The Federation of Racecourse Bookmakers Limited

Association of Racecourse Bookmakers | National Association of Bookmakers | Rails Bookmakers Association

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The Federation of Racecourse Bookmakers' response to 'Betfair comment on submissions to the HBLB Consultation Exercise regarding betting exchanges'

23rd November 2010

The Federation of Racecourse Bookmakers (FRB)

The Federation of Racecourse Bookmakers was formed in 2003, to provide an umbrella organisation to cover:

- **Association of Racecourse Bookmakers**
- **National Association of Bookmakers**
- **Rails Bookmakers Association**

Whilst the three associations retain their individual autonomy, the FRB is able to act jointly and collectively for the interests of all racecourse bookmakers.

Response

1. For clarity, the FRB's September response is described as FRB (1). Betfair's three responses to the HBLB consultation are described below as follows:

    a. Betfair (1): *Betfair response to HBLB Consultation Exercise Re betting exchanges*
    b. Betfair (2): *Betfair rebuttal of Racing's submission to the HBLB consultation regarding customers of betting exchanges*
    c. Betfair (3): *Betfair comment on submissions to the HBLB Consultation Exercise regarding betting exchanges*

2. The FRB's response focuses primarily on the points directed at the FRB in Betfair (3). However, as Betfair has understandably chosen not to repeat arguments presented in one submission in another, the FRB has necessarily referred to the fuller explanations given by Betfair elsewhere at times.

A) The definition of a bookmaker

Receiving or negotiating bets

3. Betfair goes to great lengths to argue that its customers do not receive or negotiate bets. Yet the manner of Betfair's operation does not preclude its customers receiving bets. Stakes and liabilities are lodged with Betfair, but the outcome – in the form of winnings and losses – are still ultimately received by customers.

4. In arguing that its customers do not 'negotiate' bets, Betfair is selective in its definitions, giving only the *Oxford English Dictionary's* first. The *OED* gives five definitions of 'negotiation':

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a. 'To hold communication or conference (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to some settlement or compromise.'
b. 'To deal with, manage, or conduct (a matter or affair, etc., requiring some skill or consideration).'
c. 'To convert into cash or notes.'
d. 'To deal with, carry out, as a business or monetary transaction.'
e. 'To succeed in crossing, getting over, round, or through (an obstacle etc.) by skill or dexterity.'

5. These definitions are clearly applicable to betting exchange customers who use their skill in conducting monetary betting transactions. Moreover, communication occurs between customers via the exchange and in competition with other communications taking place concurrently on the exchange.

Business users of betting exchanges

6. Furthermore, it is necessary to view the complete definition of s55 of the Betting, Gaming and Lotteries Act 1963 ('the 1963 Act'). For example, negotiation necessarily involves at least two parties and following that line of reasoning means that both punter and bookmaker are liable. It is carrying on the business of doing so which differentiates the bookmaker from the punter.

7. Betfair does not demonstrate that its users are not carrying on the business of receiving or negotiating bets – or to avoid asking them to prove a negative, Betfair does not demonstrate that its users are recreational. Rather, in pages 5 to 7 of Betfair (1):

    a. Confirms that its customers use Betfair to fulfil a number of services which is no different from a business which chooses to outsource particular functions.

    b. Conflates licensing, taxation and the Levy. As discussed below, the policy objectives and legislative regimes are distinct and equivalence cannot be assumed.

8. Betfair (1) states on page 2 that *'no customer of a betting exchange should be regarded as being a leviable bookmaker, solely based on his or her exchange betting'*. This fails to address two points:

    a. Firstly, the possibility that a bookmaker could choose to run a bookmaking business using only a betting exchange. As raised in paragraph 13 of the FRB's first submission, many traders conduct a business from a single platform (such as the Main Market on the London Stock Exchange), Betfair is a licensed bookmaker but is unlikely to use other platforms, and Betfair is a favourable platform which could be used exclusively to carry on a bookmaking business.

