profitable. This is risible⁸. The Board has a broad discretion as to where it devotes its resources in respect of enforcement and recovery. For the reasons Racing has set out in the First Racing Submission and here, it appears very likely that taken in the round there is a substantial opportunity of recovering significant levy from the customers of exchanges. This justifies the Board taking steps to seek to recover this amount.

Customers of traditional bookmakers only place back bets. Accordingly, even if such a customer fell within the definition of "bookmaker" in the 1963 Act, he could not have any liability to pay levy under the current (49th) Levy Scheme. This is because the definition of Gross Profit set out in the Scheme (see further paragraphs 7.8 to 7.11 of Appendix 1) only applies to lay bets (save for back bets placed via an exchange).

If despite these submissions Betfair considers that nonetheless there is a case for such steps to be taken against customers of traditional bookmakers for the recovery of levy, it should make it. Indeed, if there was any basis for such steps to be taken, Racing would of course support it since such steps would lead to greater levy yield. However, as far as Racing is aware, there is no equivalent case for taking steps against customers of traditional bookmakers, but there is a case for taking steps against certain customers of exchanges. In such

⁷ For the purposes of such an application, the Board would merely need to establish that it has an arguable *prima facie* case. It would not at this stage, as Betfair appears to suggest, have to establish definitive proof.

⁸ Indeed, similar arguments of discrimination by Betfair were very recently wholly rejected by the Federal Court of Australia in *Betfair Pty Ltd v Racing NSW* [2010] FCAFC 133.

circumstances, it is plainly not discriminatory or in any way improper for the Board to undertake the latter but not the former.

- (d) *That Betfair may move offshore.* Again, in its various submissions, Betfair make (scarcely) veiled threats of moving offshore. In fact, this is likely to provide little protection from the approach outlined by Racing to seek to recover from Betfair's customers. The Board must not lose sight of a central theme of this consultation which is the location of the customers of exchanges not the location of the exchanges themselves⁹. The types of disclosure obligation that Racing suggests that the Board seek against the exchanges are often available in foreign jurisdictions including to assist proceedings in other jurisdictions. So the *Norwich Pharmacal* order (or its equivalent) may be available to the Board in any alternative jurisdiction to which Betfair may choose to move. After the information has been obtained, the customers against which the Board will wish to proceed will by definition be located in Great Britain.

Moreover, it is quite possible that the enforcement provisions under CPR 72 available against intermediaries such as the exchanges as outlined in the First Racing Submission (at paragraphs 6.10 to 6.15) may be available in foreign jurisdictions as well. For these reasons, the threat of the exchange moving offshore does not undermine this approach. On the contrary, since in such a circumstance the exchange itself would not then be liable for levy, it would mean that pursuing those of its customers who should pay levy to ensure that they did so, became all the more important.

Conclusion

13. As stated above, now that the Consultation has closed, it is time for the Board to make a decision. For the reasons which Racing has set out extensively, it is clear that there is likely to be a substantial amount of additional levy revenue available to the Board from exchange customers. It merely has to decide whether or not it wishes to take steps to seek to recover it. Bearing in mind the balance of risk and potential benefit and cost, Racing contends that the merits weigh decisively in favour of taking such an approach.

OLSWANG LLP

⁹ As noted at footnote 5 above, the Prospectus indicates that the predominance of Betfair in-business customers are located in the United Kingdom.

Appendix 1

Second submission to the Board by Racing respect of the Consultation

1. Introduction

1.1 In this Appendix, Racing:

- (a) responds to many of the points advanced by Betfair in its document (the "Betfair Rejoinder"¹⁰) entitled "*Betfair Rebuttal of Racing's submission to the HBLB consultation regarding customers of betting exchanges*" which itself was a response to the First Racing Submission;
- (b) addresses some points raised by Betfair in its document (the "First Betfair Submission") entitled "*Betfair response to the HBLB Consultation Exercise re betting exchanges*";
- (c) adopts the terms defined in the main part of its second submission (the "Second Racing Submission"); and
- (d) does not seek to address every point raised. No inference should be taken simply because a point is not addressed that it is accepted by Racing.

1.2 In this Appendix, the following matters are dealt with:

- (a) issues concerning statutory construction;
- (b) the review by HM Treasury in 2004/5;
- (c) consultations other than that carried out by HM Treasury;
- (d) the amount of levy potentially at stake;
- (e) alleged discrimination;
- (f) the ambit of the Consultation; and
- (g) other matters.

1.3 We will deal with each in turn.

2. Statutory construction

2.1 As we point out in paragraph 10(a) of the Second Racing Submission, the differences between Racing on the one hand and Betfair on the other as they relate to the meaning of the terms:

¹⁰ Racing does not accept that this document successfully rebutted any of the matters advanced by Racing in the First Racing Submission.

- (a) "receiving or negotiating bets";
- (b) "the effecting of betting transactions";

in sections 27(2)(a) and 55(1) of Betting, Gaming and Lotteries Act 1963 (the "1963 Act") are purely ones of construction.

- 2.2 Betfair would appear to agree (see paragraph 4.11 of the Betfair Rejoinder) that, in interpreting the words of these sections, the approach of the courts in interpreting tax statutes should be adopted. In considering the application of the tax legislation the courts will seek to apply a purposive approach and take a realistic view of the true legal effect of the transactions:

"The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically".¹¹

- 2.3 It is with this approach to statutory construction in mind that the Board should consider the issues raised in interpreting sections 27(2)(a) and 55(1) of the 1963 Act.

"Receiving or negotiating bets"¹²

- 2.4 Betfair addresses the meaning of the phrase "receiving or negotiating bets" at paragraphs 4.2 to 4.9 of the Betfair Rejoinder and paragraphs 5.12 to 5.21 of the First Betfair Submission. Racing addressed the phrase at paragraphs 3.6 to 3.21 of the First Racing Submission.

Meaning of "bets"

- 2.5 Betfair argues that, for the purposes of construing the meaning of "receiving or negotiating bets", the word "bets" has the same meaning as "stakes". This is clearly wrong for the following reasons:
- (a) In common parlance "bet" and "stake" are not synonymous. A stake is one part of a wider arrangement, being a bet which includes other key terms such as the odds applicable to the bet.
 - (b) Betfair argues in the Betfair Rejoinder that in interpreting the word "receiving", the statute should not be re-written¹³. However, Betfair itself makes the argument that the word "bets" should be replaced with the word "stakes". Applying Betfair's own logic, had that been his intention, the draftsman could have expressed himself by using the word "stake".

¹¹ Per Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35], (2004) 6 ITLR 454 at [35]:

¹² Section 55(1) of the 1963 Act.

¹³ Which is not something Racing accepts that it is seeking to do.

- (c) Section 55(1) of the 1963 Act provides a definition for "bet" as follows

"bet" does not include any bet made or stake hazarded in the course of, or incidentally to, any gaming"

Plainly here a "bet" and a "stake" are distinct, since they are used as alternatives. It is inconceivable that a court would consider them to be the same.

- (d) Whilst it is true that a stake can be "received", it is difficult to see how a stake can be "negotiated". It is the terms of the bet (the stake being just one part) which are negotiated, not just the stake.
- (e) This interpretation of "bet" would not be consistent with other legislation as follows.

- (i) The Betting and Gaming Duties Act 1981 (the "BGDA") imposes *inter alia* liabilities on "bookmakers" to pay general betting duty. In a similar way to the 1963 Act, a "bookmaker" is defined (in section 12 BGDA) as a person who "carries on the business of receiving or negotiating bets". Section 3 of the BGDA imposes a liability on "bookmakers" to pay general betting duty on bets which are spread bets. Of course there are no stakes whatsoever involved in spread betting. As such, replacing "bet" with "stake" would render section 3 of the BGDA entirely impotent since there would be nothing (that is no stake) on which to charge duty.
- (ii) Sections 9, 11 and 13 of the Gambling Act 2005 further illustrate that the word "bet" means "bet" and not "stake". Section 9(1) states that "'betting' means making or accepting a bet". Section 11(1) commences "For the purposes of section 9(1) a person makes a bet (despite the fact that he does not deposit a stake in the normal way of betting)...". This illustrates once more that a stake is merely a single part of a larger composite arrangement, being a bet. Section 13(1), which deals with betting intermediaries (including betting exchanges) refers to "a service designed to facilitate the making or acceptance of bets between others". Clearly replacing "bets" with "stakes" in this context would make no sense.

