Betfair rebuttal of Racing's submission to the HBLB consultation regarding customers of betting exchanges

In this document the following abbreviations are used:

"BHA" The British Horseracing Authority.
"The Board" The Horserace Betting Levy Board.
"The Commission" The UK Gambling Commission.
"Consultation" The consultation exercise initiated by the Board in July 2010.
"CP" The Betting Exchanges Consultation Paper issued by the Board in July 2010.
"HM Customs" Her Majesty's Revenue and Customs.
"DCMS" Department for Culture, Media and Sport.
"Exchanges" Betting Exchanges.
"FOI Bundle" The documents provided by HM Treasury in response to a Freedom of Information Act request made by Betfair in April 2009, in relation to HM Treasury's 2004-05 review of the tax treatment of betting exchanges and their customers.
"GPT" Gross Profits Tax.
"Levy" the British Horserace Betting Levy.
"The Minister" The Secretary of State at DCMS responsible for betting and racing.
"Racing" A combination of the BHA, the Horsemen's Group and the Racecourse Association.
"Racing's submission" Racing's September 2010 submission to the Consultation.
"The Review" The investigation conducted in 2004-05 by HM Treasury into the tax treatment of betting exchanges and their customers.
"Sporting Options" R (on the application of Sporting Options) v Horseracing (sic) Betting Levy Board [2003] EWHC 1943 (Admin Hooper J).
"HM Treasury" Her Majesty's Treasury.
"1963 Act" Betting, Gaming and Lotteries Act 1963.
"1981 Act" Betting and Gaming Duties Act 1981.
"2005 Act" Gambling Act 2005.

1. Introduction

Betfair believes that Racing's submission to the Consultation is significantly flawed in a number of areas. This document seeks to highlight the most obvious of those defects. However, a failure to mention any part of the submission should not be taken as accepting it. All paragraph references herein are to paragraphs in Racing's submission save where otherwise indicated.

2. Racing's submission is most clearly deficient in the following ways:

2.1 It provides no evidence in relation to the Consultation.

2.2 It contains a number of clear errors.

2.3 It misrepresents some of the key relevant investigations carried out by independent public bodies.

2.4 It ignores some of those investigations completely.

2.5 It relies on unsubstantiated and irrelevant metrics.

2.6 It seeks to raise irrelevant "straw man" arguments, on which exchanges do not rely.

2.7 It assumes the Norwich Pharmacal process to be more applicable than is in fact the case.

In addition, this document raises a number of other questions about Racing's submission and discusses the flaws – which Racing appears to concede - of excluding non-exchange betting from the Consultation.

3. No evidence

3.1 Although primarily focused on eliciting views about the statutory definition of "bookmaker", the CP asked for evidence in respect of exchange customers and the Levy. No such evidence has been provided by Racing.

3.2 It is noteworthy that paragraphs 1.2(a), 1.2(b), 2.1(a) and 4.4 contain mere assertions but nothing more. Phrases such as "*there is likely to be a significant group"* of exchange customers who should be, but are not paying Levy; that lost Levy revenue "*is potentially substantial"*; "*it is very likely that there are"* leviable bookmakers using exchanges; and the very general statement made about the existence of bookmaker customers of exchanges towards the end of paragraph 4.4, reveal that Racing is unable to provide any evidence whatsoever that there are customers of betting exchanges who should be paying Levy but currently are not. Consequently, the Board is in no position as a result of Racing's submission to reach any conclusion which is adverse to exchanges. The language of mere supposition and assumption is, of course, consistent with unsubstantiated claims previously made by Racing and others.[1]

[1] For example, see the BHA letter to the Board of 16 July 2008, the Board's letter to Betfair of 7 April 2009, the BHA letter to DCMS/the Commission of 2 June 2009 and Racing's

4. Errors in Racing's submission

4.1 The submission contains a number of errors some of which are discussed in this section 4 but see also sections 7 and 8 below.

Racing's analysis of "*Receiving and Negotiating bets"*

4.2 Para 3.6 mistakenly claims that there is "*no specific guidance in the legislation or relevant case law which provides further explanation or guidance as to the meaning of 'receiving or negotiating bets*". In fact s.55(1) of the 1963 Act specifically refers to the meaning of "*bet"*.[2] There is no doubt that a statutory definition, by reason of its source, is likely to be highly persuasive with a court in deciding the overall meaning of "*receiving or negotiating bets"*.