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b. Secondly, the key argument that there are exchange customers who are carrying out the business of receiving or negotiating bets. As per paragraph 19(b) of FRB (1):

> *If it cannot be demonstrated in fact whether betting exchange customers are* "carrying on the business of receiving or negotiating bets" *then there can be no exchange customers who are leviable. There are: licensed bookmakers. It would be tautologous to argue that licensed bookmakers are* "carrying on the business" *by receiving bets on the exchange simply by virtue of the fact that they have a licence because they are obliged to do so.*

9. As stated in FRB (1) on page 6, '*if it is the case that it cannot be demonstrated in fact whether betting exchange customers are* "carrying on the business of receiving or negotiating bets" *then this would constitute deeply flawed public policymaking in terms of the possibility for tax avoidance…the fact that exchange customers are* "carrying on the business of receiving or negotiating bets" *would be demonstrated if there was the will and attempt to do so'.*

<u>Laying is distinct from backing</u>

10. Backers and layers within an exchange betting transaction place their stake and liability respectively with the exchange. The layer's obligation to settle and ability to do so are met in advance of the outcome being known. This is necessary given the nature of the medium and does not undermine the distinction between a backer and a layer.

11. Betfair (3) states on page 2 that the DCMS and Treasury rejected the distinction between laying and backing. However:

    a. The DCMS analysis related to the Gambling Bill – that is, licensing – and the Treasury's related to GBD – that is, taxation. They do not address the difference in the context of the Levy.

    b. Betfair points to a letter from John Healey MP, Financial Secretary to HM Treasury, dated 5 December 2005, which states, *'[w]hilst tax law does limit tax liabilities for bookmakers to their gross profits from lay bets, it does not link being a bookmaker to laying a bet'*. Even if the argument that bookmaking is not synonymous with laying – which the FRB contests – prevails, Betfair has not dismissed the point that dues can be focused on a particular activity, such as laying.

B) Betfair's incomplete reporting and analysis

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12. Betfair (3) states on page 3 that the ABB and FRB assert, *'without providing any justification, that the first part of the s.55 definition applies to betting exchange customers…The FRB's position here is even more dogmatic [than the ABB's]'*. The footnote then quotes only part of paragraph 17 of the FRB (1), that *'It is irrefutable that betting exchange customers receive or negotiate bets'.* Betfair has missed out a pertinent statement. FRB (1) stated that, *'it is irrefutable that betting exchange customers receive or negotiate bets: that is what the platform is for.'* Without bets being received or negotiated, a betting exchange could not exist so it is unclear what further justification is expected.

13. On page 3 of Betfair (1), the conditions someone must fulfil in order to be a bookmaker are listed as '(i) in business; and (ii) effecting betting transactions on horse races; and either (iii) receiving bets; or negotiating bets'. However, the rest of this response, as well as Betfair (2) and Betfair (3), concentrates on the meaning of 'effecting' rather than on the purpose of the complete clause s27(2)(a) of the 1963 Act. Therein, it states that the Levy:

> *'shall be payable only by a bookmaker who carries on on his own account a business which includes the effecting of betting transactions on horse races, and only in respect of so much of the business of the bookmaker as relates to such betting transactions'.*

This clause is not designed to draw focus to the meaning of 'effecting betting transactions', but rather to signify that the Levy only applies to horse races. To argue otherwise is disingenuous.

Moreover, Betfair's argument does not hold: Betfair may effect a transaction, but its existence is not sufficient for a transaction to occur. There must be also be a backer and a layer present to complete the effecting of a transaction on horse racing.

C) Betfair conflation of licensing, taxation and Levy legislation

14. Betfair relies on a conflation of licensing, taxation and Levy legislation to argue that its customers are not leviable – for example, in Betfair (3) on pages 3 and 9. Yet it fails to invalidate the FRB's contention in paragraph 6 of FRB (1) that:

> c. *'Parliament therefore had the opportunity to use the 2007 Order to align Levy legislation (i.e. the 1963 Act) with taxation and licensing legislation as regards betting exchanges. Parliament did not. It would therefore be a mistake to conflate taxation and licensing legislation with Levy legislation. HMRC, the Gambling Commission and the HBLB each have their own distinct statutory jobs to do.'*

15. Betfair only addresses the difference the FRB makes between taxation and licensing on the one hand, and the Levy on the other, by misquoting FRB (1) in page 4, footnote 9, of Betfair (3). It states only that *'In a similar vein, para 6 of the FRB submission states that "It*

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would be a mistake to conflate taxation and licensing.' This clearly distorts the FRB's intended meaning, where taxation and licensing should not be conflated with the Levy.