- 2.6 What is clear, therefore, is that the word "bet" should mean, simply, what it says, namely a "bet". A bet is comprised of the promises given by the parties to that bet which make up the whole.

Meaning of "receiving bets" and "negotiating bets"

- 2.7 Betfair in the First Betfair Submission argues that other possible meanings of "receiving a bet" (that is meanings other than "receiving a stake") should be rejected. For example, it argues that to include in the meaning of a bet the "terms on which it is placed" would be "nonsense" since those terms are imposed by the bookmaker. Whilst the bookmaker does dictate some of the terms (for example, his standard terms of betting dealing with each way bets) he does not dictate all terms (for example, odds).

- 2.8 This, however, is not relevant to the question. Regardless of which of the parties sets the terms, that does not prevent the bookmaker receiving from the punter a promise or bundle of rights (subject to some conditions) and, in return, the punter receiving from the bookmaker a separate promise or bundle of rights (subject to other conditions).
- 2.9 As explained in paragraph 3.10 of the First Racing Submission, a traditional bookmaker offering a lay bet clearly receives a bet. Accordingly, and as a minimum, someone placing a lay bet must also receive a bet; since he is performing a similar role to a traditional bookmaker.
- 2.10 Contrary to Betfair's arguments, the contractual analogy between "receiving" and "accepting" is persuasive. Difficulties, however, would have arisen for the draftsman had he used contractual terminology (such as "offer" or "acceptance") since, prior to 1 September 2007, bets were not contractually enforceable in the UK. This is surely why he chose the word "receiving".
- 2.11 Notwithstanding the above, in the context of exchange betting where the differences between backers and layers become, as Betfair would argue, "arbitrary" (see, for example, footnote 3 to paragraph 4.8 of the Betfair Rejoinder), the idea of each party to a bet receiving from the other a bundle of rights (subject to corresponding conditions) is perhaps the more appropriate meaning of the words "receiving a bet".
- 2.12 As Betfair regularly points out, backing and laying are simply two sides of one bet. Had the draftsman not used the word receiving but used contractual terminology such as "offer" or "acceptance" he would only have caught one or other party to the bet but not both. By referring to "receiving" and "negotiating" "bets" (being the intangible promises making up that bet), the draftsman catches both parties.
- 2.13 Note once again (see paragraph 3.12 of the First Racing Submission) that when the draftsman wants to identify just one party to the bet he uses different terminology, namely "bets placed with" and "bets placed by"¹⁴.
- 2.14 Betfair, once again, misrepresents Racing by alleging that Racing looks to introduce a distinction between "backing" and "laying". This is clearly the opposite of what Racing is doing. As explained above, both backers and layers can be construed as receiving or negotiating bets.

Conclusions – "receiving or negotiating bets"

- 2.15 Betfair's arguments in this regard simply do not hold water.
- (a) "Bets" should clearly mean "bets" not something different, namely "stakes". Betfair consistently misquotes what is said in the First Racing Submission and the Board must not be deceived by this (e.g. in paragraph 4.6 of the Betfair Rejoinder Betfair states Racing argues that "bet" means the "odds" when, in fact,

¹⁴ See the definition of "Gross Profit" in the 49th Scheme and sections 2 and 5 BGDA as referred to in paragraph J110 in the Annex to the First Racing Submission.

Racing states that "bet" means the "odds and other terms of the bet").

- (b) In determining what "receiving" means in the context it is, of course, quite right to draw parallels with contract law in relation to the rights and obligations making up the bet. Nowhere in the First Racing Submission does Racing say that "receive" should be replaced with "accept". Betfair misrepresents what is said in the First Racing Submission by implying that Racing has confused "acceptance" and "receipt", the two not being synonymous. Racing agrees that these terms are not synonymous and, as is explained above, one of two possible interpretations is that both parties to the betting contract are caught by these words not just the offeror or the acceptor.
- (c) Betfair argues that Racing fails to give "negotiating" an independent role (see paragraph 4.8 of the Betfair Rejoinder). Clearly a party can be involved in negotiating a bet (and so be caught by the legislation) without then going on to receive it. This point is obvious. For a clear example of this point in practice see HMRC Notice 451, which sets out HMRC's interpretation of the rules applicable to general betting duty payable by "bookmakers" (who are, as in the 1963 Act, defined in section 12 BGDA as persons who receive or negotiate bets). Paragraph 2.6 of Notice 451 illustrates how persons who are in the UK and who are involved in the negotiation of bets (for example a UK subsidiary of a group which is involved in determining whether bets should be accepted from customers), but who do not accept or receive them (since, for example, those bets are accepted by another subsidiary, based outside of the UK), are potentially caught by the legislation and so subject to duty.

2.16 Contrary to Betfair's misrepresentations, in no part of the First Racing Submission does Racing suggest that the words "receiving or negotiating bets" serve no purpose, provide no limitation as to levy liability or are essentially meaningless. What is stated is that they should not be given an overly restrictive meaning.

2.17 As is clearly explained in the First Racing Submission, there are only two plausible interpretations of the word "receive". Either: (a) only users who place lay bets receive bets; or (b) users who place both lay and back bets receive bets. Whichever of these interpretations is adopted, the exchange users who Betfair describes in the Prospectus as Heartland Customers will be caught since they clearly place lay bets. The key issue is, of course, whether the exchange users receiving bets are "in business".

Meaning of "... who carries on on his own account a business" and ".. the effecting of betting transactions"¹⁵

2.18 Betfair addressed the meaning of these phrases at paragraphs 5.22 of the First Betfair Submission and paragraph 4.18 of the Betfair Rejoinder. Racing addressed the phrases at paragraphs 4.37 to 4.48 of the First Racing Submission and paragraphs J108, J110 and J113 to J118 of the Annex to the First Racing Submission.

¹⁵ Section 27(2)(a) of the 1963 Act

- 2.19 Before turning to the question of whether exchange users are "in business", we respond to Betfair's comments regarding section 27(2)(a) of the 1963 Act.

Meaning of "... who carries on on his own account a business ..."

- 2.20 Betfair states that the phrase "on his own account" (see paragraph 4.18 of the Betfair Rejoinder) means "precisely the opposite" of what Racing argues in paragraph 4.45 of the First Racing Submission. Betfair makes this statement but gives no reason. Betfair states that these words "only impose Levy liability on the principal". Betfair continues "this is clearly the way the Board sees it, as is recorded in paragraph 32(2) of the CP; Betfair agrees".

- 2.21 Section 27(2)(a) of the 1963 Act, refers to a person:

"... 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 of the bookmaker as relates to such betting transactions"

- 2.22 In addition, section 55 provides that:

"'bookmaker' means any person ... who whether on his own account or as servant or agent to any other person, carries on ... the business of receiving or negotiating bets"

- 2.23 Plainly under the 1963 Act, a person acting "on his own account" is simply the counterpoint to a person acting as "servant or agent to any other person". If a person is carrying on, for his own benefit, a business of receiving or negotiating bets, whether he be an exchange user or the exchange itself, he is doing so on his own account.