4.3 Para 3.7 starts by asserting "*there is no reason to believe that the legislator was seeking to restrict the application of levy"* by the inclusion of the phrase "*receiving or negotiating bets"*. It continues that "*receiving or negotiating bets"* should mean "*entering into"* bets. Racing's position here – which despite what follows at paras 3.10-3.22 is its primary argument – is fatally flawed. Why should a phrase in a statute be rewritten in this way without the most compelling reasons? No reasons are given. The draftsman could have expressed himself by using "*entering into*" bets (or simply by using "*betting*") but he did not. Indeed, had he so intended, it is difficult to understand why he would have expressed himself in any other way. Why should this phrase be rendered effectively meaningless? The obvious answer would seem to be that Racing believes doing so helps it to argue for exchange customers to be leviable. However, basic principles of statutory interpretation undermine Racing's position.

4.4 Paras 3.10-3.14, which discuss "*receiving bets*", suffer from a number of errors. First, "*receiving"* is confused with "*accepting*"; see paras 3.10, 3.13 and 3.14. They are not synonymous and in using "*receiving"* and not "*accepting"* the draftsman has excluded the contractual connotations with which "*accepting*" is clearly associated. Accordingly the "*bundle of contractual rights and obligations"* which para 3.12 equates to a "*bet"*, is surely not the correct way to read that word. Moreover, the word "*bet"* cannot in the context of s.55 support such a meaning.

4.5 It would be highly obscure to describe a bookmaker or an exchange customer as "*receiving"* rights/obligations when the term "*accepting"* would have, *ex hypothesi,* sufficed. It is notable that notwithstanding Racing's unconvincing attempts in this part of its submission, first to dismiss the importance of the terms "*receiving and negotiating"* in the s.55 definition and second to apply the terms to exchange customers, para 4.41 states that it is the exchange which "*receives a bet"*.

4.6 Paras 3.15-3.21 discuss "*negotiating* bets" but in doing so give rise to a number of serious mistakes. First, if, as para 3.15 claims "*bet"* in this phrase means "*the odds*" then we have a remarkable situation that in the phrase "*receiving or negotiating*

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submission re the 50th Scheme of March 2010 at page 52. Each contained assertions but no evidence at all.

[2] "Bet" is defined in s. 55(1) negatively as not including "*any bet made or stake hazarded in the course of, or incidentally to, any gaming"*.

bets", the final word bears two completely different meanings, each of which depends on the preceding governing word. This is so fundamentally unlikely that it requires the most cogent of analysis to support it; Racing fails to provide that. It is extremely unlikely that, in the absence of compelling analysis, a court would adopt such an interpretation. Moreover, the second possible meaning ascribed to bet – "*other terms of a bet"* (i.e. such terms minus the odds) is obscure and illogical and could, in any event, only hold water if, in fact, as Racing assumes "*receiving*" should really be read as "*accepting*".

4.7 Betfair suggests that the meaning of bet which makes most sense is "*stake"*. Indeed para 3.18 seems partially to accept so far as "*negotiating"* is concerned, that this could be the case. However the attempt in paras 3.20 and 3.21 to deal with the difficulty about "*negotiation"* in para 3.19 does not bear scrutiny. It stretches beyond reason the meaning of the statutory language and suffers from a fundamental practical difficulty: how can a Levy scheme be considered to have been properly drafted when it is unclear whether or not a person is liable for Levy under that scheme?

4.8 The demonstrable difficulties of the assumptions made in para 3.20 are readily demonstrated; as the £600 referred to therein clearly cannot be relevant to "*negotiating"*, it should be ignored completely for Levy purposes, which makes for such complexity that it demonstrates the inherent unlikeliness of the argument proposed. If, however, it were to be said that the £600 is within "*receiving",* this highlights a fundamental problem with Racing's approach in that it would have sufficed if the draftsman had not included "*negotiating"* in the s.55 definition, for all the bets, *ex hypothesi,* would be covered by "*receiving".* This failure to give "*negotiating"* an independent role highlights a fatal inadequacy of the proposition.[3]

4.9 Given the weakness of the arguments set out in paras 3.10-3.21, it is unsurprising that Racing's primary submission is, in effect, that the words "*receiving or negotiating bets"* serve no purpose, provide no limitation as to Levy liability and are essentially meaningless. Racing demonstrates here a complete disregard for the statutory words. The courts are very reluctant to reach conclusions of this type and no reason exists for them to do so here. Moreover, in its alternative submission that the words "*receiving or negotiating"* should be read as "*accepting or offering"*, Racing provides no, or no cogent reason for so doing. It is not enough to say that the 1963 Act has fallen behind technology when, in 1963, the concepts of offer and acceptance were in common legal parlance and would have been used if it had been appropriate to do so.