16. Betfair does not answer the point in FRB (1), paragraph 22(a), that, *'[i]t was only in the context of the then Gambling Bill that the DCMS expressed the view that exchange users who were layers on the exchanges should not need to be licensed to achieve the Government's regulatory objectives. That had nothing whatever to do with whether such users met the definition of a bookmaker.'*

17. The definition of a bookmaker – who is therefore leviable if effecting betting transactions on horseraces – is separate from whether a bookmaker is licensed. As FRB (1) stated in paragraph 24, *'being licensed is an insufficient basis from which to automatically conclude that a bookmaker uses the exchanges* "in the course of business". *In addition, it is no argument to say that because a licensed bookmaker may not* "carry on the business of receiving or negotiating bets" *precludes individuals or companies without a licence from doing so.'*

18. Moreover, Section 55 of the 1963 Act sets out two groups who should not be deemed to be bookmakers: *'a person shall not be deemed to be a bookmaker by reason only of the fact – (i) that he carries on, or is employed in, sponsored pool betting business; or (ii) that he operates, or is employed in operating, a totalisator*'. The opportunity was not taken in 2007 to include betting exchange customers.

19. Betfair (3) quotes in footnote 11 of page 5 the following from page 38 of the Government response of June 2004 to the First Report of the Joint Committee on the Draft Gambling Bill: *'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'*. It cites this on page 5 as evidence that *'the Government accepted that the only way in which exchange customers could be brought within the Levy, was if the* "current law" *were amended.'* Betfair (3) goes on to state (on page 5) that, *'[t]hat law is still in place. Without specific amendment to it, such exchange customers cannot be leviable. No amendments have been proposed by Government. Accordingly, it remains the case that under the 1963 Act, exchange customers are not within the ambit of the Levy.'*

20. However, Betfair's interpretation is not the clear implication of the Government's statement:

    a. The Joint Committee's recommendation was that *'the best way of achieving a balance is to ensure that those using betting exchanges to lay bets professionally are identified, regulated, made subject to the appropriate levy arrangements, and have their status checked'* (paragraph 107).

    b. In response, the Government stated that it, *'…proposes that all exchange users, and not just a subset, should be properly identified and registered by*

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> *exchanges…This means that information about accounts or transactions can be reported to the Gambling Commission or particular individuals can be notified to the Commission if required.'* It went on to state that *'…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 relevant provisions of the Bill provide that any person providing facilities for betting requires an operating licence unless they are involved in private and non-commercial betting under Schedule 1 of the Bill, or their provision of facilities is not in the course of business (clause 22). Laying or backing on a betting exchange constitutes providing facilities for betting, and therefore where someone does this in the course of business without a general betting operating licence s/he will have committed the offence under clause 21.'* Finally, the Government stated that it was '*not persuaded'* that the law should be amended, *'bearing in mind the proposed abolition of those arrangements in the Horserace Betting and Olympic Lottery Bill.'*

21. This is perhaps the reasoning behind William Hill's submission in 1.10 that *'Whilst it may be possible to consider this issue purely in terms of extant legislation and bring business users within the scope of the levy, there is undoubtedly the need for a wider review and possible legislative change which eliminates ambiguity and brings business users of exchanges within the full scope of tax, levy and regulation*'.

22. The FRB would go further than William Hill has done. The Government's response acknowledged that betting exchange users could be acting in the course of business. It made a distinction between regulation and the Levy because of the passage of two Bills through Parliament and not to release betting exchange bookmakers from their Levy obligations. As in FRB (1), paragraph 14(a):

> *'The relevant legislation (i.e. retained provisions of the 1963 Act) does not need to be amended to bring exchange users within the scope of the horserace betting levy arrangements. The law states that the HBLB should impose the Levy on anyone who* "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".*'*

D) Conclusion

23. Betfair argues that there are no leviable exchange customers. By this interpretation, traditional licensed bookmakers should cease to pay Levy on their exchange activities because it cannot be shown that they are carrying on the business of negotiating and receiving bets on the exchange.

24. However, this document demonstrates that:

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a. It would be a mistake to conflate licensing, taxation and Levy legislation;
b. Betting exchange customers do negotiate bets;
c. Betfair has not shown either that its customers are not carrying on a business, or that its customers are all recreational users; and
d. Betting exchange customers can meet the definition of a bookmaker effecting betting transactions on horse races, as given in the retained sections of the 1963 Act, s27(2)(a) and s55, rendering those that do leviable.

25. This leads to the interpretation that there are bookmakers carrying on a business using betting exchange(s) who are leviable. Within this, identification is possible through a number of measures but cannot rely exclusively on reference to bookmakers being licensed for activities conducted in non-exchange arenas.

This document is submitted by the Directors of the Federation of Racecourse Bookmakers (FRB):

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