- 2.24 Racing examines this issue in detail in the Annex to the First Racing Submission but Betfair makes no mention at all of the issues raised (in fact, Betfair makes no reference to the Annex to the First Racing Submission at all, in which Racing sets out its detailed arguments in the way requested by the Consultation Paper – something that the First Betfair Submission completely fails to do). In paragraphs J108 and J110 (and J113 to J118), Racing illustrates very clearly that, not only is section s27(2)(a) phrased in a way that allows a levy liability to arise simultaneously for both the betting exchange and the exchange user (provided that that user is a "bookmaker" as defined by the 1963 Act) but also that the current (49th) Levy Scheme expressly envisages this (see, the references in paragraphs J108 and J116 of the Annex to the First Racing Submission to Betting Activities 1.4, 1.6 and 3.1, as defined in the current (49th) Levy Scheme).

- 2.25 Betfair also makes no mention of the arguments made in paragraph J110 of the Annex to the First Racing Submission which illustrate that the Board would seem to have misinterpreted the corresponding provisions which relate to general betting duty (and, as such, we assume that Betfair agrees with the arguments made by Racing in paragraph J110). In this paragraph, Racing illustrates (contrary to the suggestions made in the Consultation Paper) that, for general betting duty purposes, both a betting exchange and the exchange user (provided that that user is a "bookmaker" as defined by the BGDA)

can, and regularly do, each have a general betting duty liability in respect of the same bet.

- 2.26 Since the issues dealt with in paragraphs J108 and J110 of the Annex to the First Racing Submission illustrate that the Board may have interpreted some of the relevant provisions incorrectly in its Consultation Paper, Racing would like to bring those issues expressly to the Board's attention.

Meaning of "... the effecting of betting transactions..."

- 2.27 At footnote 6 of paragraph 4.18 of the Betfair Rejoinder, Betfair alleges that Racing has not sought to address section 27(2)(a) of the 1963 Act in which the phrase "...the effecting of betting transactions..." is used. Racing makes little of this phrase in the body to the First Racing Submission (since its meaning is so clear and exchange users fall so clearly within it) but, as explained above, examines the issues in the Annex to the First Racing Submission (see the comments in J108 and J113 to J118 which concern the ability of both an exchange operator and an exchange user to have a levy liability in respect of the same bet).

- 2.28 Betfair states correctly that "effecting" means simply "bringing about". It is not apparent to Racing why it could be said that any of the exchange or either of the customers party to a bet made via an exchange have not "brought about" the bet. Plainly each of them has.

Meaning of "business"

- 2.29 Betfair addressed the meaning of the phrase "business" at paragraphs 4.10 to 4.18 of the Betfair Rejoinder and paragraphs 5.8 to 5.11 of the First Betfair Submission. Racing addressed the phrase at paragraphs 3.22 to 3.44 the First Racing Submission.
- 2.30 As stated above, whether or not an exchange user is in business (thereby making him a leviable bookmaker) is the key issue which is at the centre of this consultation.
- 2.31 As explained in the First Racing Submission, in determining this two separate questions must be addressed. First, as a matter of law, how should the word "business" be construed in the context of the legislation and, second, as a question of fact, are there users who are carrying on a "business" of receiving or negotiating bets ?

The legal question (see paragraphs 3.23 to 3.38 of the First Racing Submission)

- 2.32 Betfair's arguments with regard to the legal question are limited:
- (a) first, to follow what they assert was HM Treasury's approach in their 2004/5 review, which as explained below is fatally flawed; and
 - (b) second, a discussion as to how the word "occasionally" should affect how the word "business is interpreted".

HM Treasury's approach in their 2004/05 review

2.33 Whereas Racing has explained clearly and in detail that "business" is a wider concept than "trade", Betfair's retort (see paragraphs 4.12 to 4.14, 5.5 and 5.7 of the Betfair Rejoinder) is merely that HM Treasury considered this point in its enquiries and appeared to equate "business" with "trade" leaving the reader to infer that HM Treasury must have been right. Whilst the position is not as clear cut as Betfair would have the Board believe (another interpretation of the FOI Bundle is that HM Treasury and HMRC were of the view that, had they determined that exchange users were in "business", then that would have exposed them to an increased risk that users may also be operating a "trade" with the result being that they might then have to allow them income tax relief for betting losses – this issue is explored in detail in paragraphs 4.7 to 4.23 of the First Racing Submission and in paragraph 3 below), a long list of case law (referred to in paragraphs 3.23 to 3.38 of the First Racing Submission) clearly illustrates that HM Treasury and HMRC were completely wrong on this point.

2.34 This argument, which is so very misguided, is an absolutely vital one for the Board to see in its true light. The following points are vital:

- (a) it is for the Court (and no-one else), to determine the meaning of the word "business" – the Board should be mindful of what the Court's view on this would be and not that of HM Treasury and/or HMRC;
- (b) the Board must not be led blindly by what HM Treasury and/or HMRC stated in what has been shown in the First Racing Submission to be a review the conclusions of which were decided for policy reasons and which did not relate to levy liability (discussed further at paragraph 3 below); and
- (c) in any event, that HMRC are very often wrong on issues of law is easily illustrated by the very large number of tax cases they have lost. In addition, the case law shows that, contrary to HMRC's interpretation, the word "business" should be given its usual meaning which is significantly wider than the word "trade". These last points are illustrated further below.

2.35 A very recent case, *Torkington v HMRC*¹⁶, was heard on 1 September 2010. This case was another in which the Court had to consider whether or not the taxpayer carried on a "business" and, in that regard, had to consider the meaning of that word. In the judgment of the Tribunal it was noted (paragraph 30) as follows:

"In assessing the business activities of the company, we took into account the wide interpretation often given to the term business. We bear in mind that we are not bound to adopt such approach, but considering the correct interpretation to give, we looked first at the wording of the legislation. We are urged by HMRC to refer back to Section 13A(2) ICTA 1988 and conclude that the word "business" is used

¹⁶ TC/2009/15024

in the context of Section 360(1)(b) ICTA 1988 as "that of trade." We do not accept that such a restrictive context should be applied where the legislation specifically refers to "purposes of the business" as opposed to "trade" in what, in our view, must have been deliberately unrestricted terminology. Taken together with the liberal interpretation regularly applied by the courts, albeit where the facts may be distinguishable, we find that intention behind the legislation must be to allow a flexible and wider approach."

- 2.36 Once again, despite HMRC's arguments to the contrary, the Court found that the word business should be given its usual wide meaning and should not be limited to the more limited term trade.
- 2.37 In interpreting the word business in section 55(1) of the 1963 Act, its meaning must be construed in the context of the legislation. Nowhere in the 1963 Act, does there appear the word "trade". In contrast the word "business" appears on many occasions. Had the draftsman meant the word trade, surely he would have used it? Since the Courts have consistently found that the word business has a wider meaning than the term trade, then this meaning (being the usual meaning of the word) should be adopted for levy purposes.

The use of the word "occasionally"

- 2.38 Betfair (in paragraphs 4.10 and 4.11 of the Betfair Rejoinder) states, correctly, that the word "occasionally" (in the section 55(1) definition of "bookmaker") is used in a way such that a person need not exclusively carry on a business of receiving or negotiating bets to be a "bookmaker". It then goes on (in footnote 5), however, to confuse the issue by making reference to an on-course bookmaker needing a licence under the Gambling Act 2005. As Racing has pointed out repeatedly, whether or not someone needs a licence is not relevant to the question of whether they may be a bookmaker for levy purposes. What Betfair helpfully points out, however, is that, in determining whether or not someone falls within the definition of "bookmaker" as a result of being in "business", the word "occasionally" makes it clear that it is how that person receives or negotiates bets which is key, not necessarily how often he does so. In other words, it is a qualitative, and not necessarily a quantitative, analysis that is required in determining whether or not someone is in business.

The factual question (see paragraphs 3.39 to 3.44 of the First Racing Submission)

- 2.39 Betfair's arguments in this area are limited and include:
- (a) a list of differences between exchange users and traditional bookmakers (see paragraphs 5.8 and 5.9 of the First Betfair Submission); and
 - (b) Betfair's attempts to deal with the poll of its users (referred to in paragraph 3.41 of the First Racing Submission) which illustrated that 17.67% of those users derived their primary source of income from betting.
- 2.40 We deal with these issues in turn.