Racing's analysis of "*carrying on a business*"

4.10 Paras 3.22-3.44 discuss the statutory requirement of "*carrying on a business*" but again, they contain a number of errors. First, it is not correct to conclude, as does para 3.24 that the word "*occasionally"* in s.55 "*suggests that the test for carrying on a business is not a particularly high one"*. Being captured by the "bookmaker" definition involves the imposition of a tax, the non-payment of which could have,

[3] When Racing seeks to introduce a distinction between exchange backing and laying in this section of its submission, in an effort to apply meaning to "*receiving and negotiating",* one is reminded of the Government's statement, (referred to at para 6.3 below), that any distinction between backers and layers would "*be arbitrary and introduce unnecessary and unwise regulatory loopholes*".

under the 1963 Act, led to the refusal to renew a bookmaker's permit without which a person could not carry on his business lawfully. Indeed this potential detriment continues under the 2005 Act; see the Gambling Act 2005 (Horserace Betting Levy) Order 2007, SI 2007/2159, Art.3.[4]

4.11 All that the word "*occasionally"* signifies is that the bookmaker need not exclusively carry on such a business; he could operate as a part-time bookmaker and still be captured by the s.55 definition.[5] It is noteworthy that Racing's first submission on "*carrying on a business"* seeks to claim that the statutory qualifying criterion is low. If one adds to that one of Racing's primary arguments on "*receiving or negotiating bets*" (i.e. that those words have little or no meaning) one arrives at the result where "*bookmaker"* in s. 55 1963 Act is apt to cover a very wide spectrum, as both material parts of the definition are said to be so all-embracing. Such a conclusion accords no effective limitation to the phrases used in a provision which, in effect, imposes a tax. It thereby offends the principle expressed by Evans LJ in Ingram etc v. IRC [1997] 4 All ER 395 at 414 that "*in the context of tax legislation it is necessary to consider the legal analysis with the utmost precision, so that the taxpayer shall not become liable to tax unless this is clearly and unequivocally the effect of the statutory provisions".*

4.12 The distinction which is then sought to be drawn at some length in paras 3.25 et seq. between carrying on a trade and carrying on a business, is a flawed attempt to establish a point which does not and cannot bear analysis.

4.13 The most fundamental error here arises from the fact that, at this point, Racing misrepresents/fails to understand the clear views expressed by HM Treasury in its 5 December 2005 letter, setting out the conclusions of its 20 month Review. A fair reading of that letter contradicts the claim made in para 3.43(c).

4.14 The HM Treasury letter considered two issues in relation to the tax treatment of exchange customers. First, were exchange customers who were making lay bets, engaging in bookmaking? In concluding that they were not it referred to tax law which it said "*defines a bookmaker as someone who receives or negotiates bets by way of a business"*. It also equated "*business*" with "*trade"*, contrary to Racing's submission. Second, and more widely, HM Treasury asked whether there were persons on exchanges who "*are in business….and whether these people should be taxed as bookmakers*". In rejecting that, it stated "*there is not sufficient evidence to characterise these users as running a business*". The examples cited by Racing concerning investment businesses and trading companies which have ceased to trade but which retain assets from which income is derived, are so far removed from the position here as to be irrelevant. See further paras 5.1-5.4 below.

4.15 Moreover, even certain documents within the FOI Bundle on which Racing relies, contradict its arguments in respect of "*business"*; see paras 5.5-5.9 below.

4.16 By claiming in para 3.41 that the Befair poll referred to therein is confirmation that "*17.67% of users polled volunteered that they used Betfair to generate their primary income*", Racing appears to have misread the question being posed. Respondents

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[4] The relevant approach to construction here is that "*persons should not be subjected by law to any sort of detriment unless this is imposed by clear words.*" – Bennion on Statutory Interpretation, 5th ed. page 827.