Differences between exchange users and bookmakers

- 2.41 Racing agrees that there are differences between exchange users and traditional bookmakers. In the same way, there are differences between traditional bookmakers, spread betting operators and exchanges, yet each of them carries on a business.
- 2.42 That there are differences between bookmakers and exchange users does not prevent an exchange user from being in business; those exchange users that are in business are merely carrying on a different kind of business to traditional bookmakers (and spread betting operators and exchanges etc.)
- 2.43 Merely because the exchange provides the forum (together with some associated rules) whereby users can bet with one another does not prevent those users being in business. As referred to in the First Racing Submission (see paragraph 3.42 of the First Racing Submission) online auction sites provide an environment, some of the terms of which are dictated by the operator. Although the users of such auction sites interact with one another in a way that is different to the way in which they might interact outside of that environment does not prevent those users from being capable of being in business.
- 2.44 By being able to select the preferred odds, place both back and lay bets without being "closed down" or limited in the amount that can be staked (save by the quantity of bets being placed in the opposite direction) and organise one's affairs in a commercial way (e.g. using bots and hiring boxes at race courses and/or terminals in an exchange room to methodically and systematically exploit less organised and savvy users), exchange users have the ability to operate a betting "business" using the exchange's platform.
- 2.45 The way in which Betfair describes its "Heartland Customers" in the Prospectus suggests that many of these customers may be in business.
- 2.46 The Prospectus describes Betfair's customer base and separates them in three broad customer segments. One of those segments is described as the Heartland Customer segment. Heartland Customers are described, and are referred to, as follows:

"Heartland Customers are regular, well informed and sophisticated customers who understand and make use of the core Betting Exchange differentiators such as lay betting and trading capability. Heartland Customers are motivated principally by the functionality and value offered by the Exchange Platform and typically are high volume customers who generate high levels of [average revenue per user]. Many of these customers can only use Betfair's Exchange Platform for their betting activities. The Directors estimate that Heartland Customers comprise approximately 20 per cent. of Core Betfair's customer base."

"United Kingdom: In the United Kingdom, Betfair believes that it has a substantial market share of the high value Heartland Customer segment. Betfair also believes that this customer segment has been significantly expanded by the Betting Exchange, as Heartland Customers would previously have been unable to easily engage in the trading and laying functionality that this segment typically utilises."

"PART 1 RISK FACTORS

A significant portion of Betfair's revenue is derived from Betfair's Heartland Customers.

Betfair's Heartland Customers (as described in Part C of Part 7 "Core Betfair") represent a minority of Betfair's total customer base but generate, collectively, a significant proportion of Betfair's net gaming revenues. Whilst no single Heartland Customer generates more than one per cent. of Betfair's revenues, if macroeconomic factors, licensing, regulatory or tax reasons or other factors outside Betfair's control as more particularly described in this Part I "Risk Factors" were to result in a significant number of these Heartland Customers ceasing to use (or reducing the levels of their use of) Betfair's products, this may have a material adverse effect on the operations, financial performance and prospects of Betfair."

"The success of the Betting Exchange depends upon maintaining liquidity: Betfair's Betting Exchange product operates with, and its success is dependent on, high levels of liquidity and a significant proportion of this liquidity is created by transactions generated by Betfair's Heartland Customers. A significant reduction of this liquidity could have a material adverse impact on the attractiveness of Betfair's key products as well as eroding one of its key competitive strengths. The occurrence of any of the risks relating to the operations of Betfair and/or those relating to the online betting and gaming industry may have an adverse impact on liquidity levels on the Betting Exchange, which in turn may have a material adverse effect on Betfair's operations, financial performance and prospects."

The Betfair poll

- 2.47 In paragraph 4.16 of the Betfair Rejoinder, Betfair attempts to deal with the Betfair poll (referred to in paragraph 3.41 of the First Racing Submission) which illustrated that 17.67% of users polled declared that betting proceeds constituted their primary income (although please note that – tellingly - since publishing the First Racing Submission, the results of this poll can no longer be accessed at the URL set out in footnote 14 to the First Racing Submission).
- 2.48 Racing agrees that the question was not "why do you bet on Betfair?" but "why do you bet?". However, Racing would like to point out the following:
- (a) this poll was a poll of Betfair's customers (who clearly bet using Betfair);
 - (b) those customers who declared that betting proceeds constituted their primary income (and so are clearly making a living from betting) are highly likely to fall in the segment of Betfair's customers referred to in the Prospectus as "Heartland Customers" who, as Betfair explain in the Prospectus:
 - (i) are "well informed and sophisticated customers who understand and make use of the core Betting Exchange differentiators such as lay betting

and trading capability.." and "...are motivated principally by the functionality and value offered by the Exchange Platform and typically are high volume customers who generate high levels of ARPU [average revenue per user]";

- (ii) "comprise approximately 20 per cent. of Core Betfair's customer base";
- (iii) "represent a minority of Betfair's total customer base but generate collectively a significant proportion of" the "liquidity" on which "the success of the Betting Exchange depends"; and
- (iv) "would previously [i.e. before the advent of the Betting Exchange] have been unable to easily engage in the trading and laying functionality that [the Heartland Customer] segment typically utilises";

- (c) since, as Betfair points out itself, the inclusion of the word "occasionally" in the definition of "bookmaker" means that a person need not exclusively carry on a business of receiving or negotiating bets to be a "bookmaker" and so, depending upon the activities that they undertake (which will determine whether or not they are operating a "business"), the 42.8% of Betfair customers polled who stated that betting proceeds supplemented their (other) income, may also include leviable bookmakers.

2.49 Racing agrees that simply making money through betting activity does not necessarily equate to business. The Board must not be misled by Betfair's continuous misrepresentation and misquoting in the Betfair Rejoinder. Racing states clearly, in the First Racing Submission, that only some exchange users will be in business.

Conclusions

2.50 As explained at the beginning of this Appendix, in considering the application of the tax legislation the courts will seek to apply a purposive approach and take a realistic view of the true legal effect of the transactions.

2.51 The Board has to ask itself what type of customer on an exchange:

- (a) rents boxes at racecourses and/or terminals in exchange rooms so as to achieve, whilst betting "in running", a competitive timing advantage over other users who will see the action several seconds later than they do; and/or
- (b) pays one or more of Betfair's transaction, data request and premium charges; and/or
- (c) makes a living from betting; and/or
- (d) is so able to make a living from betting due to the ability to lay bets and to trade being activities which they cannot easily undertake via other operators or platforms.

2.52 The answer is a customer which must be liable to pay levy since he must be a customer who is:

- (a) effecting betting transactions; and
- (b) carrying on a business, on his own account, of receiving or negotiating bets.

3. The review by HM Treasury

3.1 In paragraph 5 of the Betfair Rejoinder, Betfair suggests that, in 2004, HM Treasury considered whether exchange users were in business and concluded that they were not and, as a result, that should be the end of it. This view is misguided for the following reasons:

- (a) as stated above, the Court (and no-one else) must make the determination as to whether exchange users fall within the definition of "bookmaker";
- (b) the way in which exchange users behave in 2010 and the current sophistication of the platform, as compared with 2004, is likely to be materially different;
- (c) in interpreting the ambit of the word "business", HM Treasury clearly got it wrong by construing that word as meaning "trade" (see paragraphs 2.33 to 2.37 of this Appendix);
- (d) the FOI bundle clearly illustrates that policy issues (relating to income tax) permeated HM Treasury's review (being policy issues which should not concern the Board, since it is in no way concerned with any tax, duties or levies other than the levy) and so explain HM Treasury's reasons for reaching the conclusions that they did. In paragraph 5 of the Betfair Rejoinder, Betfair attempts to discredit this view but fails to do so.

3.2 In paragraph 5.4 of the Betfair Rejoinder, Betfair claims that Racing's position, that HM Treasury's conclusions were policy based, "can be comprehensively rejected" but then simply reiterates the conclusions which HM Treasury drew. Betfair gives no good reason why Racing claims can be rejected. Betfair does not in any way deal with the clear message that comes from the FOI Bundle that HMRC did not want to find exchange users liable for general betting duty since, in HMRC's view, that would have been likely to result in HMRC having to allow exchange users (a disproportionately large amount of) income tax relief for losses.

3.3 Betfair never even questions whether HM Treasury and HMRC were correct to equate "business" with "trade" and gives no legal backing for that view. Racing has tackled this issue in detail and shown that HM Treasury's approach was wrong.

3.4 In paragraph 5.9 of the Betfair Rejoinder, Betfair seems to completely miss the point that HM Treasury and HMRC considered that had they concluded that exchange users were in business in respect of one tax (general betting duty), that conclusion could potentially have had a detrimental knock-on effect on another tax (income tax) and that, on balance, HMRC would be better off if it were to forgo any general betting duty (by concluding that exchange users were not in business) and, thereby avoid having to run the risk that exchange users would be entitled to income tax loss relief in respect of any losses. As such, it is clear that, although HM Treasury may have wanted people to believe that it

had "applied tax law and not policy considerations" (see paragraph 5.9 of the Betfair Rejoinder), the FOI Bundle shows that the reverse was true.

3.5 Betfair suggests (in paragraph 5.10 of the Betfair Rejoinder) that Racing's conclusions from the FOI Bundle rest on "personal views" of "individual officers". Observations, for example, that: "the main concern of HMRC direct taxes is that any such move [being a determination that exchange users were in business] would allow a large number of losing gamblers to offset gambling losses against their winnings against other taxable income" may have been uttered by an individual officer but clearly illustrate an official view.

3.6 In determining the legal questions of statutory construction, the Board needs to reach its own conclusions and should not take into account any conclusions reached by HM Treasury since it has been shown by Racing that those conclusions were very materially (if not entirely) reached for wider policy reasons.

4. Consultations other than that carried out by HM Treasury

4.1 Racing made no reference to the Consultations mentioned in section 6 of Betfair's Rejoinder since, contrary to Betfair's assertion, they bear no relevance to the core issue of the Consultation.

4.2 Betfair makes selective quotes from the DCMS Position Paper but it is instructive to read the whole paper and, in particular, the very first paragraph which states:-

"This paper outlines a framework for the licensing of betting operators. It is not a final statement of Government policy; rather it reflects the current thinking in preparation for the reform of gambling legislation."

4.3 So, not only was this a discussion paper but its focus was on the licensing regime and what was required in order to achieve the Government's regulatory objectives. It has no relevance to the key question posed by the Consultation of whether there are exchange users who are leviable bookmakers.

4.4 Paragraph 35 of the Position Paper states:

"We have considered carefully representations suggesting that customers of betting exchanges who offer (or "lay") odds should be licensed as bookmakers. We have considered these proposals carefully but have concluded that it is not necessary for any exchange users to be licensed. Rather, we believe that the conditions of licence proposed for betting exchanges, (outlined in summary form below) will be sufficient to ensure that the aims of gambling regulation can be achieved without further regulation. Nor do we propose any regulation of any other group of betting customers. An annex on this subject is attached to this paper."

4.5 In other words, as was stated in paragraphs 4.3 to 4.6 of the First Racing Submission, there is no need for exchange users to be licensed since, provided the exchange is itself licensed, the policy objectives of the Gambling Act are being satisfied. This is confirmed

by the Annex to the DCMS Position Paper which specifically deals with the licensing of betting exchanges.

4.6 Indeed, paragraph 9 of the Annex states:

"Those individuals and organisations advocating the licensing of exchange users laying odds suggest that this act, if carried on regularly and to some significant level of value, constitutes the business of bookmaking, as defined in the Betting, Gaming and Lotteries Act 1963 ("1963 Act"). Of course, the 1963 Act was formulated long before the Internet, let alone a betting exchange, were ever conceived of, and does not therefore specifically address the exchange business model. Interpretation of existing legislation is a matter for the courts. The Department will bring forward, in proposals for new legislation, definitions that draw a clear distinction between the acts involved in carrying on the business of bookmaking, and those that are involved in the operation and use of betting exchanges. While there seems sure to be an ongoing debate about these issues it will not be productive for anyone to focus on the current definition of "bookmaker".

4.7 The Department correctly states that interpretation of legislation is a matter for the courts – a point which Racing has made several times but Betfair seem to prefer the interpretation of any body other than the courts – and the reason why the Department said that there was no point in focusing on the 1963 Act definition of "bookmaker" was because that Act was to be repealed (and was in fact repealed) by the Gambling Act. It is only because the intended abolition of the Levy did not in fact take place that the Levy-related provisions of the 1963 Act were saved and that we still need to consider the definition of "bookmaker".

4.8 Yet again, in paragraph 6.3 of the Betfair Rejoinder, Betfair extract two incomplete quotes from a Government document to give a false impression. The full quotes (emphasis added to show the words which Betfair has failed to include) are:

"The Government agrees with the Committee's conclusion that those who use exchanges to conduct betting operations in the course of business should be regulated. The Bill already provides that all such persons must obtain a Gambling Commission operating licence, and does not differentiate between backers and layers in this respect: any such distinction would, in the Government's view, be arbitrary and introduce unnecessary and unwise regulatory loopholes."

"The Government is not persuaded that the current law should be amended to bring exchange users within the scope of the horserace betting levy arrangements, bearing in mind the proposed abolition of those arrangements in the Horserace Betting & Olympic Lottery Bill"

4.9 As with the DCMS Position Paper, the Government understandably did not want to prolong the debate on this issue as its intention, at that time, was to abolish the Levy.

4.10 As to the points made in paragraphs 6.4 and 6.5 of Betfair's Rejoinder, these were again issues of licensing where the Government and Gambling Commission's sole aim was to ensure that the policy objectives of the Gambling Act were being achieved. Again, these reviews have no relevance whatsoever to the question of whether there are exchange users who are leviable bookmakers.

5. The amount of levy potentially at stake

5.1 As stated in the Second Racing Submission, the amount of levy which could potentially be raised from exchanges cannot be currently ascertained by Racing. The information on which any assessment of this amount could be sensibly undertaken is solely controlled by the exchanges. In the First Racing Submission, Racing attempted to estimate what the sums at stake might be and this estimate has been strongly criticised by Betfair in the Betfair Rejoinder.

5.2 However, what is noticeable about this criticism is that at no time has Betfair ever provided any actual figures of its own. For example, at paragraph 7.10 of the Betfair Rejoinder, Betfair states that it *"has never claimed that 0.5% of its customer [sic] are likely to pay the [premium] charge"*. In fact, Racing understands that when Betfair introduced its premium charge, it wrote to its customers as follows:

"If your betting in the future continues to be as successful as it has been in the past then you could be required to pay Premium Charges in line with others who, like you, fall into the top 0.5% of our customers."

5.3 It was from this that Racing inferred that 0.5% of Betfair customers pay the premium charge. Racing accepts that may not be the case. However, if the true figure supported Betfair's case, presumably it could and would have provided it.