[5] Indeed a bookmaker might have just one pitch, at a racetrack which races only a handful of times a year, but would still be captured by the s.55 definition and would have required a bookmaker's permit in the past and would now need to be licensed under the 2005 Act.

were asked "*why do you bet?";* they were not asked "*why do you bet on Betfair?".* In any event, simply making money (even regularly) through one's betting activities, does not constitute "betting in the course of business". The mischaracterisation of this poll by Racing does however raise questions about the limited scope of the Consultation, a point which is elaborated on in more detail at para 9.4 below.

4.17 The online auction sites referred to by Racing at para 3.42 are not relevant to the question at issue in the Consultation. These auction sites do not fulfil a role analogous to an exchange. Although the auction site provides the introduction between buyers and sellers, the parties otherwise transact directly. Sellers are in a position to receive personalised feedback and build up a clientele through such a website and are at risk from non-payment by buyers. Similarly buyers are at risk that a product purchased will not be delivered or will be delivered in defective condition. Having made the introduction, the auction site takes limited responsibility for the direct commercial relationship established between buyers and sellers. The contrast between an exchange customer and a person transacting on an online auction site is stark. Sellers on auction sites are acting as merchants; customers of betting exchanges are not acting as bookmakers.

4.18 Finally, para 4.45, whilst not unique in a document which frequently attempts to ignore inconvenient points or fails to grapple with them in any persuasive fashion, surely falls into gross error in its reading of "*on his own account"* in s. 27(2)(a).[6] That phrase means precisely the opposite of Racing's argument. Those words are clear and unambiguous. They only impose Levy liability on the principal. This is clearly the way the Board sees it, as is recorded in para 32(2) of the CP; Betfair agrees.

5. Misrepresentations of key investigations

5.1 At paras 4.7-4.23, over many pages, Racing sets out its case in respect of the HM Treasury Review of 2004-2005. Some passages, such as the first sentence of para 4.9 are expressed so obscurely that they defy comprehension. In this area of its submission Racing quotes extensively from the FOI Bundle.[7] That bundle, as paragraph 4.15 concedes, contains a number of opinions personal to particular writers. They are no more than that. Others are merely discussion papers; for example see document 5 quoted at para 4.14. The critical document however is HM Treasury's 5 December 2005 letter, which set out its considered conclusions at the end of the Review. That letter, however, is only referred to on one occasion by Racing, at para 4.7 and even then in a misleading fashion. Its contents fatally undermine the claim made by Racing at para 4.13 that "*it is very clear that even in 2004/05 the Treasury did not conclude that none of Betfair's users were in business".* It is necessary to set out the position in full.

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[6] Liability to Levy does not, as the Board in the CP rightly points out, arise solely from the definition of bookmaker found in s.55; a person must also be "*effecting betting transactions"* within s.27(2)(a) to be a leviable bookmaker. This surely emphasises that being "*a party to a bet"*, or simply "*betting*" (either of which phrases could have been used) may not be sufficient. Racing has not sought to address this provision.

[7] Unfortunately, the citations and contents are not entirely accurate. For example, document "21.B" quoted in para 4.22 does not exist. The relevant document is 22.B. Moreover the passage quoted at the top of page 18 is inaccurate and makes no sense.

5.2 With regard to the tax treatment of betting exchange customers, HM Treasury considered that this raised two issues:

First, whether it *"should tax persons who lay bets on betting exchanges on the grounds that they are bookmakers".* HM Treasury decided that *"taxing layers on exchanges, purely on the basis that they lay bets, would not be fair or proportionate"* and it explained this on the following basis: "*Whilst 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. Instead it defines a bookmaker as someone who receives or negotiates bets by way of business. For bookmakers, it is clear that laying bets is a business activity, in the sense that it is carried out for the purposes of a trade and has an inbuilt system of profit. This is not generally true for layers on exchanges who are not conducting a trade, nor are they generally able to build in a profit margin to their price. The decision not to tax layers on exchanges is also consistent with social policy set out in the Gambling Act. I should stress that bookmakers are already liable for duty on their gross profits from lay bets on exchanges, and HMRC will continue to ensure compliance with this."* [Emphasis added].