5.4 Similarly, at paragraph 7.23, Betfair criticises the inference made by Racing that 20% of the gross winnings of all exchange customers can be attributed to potentially leviable customers. In fact, at page 49 of the Prospectus, it states that the Directors of Betfair estimate that Heartland Customers, who *"are regular, well informed and sophisticated customers who understand and make use of the core Betting Exchange differentiators such as lay betting and trading capability ... comprise approximately 20 per cent. of Core Betfair's customer base"*. It is true that there will undoubtedly be Heartland Customers who will not be leviable. However, it is also true that Heartland Customers will be responsible for significantly more activity *per capita* than other customers. At page 14 of the Prospectus, it states *"Betfair's Heartland Customers (as described in Part C of Part 7 "Core Betfair") represent a minority of Betfair's total customer base but generate, collectively, a significant proportion of Betfair's net gaming revenues"*. Accordingly, if Heartland Customers account for 20% of the customers, they will certainly account for significantly more than 20% of the winnings. Even if the "in business" customers represent only a proportion of this, it would appear that the estimate of 20% would, indeed, be very conservative.

5.5 Moreover, once again Betfair declines to give the true figure. Indeed, other than saying that it does not accept the description "very conservative", it does not ever tell the Board

whether the true figure is higher or lower than 20%.

- 5.6 Betfair refuses to provide such information when it could quite easily do so. Since it has not done so it is only proper for the Board to draw the inference that this is because there are, in fact, significant sums at stake.

6. **Alleged discrimination**

- 6.1 In relation to paragraphs 8.1 to 8.4 of the Betfair Rejoinder, we have to repeat yet again the difference between the Gambling Act 2005 which is focused on achievement of the licensing objectives set out in section 1 (Prevention of Crime, Fairness to the Consumer and Protection of the Vulnerable) and the relevant provisions of the 1963 Act which provide for the payment of levy by "bookmakers". We would also refer Betfair to paragraph 4 of this appendix.

- 6.2 Paragraph 8.4 demonstrates yet again Betfair's failure to understand the distinction between the two Acts. Section 33(3) of the Gambling Act reflects the comments made by DCMS in paragraph 35 of their Position Paper (see paragraph 4.4 above) that users of exchanges do not need to be licensed in addition to the exchange since the *"licensed proposed for betting exchanges will be sufficient to ensure that the aims of gambling regulation can be achieved without further regulation"*. This has absolutely no relevance to whether an exchange user is a "bookmaker" under section 55 of the 1963 Act.

7. **Ambit of consultation**

- 7.1 Betfair alleges on a number of occasions (see paragraph 9 of the Betfair Rejoinder) that the Consultation is too limited in its scope and should apply to users of other platforms and/or customers of other operators. The consultation is not relevant to other platforms or operators for two important reasons:

- (a) first, it is the opportunity to place very numerous "lay" bets on exchanges (and not just the opportunity to "back the field" every now and again where traditional bookmakers occasionally offer such bets on particular markets – see paragraphs 5.23 and 5.24 of the First Betfair Submission) that represents the opportunity that allows a punter to organise himself, as an exchange user, in a way that constitutes a "business" (see paragraphs 3.1 to 3.5 of the First Racing Submission for examples); and
- (b) second, where exchange users who are in business (which would include a traditional bookmaker using an exchange) place "back" bets with traditional bookmakers outside of the exchange environment, no levy liability can arise to them under the terms of the current (49th) Scheme.

- 7.2 These issues are explored further below.

Exchanges constituting the opportunity whereby punters can carry on a betting business

- 7.3 In Betfair's First Submission (see paragraphs 5.23 to 5.26) it discusses lay betting on exchanges and states accurately that *"a lay bet struck on an exchange is simply a bet*

that an outcome will not happen. It is factually and mathematically identical to backing the other outcomes ("the field") to win" and then gives examples of a football match and a horserace.

7.4 However, it then goes on to suggest that the same opportunity is readily available to non-exchange betting operators. Whilst this is undoubtedly correct in the case of an event where there are only two (or perhaps three) outcomes – will Arsenal beat Chelsea (or will they draw) or will England qualify for the World Cup? – it does not apply to the typical horserace for two reasons.

7.5 First, if one takes, say, an 8 runner race (and the position is even more stark as the number of runners increases), whether it is on a racecourse, in a betting shop or on a bookmaker's website, the punter (as set out in footnote 8 to the First Betfair Submission) would need to place a bet on each runner to achieve the same return but, in contrast to the position on an exchange, the punter would have no guarantee that all of his bets would be accepted at the required odds for his "book" to be economic.

7.6 The second reason is that traditional bookmakers do not operate to a "100% book" meaning that in Betfair's example, the customer would probably have to stake, say, £110 to get a return of £100 whichever horse wins the race.

7.7 This point is made expressly at page 50 of the Prospectus:

"United Kingdom: In the United Kingdom, Betfair believes that it has a substantial market share of the high value Heartland Customer segment. Betfair also believes that this customer segment has been significantly expanded by the Betting Exchange, as Heartland Customers would previously have been unable to easily engage in the trading and laying functionality that this segment typically utilises." (emphasis added).

No levy liability can arise to punters (even if they are bookmakers) placing back bets outside of the exchange environment

7.8 As is explained in paragraph J110 in the Annex to the First Racing Submission, off-course "bookmakers" (i.e. those persons receiving or negotiating bets as part of a business) are liable to levy only on their "Gross Profit" as defined in the 49th Levy Scheme. This results in a levy liability arising to a bookmaker in only two circumstances:

- (a) whether inside or outside of the betting exchange environment, on "bets made with him" (see, for example, Betting Activity 1.1, 1.2 and 1.3 of the 49th Levy Scheme); and
- (b) only when bets are made via a betting exchange, on "bets entered into by him" (see Betting Activity 1.4 of the 49th Levy Scheme)¹⁷.

7.9 Assume for a moment that an exchange user is in business (but is not a "traditional

¹⁷ Note that this terminology ("with" and "by") is also used in BGDA (e.g. section 2). See further footnote 5 above.

bookmaker"). In placing bets with a traditional bookmaker outside of the exchange environment, he will not have any betting activity that is leviable since those bets will be placed by him and not with him and, as a result, he will not fall within paragraph 7.8(a) above. As such, it will only be the traditional bookmaker who accepts his bet (otherwise then via an exchange) who will be within the scope of the levy for the purposes of paragraph 7.8(a) above.

7.10 In contrast, when the same exchange user places either back or lay bets via an exchange he will be within the scope of the levy because:

(a) it will only be within the exchange environment when the user will have bets placed "with him"; and

(b) where his back bets are placed via the exchange (being bets placed "by him" via an exchange), the 49th Scheme specifically bring these bets within the scope of the levy.

7.11 For the above reasons, a user's activity on platforms other than betting exchanges simply is not relevant as no levy liability can arise. In this regard, Betfair has failed to understand how the 49th Levy Scheme operates.

8. Other matters

8.1 Finally Racing deals briefly with three other matters raised by Betfair.

Sporting Options

8.2 At paragraphs 8.5 to 8.12 of the Betfair Rejoinder, Betfair refers to the case of *Sporting Options v The Levy Board*, the successful judicial review of the 43rd levy scheme, and in particular how this was dealt with in the First Racing Submission. Olswang LLP, the solicitors for the British Horseracing Authority and the authors of this submission and the First Racing Submission, acted for the Claimant in that action and so have an intimate knowledge of it. It remains their view that this was a case which turned on procedural impropriety and that, absent such procedural impropriety, it is unlikely that the claim would have succeeded. For example, Betfair, at paragraph 8.9 of the Betfair Rejoinder refer to the judge's remarks regarding the vulnerability of the exchanges to sabotage occasioning artificial levy liability under the provisions of the 43rd scheme. In fact, as Betfair notes, the judge stated that this issue "... certainly requires consideration", that is that it required consideration by the Board at the time which it did not get. That is a procedural not a substantive failing. This was typical of the judge's concerns.

8.3 For these reasons, Racing is confident that the Sporting Options decision is no basis for inferring that any future levy scheme which imposed levy on an exchange in respect of the profits made by its customers would be subject to a successful challenge by way of judicial review.