Second, as to "*whether there are persons who are in business on the betting exchanges more generally and whether these people should be taxed as bookmakers."*

HM Treasury stated:

"We have looked more widely at whether there is a group of users on betting exchanges who are acting by way of business and are not currently being taxed. Whilst there are clearly differing levels of activity on exchanges and some users do bet in high volumes, there is not sufficient evidence to characterise these users as running a business, as opposed to merely being high-volume gamblers, who have traditionally been outside the tax net."

5.3 Moreover, it is also important to understand why the rejection of taxing exchange customers is relevant to the Consultation. The Review expressly considered issues which in principle are identical to those which form the subject of the Consultation. It applied the definition of bookmaker which is found in s.55 of the 1963 Act and did not find sufficient evidence to characterise any exchange customers as being "*in business"*.

5.4 The claim repeatedly made by Racing that the conclusions of the Review were primarily policy-based can be comprehensively rejected. HM Treasury analysed the statutory requirement that in order to qualify as a bookmaker (before even considering whether he was *"receiving or negotiating bets*"), a person had to carry on a "*business*" (or conduct himself "*by way of business*") and specifically found that it was not fulfilled. The HM Treasury letter specifically states that "*tax law…….defines a bookmaker as someone who receives or negotiates bets by way of business*", i.e. in the exact same way as s.55 of the 1963 Act. Having applied that definition to the facts, HM Treasury expressly found that exchange customers placing lay bets did not fall within that category. That decision was based upon a technical legal interpretation of the definition of "*bookmaker*", applied to an exhaustive examination of the betting being undertaken by the highest volume exchange customers.

5.5 Moreover, even some of the passages chosen (selectively) by Racing from the FOI Bundle do not assist its case and frequently undermine it. For example, paras 4.14

and 4.16 quote from document 5 in that bundle and appear under the not unimportant heading (which Racing does not quote) "*Taxing betting exchange users because they are in business.*" Para 4.16 contains the following words from the same document: "*If we were to say certain users were in business and should pay [GPT] it would be hard to resist the argument that they should pay income tax?"*. In other words HM Treasury was equating being in business with trading, again contrary to one of Racing's main submissions.

5.6 Further, para 4.18 quotes from document 7 of the FOI Bundle, however even the passage relied on at the bottom of p.16 of Racing's submission makes it clear that the element of "*presentational awkwardness*" which Treasury officials were considering might well not apply to those who were in business.

5.7 Para 4.20 sets out passages from document 17 of the FOI Bundle and in words (at the very end of that paragraph) emphasised by Racing, it is clear that being in business and trading are treated by HMRC as being synonymous; not, as Racing argues, as different concepts. See also para 4.22 at the bottom of page 17 where it is stated that even "*high-volume exchange users…..are not acting as bookmakers*". See further the passage quoted at the foot of page 18 under the heading "*Type of tax*". The emphasised words show that the author was recording a view which rejected charging income tax, however the two preceding sentences which are unemphasised make it clear that this was not the only tax being considered.

5.8 It is clear that General Betting Duty or GPT was also examined. The application of that tax depends on whether s.12 of the 1981 Act is fulfilled. That section applies if, as the CP makes clear, a person is acting as a bookmaker, in the exact same terms as those used in s.55 for Levy purposes. The application of GPT here was, as we know, rejected as the 5 December letter records. This demonstrates beyond argument that in 2004-2005 HM Treasury considered whether exchange customers were in the business of receiving or negotiating bets and concluded that they were not.

5.9 When para 4.23 (echoing claims made in paras 4.9 and 4.17 that the policy which drove HM Treasury's conclusion was that of preventing gamblers from offsetting losses for income tax purposes) therefore claims that HMRC was reluctant "*to accept any new regime which might result in it having to give income tax relief in respect of gambling losses*...", it is simply wrong. HMRC considered another tax, the very one which applies to those who fall within s.55 for Levy purposes and rejected its application to high volume exchange customers. Indeed para 4.8 specifically accepts this point as follows: "*The Treasury's eventual conclusion [was]…not to pursue existing users for general betting duty*....". Accordingly, the claim made earlier by Racing (at para 3.44) that "*where liability to income tax is not being considered…the court may feel less reluctant to find that a HVPU is carrying on a trade"*, is not relevant and the penultimate sentence of para 4.9 is flawed. HM Treasury applied tax law not policy considerations.