Competition

8.4 At paragraphs 10.1 to 10.4 of the Betfair Rejoinder, Betfair states that "it would be highly

questionable under domestic and European competition law for representatives of the primary commercial competitors of betting exchanges to agree ... to take steps which so manifestly disadvantage exchanges" and that such provisions would be "discriminatory". As stated at paragraph 12(c) of the Second Racing Submission and at paragraphs 6.1 and 6.2 above, Betfair's arguments that the suggested approach is discriminatory is risible. More generally in terms of competition law, Betfair does not develop its arguments at all nor identify on what ground such an approach would be "highly questionable under ... competition law" and in particular what distortion of competition would arise. It appears to be no more than an afterthought. Racing considers that this too is risible.

Norwich Pharmacal

- 8.5 At paragraph 11.4 of the Betfair Rejoinder it is suggested that Racing has sought to have the traditional bookmakers fund an application by the Board for a *Norwich Pharmacal* disclosure order against Betfair. In fact, while Racing does not understand that it would be in any way improper for any party with an interest to fund such an application, if it were minded to do so, or for any such party to be solicited to do so, this is in fact completely untrue.

Miscellaneous

- 8.6 The footnote to paragraph 12.5 of the Betfair Rejoinder is again misleading in that the reference in the Chief Executive's letter is to "licensed bookmakers" and not to exchange users who are in business. Betfair has not suggested that the losses and gains of each of its customers tend to cancel themselves out.

Appendix 2

Examples of exchange trading room websites



Telephone: 0151 525 7841



Welcome to Aintree Trading Room

Situated in a prime location next to the home of one of the world's most famous national hunt races, the Aintree Grand National, Aintree Trading Room provides its customers with a complete betting experience.

Discreetly hidden away in a purpose built private room within independent betting shop, Cheshire Racing (Aintree), Aintree Trading Room is a state-of-the-art betting exchange office specifically designed to enable customers to trade in a comfortable and relaxing environment.

JP Traders has designed a purpose built environment where traders have access to all the latest technology to enhance their sports trading experience. Each trader has access to their own personal trading pod, which offers:

- High speed premium broadband connections
- Specialist Gruss trading software
- Access to SIS and Turf TV
- Top quality PC
- Individual LCD TV
- Branded headphones
- Comfortable reclining chair

In addition to the excellent facilities, all traders are personally greeted and provided with an induction prior to commencing trading. So if you're looking for a professional environment in which to conduct your trading or would simply like to find out more about online trading contact us today.

Telephone: 0151 525 7841
Email: jason@aintree-trading-room.co.uk
Address: 176 Warbreck Moor Liverpool L9 0HZ

Opening Hours:
Monday to Saturday 10am to 10pm
Sunday 10am to 6:00pm
An out of hours service is available for international sports betting upon request.

JP TRADERS AND CHESHIRE RACING ARE LICENSED AND REGULATED BY THE GAMBLING COMMISSION TO OFFER BETTING SERVICES WITHIN THE UK. LICENCE NUMBERS ARE XYZ AND XYZ. BOTH COMPANIES ARE MEMBERS OF IBA AND IBAS. BETTING FACILITIES ARE ONLY AVAILABLE TO PERSONS OVER THE AGE OF 18 - AGE VERIFICATION WILL BE REQUIRED UPON REGISTRATION. PLEASE BET RESPONSIBLY.



SUBMIT

[play intro](#)



[Home](#) [Betting Exchange](#) [Trading Room](#) [What We Offer](#) [FAQ's](#)
[Reciprocal Links](#) [Gallery](#) [What Is Sports Trading & In-Running](#)
[Location & Contact Details](#) [2009 Sports Calendar](#) [Press & Media](#)

Opening Times:

The sports exchange is closed
23rd, 24th & 25th Dec and
open as usual from 26th Dec
Winter 11am - 9pm,
Summer 12pm - 10pm.

Subscribe To Our RSS News Feed:

Keep up to speed with all that
is happening at CWSE.
**Subscribe to our RSS news
feed** and you will not miss any
of the action at CWSE

Betting Exchange Trading Room

Canary Wharf Sports Exchange
has a **Las Vegas sports-book**
operations look, which can look
a lot like a commodities-futures
trading room. You can sit
comfortably in one of our 30
bespoke work stations with
leather recliners along with your own 19in 150 degree
flat screen television, 19in PC monitor with cube located
under your work station with **Bose Triport headphones**.



All your betting is carried out
from your seat with the help of
instant betting tools linked
directly to the worlds largest
betting exchanges. With fibre
optic Internet connection, you'll
get speeds of **100Mbps**

download speed, and **100Mbps upload** speed plus with
a range of resilience options available including fail-over,
load balancing, and disaster recovery.



You can watch all **major
sports events live** from
around the world without
moving from your seat. Football
games, boxing, golf, rugby,
horse racing, athletics, cricket,
cycling, greyhound racing, ice
hockey, motor sport, snooker, darts, tennis, American
football, basketball, baseball, or you can choose to watch
it on one of our four 50in LCD TV screens. up to the
minute live shows on betting odds on any one of our
sixteen 32in LCD televisions.



In our trading room you have
the opportunity **become the
bookmaker** (layer) as well as
the backer. You can lay that a
certain football team or a horse
will not win the events. Sports
betting exchanges take bets on
virtually every sport and not just who'll win, but what the
final score will be, who'll be first to score a goal, who'll be
the top scorer, which horse will win the race you name it
and we will do our best to accommodate you.





Personal Telephone Betting (Betting Exchange Trading Centre | Licensed Betting Office | Commission Agency Service)

- Home
- Personal Telephone Betting
- Betting Exchange Trading
- Licensed Betting Office
- Commission Agency Service
- Betting Exchange Training
- Contact Us
- Location
- Pictures
- Elitebet News
- Computer Support Service
- Trading Blog



Betting Exchange Trading

- Join in the excitement and profit potential of the betting revolution by visiting Elitebet's expanded and improved high-tech in-running trading centre:
- FREE parking one minute away.
- Two minutes from Highgate Tube station.
- TWENTY high-tech betting workstations in three trading rooms rented by professional traders for a one-off daily fee or monthly charge.
- Every workstation fitted with a high-spec Pentium Dell PC with over 1GB of ram linked by a gigabyte IT network to four state-of-the-art internet connections.
- Workstations pre-loaded with advanced one-click betting software to enhance bet execution.
- Each workstation equipped with personal LCD TV displaying fast-feed SIS pictures, Sky Sports and satellite feeds.
- Upgraded Elitebet trading centre now features chill-out TV room plus full on-site catering facilities including microwave for the exclusive use of trading clients.
- 24-hour opening hours available for major overnight sports events.

Dear Trader,

Thank you very much for your interest in London's first cutting edge Betting Exchange Trading Centre. We are proud to invite professional gamblers and in-running sports traders to experience our state of the art betting facilities.

The Elitebet Betting Exchange Trading Floor first opened its door for business in September 2006.

Since that date, we have built up a loyal client base of successful sports traders who regularly use their judgment to win money on the online gambling markets.

Many of our existing clients specialise in horse racing - but as our facilities expand and improve we are increasingly attracting sports traders interested in betting on live events ranging from golf and football matches to major tennis tournaments and political elections.

The Elitebet trading centre has been purpose-designed to appeal to a wider audience than just in-running traders. Our three trading rooms are equipped with the latest betting show data from SIS to keep you far ahead of teletext - a request made by clients who specialize in arbitrage and form-based punting.

We are proud that the Elitebet trading centre has already attracted sports traders from across Europe - and even as far afield as Barbados.

We recently passed a historic milestone during the US Open Tennis tournament when we offered uninterrupted trading facilities for 24-hours - turning Elitebet into Britain's first round-the-clock betting emporium.

Our state of the art trading rooms have been designed with one target in mind - to maximise your chance of making a profit from gambling.

Our facility is fitted with the ultra high-spec computer equipment, betting exchange API trading software, as well helpful trained support staff and IT back-up.