5.10 Racing seems to place great importance on personal views expressed at parts of the FOI Bundle. However, views of individual officials expressed therein which are inconsistent with the final decisions set out in HM Treasury's 5 December 2005 letter, can bear little weight. That HM Treasury considered these views but rejected them, provides all the more compelling a basis for the Board to similarly disregard them. Accordingly the Board cannot reasonably take such personal views into account, for

to do so would be to reject unreasonably the position taken by HM Treasury at the conclusion of the Review.

6. Racing's submission ignores some relevant investigations completely

6.1 One of the most remarkable features of the submission is its failure to engage at all with the conclusions reached since 2003 by a number of public authorities, all of which are referred to in the CP, all of which are relevant to the core issue of the Consultation and each of which undermines Racing's position. Briefly, there is no mention at all in Racing's submission of the matters set out at paras 6.2-6.5 below.

6.2 Racing makes no reference to the DCMS Position Paper of May 2003 in which it is clear that the Government did not consider that exchange customers were carrying on a business. Paras 10, 13 and 14 of that Paper stated as follows:

> *10. We have taken some time to understand the betting opportunity provided by betting exchanges. In broad terms, we regard an exchange user (whether they are laying or backing) as a person involved in a relationship with the operator of the exchange. In the way that the exchanges operate at present, a user cannot bet without entering the controlled market provided by the operator. Once they have entered this market, they must conduct their activities in accordance with the rules and systems devised by the operator. They cannot hold themselves out as an independent business, capable of setting and altering the rules of the exchange. This is an important consideration when one considers what has been referred to as the risk of 'unlicensed bookmaking' through a betting exchange.*
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> *.....*
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> *13. A comparison with traditional forms of bookmaking illustrates the point: If a private person acts as though s/he was a bookmaker in public or at an office, and offers odds to other private individuals, there is a risk to those third parties. The unlicensed person offering odds may not have sufficient finance to make good winnings, or they may simply not make themselves available to pay. There is a risk of harm.*
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> *14. On the other hand, where someone who may not qualify as a bookmaker offers odds on the betting exchange, there is no risk of harm. The person cannot deprive other users of winnings, because s/he does not hold any stakes. Moreover, the exchange operator will not permit the 'unfit' user to bet or lay odds where s/he does not have sufficient funds deposited to cover the maximum liability associated with those transactions. There is no risk of harm to the public from an exchange user. The user enters a regulated market where the market provider is licensed in ways that ensure that no user may present a risk to other users. If payment is guaranteed and anti-money laundering measures are in place the threat of criminal activity is negligible.*

6.3 The Government response of June 2004 to the First Report of the Joint Committee on the Draft Gambling Bill is also completely ignored by Racing. At page 38 of that response the Government recited particular recommendations contained in the First Report which were relevant to exchanges. It pointed out at para 107 that any

distinction between backers and layers would "*be arbitrary and introduce unnecessary and unwise regulatory loopholes"*. It also stated "*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*". In other words, it recognised that bringing exchange customers within the Levy would require that the law be amended. The law referred to is of course the 1963 Act, which still applies.

6.4 HM Government further rejected the First Report's suggestion that so-called "*non-recreational exchange layers*" should be identified by the introduction of a threshold "*above a certain level"*. In doing so the Government stated at para 109:

> *We believe any attempt to define a threshold for non-recreational users would inevitably be arbitrary and could not provide any certainty about the point at which a user was undertaking betting transactions in the course of business.*

Those positions have been maintained by HM Government, despite the 2005 Act having now been in force for three years. Nor has the Commission, whose experience and knowledge gained over that period of how the Act has worked in practice, changed its approach to this issue, despite continuous pressure from the anti-exchange lobby.

6.5 Nor is any reference made by Racing to the current position under the DCMS/Commission fees consultation of 2009 or to the DCMS letter of 25 August 2009 (written to the BHA) in which it was concluded that the status quo in respect of exchange customers should be maintained.

7. Racing's submission seeks to rely on unsubstantiated and irrelevant metrics

7.1 Racing's case is heavily dependent on demonstrating that expanding the Levy base to exchange customers will raise a significant amount of new Levy monies. Clearly if the amounts at stake are small, even ignoring the weakness of the underlying legal arguments, then it could not possibly be considered a reasonable or proportionate use of the Board's resources to incur the expense of a major legal dispute without the prospect of there being worthwhile sums to collect. A key weakness of Racing's case is that it has provided no evidence whatsoever to support the conclusion that there are substantial (or indeed any) such sums at stake. In order to compensate for this lack of evidence, Section 5 of Racing's submission ("*Potential Levy liability of betting exchange users"*) seeks to put forward eye-catchingly large numbers, but its attempt to do so is replete with factual errors and built on unreasonable assumptions, leading inevitably to unsubstantiated conclusions on which the Board cannot reasonably rely.

7.2 Para 5.6 refers to the voluntary contribution to the Levy made by Betfair in 2009 and incorrectly claims that in future, similar amounts will be diverted to Betfair's own marketing and promotional activity. That is not the case. It is Betfair's publicly stated intention that an amount equivalent to the voluntary payment previously made to the Board (less provision for legal fees necessary to deal with the constant attacks on Betfair's business by Racing) will be used not for commercial marketing and promotional activity per se, but will be directed to grassroots initiatives in British horseracing.

7.3 Footnote 29 incorrectly claims that all bets of Betfair's non-UK customers have been placed with Betfair International since 2004. This is not the case – Betfair International began operating in 2008.

7.4 Footnote 31 claims that Betfair's voluntary contribution represents 10% of the commission charged by Betfair to its non-UK customers on their betting on British horseracing. This claim is incorrect. The voluntary levy amount is the difference between Betfair's statutory Levy, and the amount that would be due if Betfair International were based in the UK and subject to Levy.

7.5 Para 5.14 claims that Betfair's terms and conditions do not shed any light on the question of what Betfair Ltd. charges Betfair International. Betfair customers pay commission of between 2% and 5% based on their level of activity, as stated in the Betfair Charges section of the Terms and Conditions. Betfair International, as a customer of Betfair Ltd., pays commission on the same basis as any other customer of Betfair Ltd.

7.6 Paras 5.16 and 5.17 speculate on whether Betfair accounts for Levy on the revenue made from charges other than commission. Bizarrely, Footnote 36 highlights that this is a question Betfair has already conclusively answered in the affirmative.

7.7 Footnote 37 assumes that Betfair Ltd. does not charge Betfair International commission, or that Betfair is ignoring its statutory obligation to account for Levy on the commission it does charge. As explained above, both assumptions are wrong, as must be any argument based on them.

7.8 Paras 5.21 and 5.22 conclude that the scant data which Racing does have is consistent with Betfair's statements and that it has provided no evidence whatsoever to allege any underpayment of Levy by Betfair, nor that there is anything factually inaccurate about any statement made by Betfair. Para 5.21 includes the revealing comment: "*Having said that, the Levy Board would seem to have no way of knowing for sure".* Given that the questions being considered here by Racing relate to the business of a non-UK licensed operator (Betfair International), which does not transact with UK resident individuals, quite why Racing seems to think the Board should interest itself in the affairs of that business is puzzling.

7.9 Earlier in the submission, at para 3.4, Racing states that: "*This paper does not seek to identify the level of exchange activity at which a liability to pay levy arises, i.e. the threshold of activity, above which, one might argue that a user in business."* [8] However, this is precisely what Racing attempts to do in paras 5.23 to 5.26, using Betfair's premium charge as the threshold. Apparently anyone subject to the charge, without further investigation, can be deemed a leviable "bookmaker*"*.

7.10 Para 5.23 states that Betfair has claimed that 0.5% of its customers are likely to be subject to the premium charge and that this means (based on a total customer number of 2,500,000) that 12,500 Betfair customers are subject to the charge. Betfair has never claimed that 0.5% of its customer are likely to pay the charge and any further assumptions based on this misrepresentation will also be incorrect.

[8] Indeed the application of thresholds in the context of determining what may constitute "business" betting activity is something the government has previously rejected. See para 6.4 above for more detail on this.

7.11 Para 5.25 makes two explicit erroneous assumptions, and one error implicitly:

(i) That any customer who ever incurs the premium charge is likely to be a leviable bookmaker;

(ii) That based on the erroneous 12,500 figure from para 5.23, this would imply that there were 6,375 UK customers who are leviable bookmakers; and

(iii) That customers who incur the premium charge do so from betting on British horseracing.