We also screen the widest possible range of satellite sports feeds - such as tennis and football - as well as Sky Sports, S.I.S and Turf TV horse-racing pictures.

Subject to demand, we are open round the clock - allowing professional gamblers to trade sporting events in different time zones at anti-social hours. Elitebet's pledge is to endeavour to meet every need of our clients - ranging from picture feeds to refreshment and IT support. We hope this will enable our clients to concentrate on what they do best; gambling for profit with no distractions.

We offer all our clients refreshment facilities, a chill-out area and the chance to network with like-minded professional gamblers.

If you are interested in finding out more about how Elitebet can help boost your gambling profits please phone us on 0208 341 5555 or send an email to info@elitebet.com.



Our staff will do their best to set up a trial visit to the Elitebet trading centre (subject to availability) or arrange a meeting with an existing client to discover how Elitebet's facilities could assist you.

Elitebet is ideally located just two minutes from Highgate tube station on the Northern Line. We also guarantee totally FREE on-street parking just one minute from our trading centre after midday.

(You are advised to ask our staff immediately on arrival for full details of local parking restrictions to avoid falling foul of London's notoriously zealous traffic wardens.

Visitors are advised to park in Bishop's Road - which is just one minute away by car (see map) - which offers unrestricted free all-day parking after midday on Monday to Friday and all day at weekends.

To reach the free parking zone from inside the trading centre, turn left onto the Archway Road. Then take the first left hand turning onto Bishop's Road.) We offer our clients a range of fee options which must be paid to our staff on arrival.

New clients are invited to pay a daily fee ranging from £34 to £40 per day depending on their trading requirements. We offer discounted monthly packages to regular loyal clients.

Our fee entitles clients to use a personal workstation connected to the internet during betting shop hours. (10am- 6.30pm Monday to Saturday and 11 am-6.30pm on Sunday during the winter).

The charge is typical of the fees levied by other exchange trading rooms elsewhere in the country - despite our accessible prime location.

We allocate seats on a first-come first-served basis via a telephone booking system on 0208 341 5555. We strongly advise visitors to confirm seat availability before traveling to the trading centre.

Many exchange professionals install their own specially designed software on our computers but daily-fee clients should be aware that machines are purged of unrecognised software every evening.

We ask clients to leave their workstation computer free of viruses and in a fit state to be used by another client on departure. Spyware and other programmes which slow down or corrupt the IT equipment for other users are strictly banned.

Clients are discouraged from talking in the main. Our staff are trained to assist you with any IT hardware problems you might experience - and we have an IT expert on call in the event that our managers are unable to solve your problem immediately.

The exchange traders we have consulted have all chosen Betfair as their preferred exchange because of its liquidity. Therefore, we have reached an agreement with the world's leading betting exchange. Our contract obliges us to ensure our clients trade using Betfair instead of any rival exchange and we hope you will respect this.

After the trading day is over, we tend to relax in the Highgate Inn just a few doors away. This friendly venue also screens Attheraces and boasts some keen racing enthusiasts.

If the weather is pleasant, we urge you to stroll across the road during the day to unwind in the beautiful parkland of Highgate Wood which is open to the public.

For the convenience of clients, we have an arrangement with an outside caterer who will cook and serve you meals at your desk on request for an additional charge.

Our betting exchange trading centre clients are very welcome to use our Licensed Betting Office for cash and deposit phone bets.

This facility is likely to appeal particularly to clients placing multiple bets and playing FOBT games not available on the exchanges. Unfortunately, the exchange trading room is such a low-margin business that we cannot afford to lay fixed odds prices displayed on our text screens which are offered at a shorter price on the betting exchanges.

This rule applies to both the win and place part of any bet. It would greatly help our staff if you could avoid putting them in the position of declining these uneconomic type of bets.

Subject to this condition, we endeavour to offer a competitive pricing service to offer cash and telephone punters the best value betting odds.

Finally, we leave you with the thought that Elitebet are among the most unusual high street bookmakers in

Britain. Why? Because we want our clients to win.

The more profit our clients make trading on the exchanges, the more exciting will be future of London's first betting exchange trading centre.

So most of all - Good Luck,
The Elitebet Team

All contents © 2007 Elitebet.com, Elitebet Ltd. All Rights Reserved.

Website Design by Design2kill.com



JL Betting Exchange

One of the original and longest established Betfair Betting Exchange trading rooms, set up in 2005 by the late John Lovell a bookmaking pioneer who was the first man to introduce computerised bookmaking systems to British racecourses. The shop is a hybrid between a traditional betting shop and a high tech Betfair office. In essence the trading room is designed to provide the perfect platform for in-running trading making the most out of the time delay between At The Races/Racing UK and SIS/Turf TV.

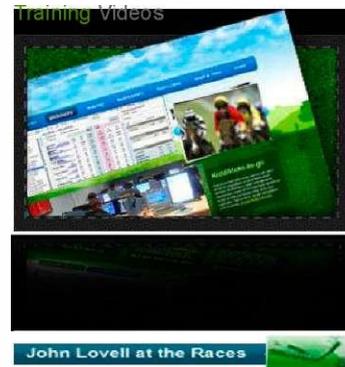
Many of the offices' punters have used the facilities to huge levels of success and in the process earn life changing sums. The shop has received national recognition in the press and industry publications. The office terminals all come equipped with high spec computers, one-click betting software and individual TV monitors. The shop is run by John's sons- James a racecourse bookmaker and member of the Wales and West point to point bookmakers committee who gained a degree in gambling studies at the university of Salford and David who at 22 years of age has become a successful in-running punter owning a string of National Hunt horses trained by Tim Vaughan.

1 Video Library

We offer free training for all beginners who wish to know more about how to bet, lay or trade i running on the Betfair Sports Exchange. We will show you how to setup and use the software, will also offer sound advice on how to get started.

You will also have a chance to chat with seasoned players who have a proven track record. ■

.....
 For more information please call: _____
 The office opens at 11 o'clock everyday and closes after the last race.



"Why are these trading rooms so popular?
Simple. With the right set-up, the fastest connection
and the fastest pictures, you've got a massive
advantage over other punters."

Exchange Room

A

Your In-Running Edge

[The Exchange](#)

R
o
o
m

Y
o
u
r

I
n
-
R
u
n
n
i
n
g

E
d
g
e

- HOME
- ABOUT US
- FACILITIES
- BETTING IN-RUNNING
- BEGINNERS
- TRAINING
- CONTACT US

About Us

The Exchange Room is set up by racing professionals who know the market, who know what it takes to win. And we know a microsecond can make the difference in the tight world of horse racing.



Air-conditioned offices, leather-padded chairs and state-of-the art hardware

We also know that successful trading in-running needs the right environment. So we give you air-conditioned offices, leather-padded chairs and state-of-the art hardware. Because, believe it or not, we want you to win consistently. Our living comes from charging out our desk space. Yours could come from in-running trading.

You might start out as a casual punter, betting for fun, but before long you'll feel like a City trader, hooked on the live action, playing the odds - playing to win. Make no mistake, in-running trading is the nearest thing betting has ever had to an unfair advantage. Our ultra-fast pictures are seconds quicker than the satellite racing channels.

And, with a dedicated ultra-fast, ultra resilient line, you can place your bet with Betfair in under ten milliseconds. That can be up to 25 times faster than a regular ADSL connection - 24 hours a day.

All of which puts you among the front-runners, with a web connection working at the speed of thought and pictures feeding at the speed of light. Back, lay or cancel at unbeatable speed as you keep yourself fuelled on free drinks and snacks throughout the day.

Want to tip the odds further in your favour? Ask about our easy-to-follow, trading in-running training, held in our informal, private offices.

BETTING IN RUNNING, TRADING IN RUNNING. THE EXCHANGE ROOM, THE HOME OF IN RUNNING BETTING.

© 2010 The Exchange Room. All Rights Reserved.