7.12 The assumption that anyone incurring the charge must be "*in business*" is wholly incorrect. As Betfair has explained previously to the BHA[9], the premium charge merely ensures that customers who are in profit over the lifetime of their Betfair account, pay Betfair a sufficient percentage of their winnings in the long term, regardless of absolute amount. It is perfectly possible for a customer winning small amounts to incur the charge, providing the customer has only paid a negligible amount of regular commission.[10] Conversely, Betfair has customers who are licensed bookmakers betting "*in business*", but who have never incurred the charge.

7.13 If the Board is convinced by Racing's assertion that Levy should be collected from any customer of Betfair who wins £100 or more for every £85 lost (the threshold Racing sets in Section 5 to define the term "*in business*"), then it would surely have to adopt the same approach for all other betting operators in order to avoid discriminating against one operator or class of operators. There will undoubtedly be customers of traditional bookmakers who meet this threshold. In other words, all punters who have won £100 or more in a Levy year for each £85 lost.

7.14 Para 5.26 asks a number of questions, with no answers provided. In other words in this paragraph Racing admits that to make the case that Betfair customers are shortchanging the Levy, it would need a large amount of evidence that it has not been able to produce. We believe this speaks for itself.

7.15 Para 5.28 states that commission can be "*as high as 20%*". This is incorrect, and it appears that Racing has confused commission, which is charged per event, with the premium charge, which is not.[11]

7.16 Para 5.30 correctly concludes that it is perfectly possible for the net winnings of all customers (before commission) to be zero, regardless of the amount of gross winnings, or the commission collected by Betfair. Together with the supporting points at paras 5.31 to 5.34, this destroys the myth of exchange customer "*net winnings*" per market being a measure of anything meaningful.[12] This entirely

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[9]For example, see Betfair response dated 10 August 2010, to submission of British Horseracing re 50th Levy Scheme.

[10]It would seem that Racing is advocating that the Board pursue a Betfair customer through the courts who has won £100 in a year on British horseracing, but only paid £10 in commission to Betfair and as a result has incurred the premium charge, thus (according to the threshold set by Racing in section 5 of its submission) transforming the individual from a punter into a leviable bookmaker.

[11] Again, this error is one which has previously been pointed out by Betfair to the BHA in the document referred to at footnote 9 above.

[12] Exchange customer "net winnings" per market, means the winnings on a given market which a customer may have, before commission charges are applied by the exchange. This is

contradicts the flawed "Levy Lacuna" calculations which, using exchange customer "*net winnings*" per market as their starting point, underpinned the betting exchange section of the BHA's November 2007 submission to DCMS, relating to the 47th Levy scheme.

7.17 This change of position by Racing (see para 5.34 of its submission in particular) also undermines the CP itself, the first page of which (at para 5 of the CP), featured prominently the claim that "exchange customers" have "net winnings" of £1.5bn. Racing has indirectly confirmed what Betfair had feared, i.e. that the Board will need to tread carefully in relation to any Consultation responses which may have been influenced by para 5 of the CP.

7.18 Para 5.30 correctly states that although it would be "*ludicrous*" to suggest that every single Betfair customer is a bookmaker for Levy purposes, if they were, it would still be impossible to state their combined Levy liability more accurately than to say it would be somewhere between zero and £200m. Although Racing's submission neglects to say it, for the liability to be £200m, not only does it require the inconceivable condition that every penny on Betfair is won by Betfair customers who can be considered leviable bookmakers under the 1963 Act, but it also requires the equally inconceivable condition that those leviable bookmakers never have a losing race and only ever win. This paragraph of the submission also gives a reference for a "conservative" amount of Levy being "lost", namely zero. The reality is that no evidence in Racing's submission actually demonstrates a "Levy shortfall" number bigger than zero.

7.19 Paras 5.32 and 5.33 highlight that "gross winnings" is not the same as "net winnings", but use entirely unrealistic numbers. If one wanted to argue that Betfair customers were like bookmakers, then it would seem more logical to use margins which are representative of what a bookmaker might hope to achieve. For example winning 100 for every 85 or 90 paid out, as opposed to winning 100 for every 40 paid out.

7.20 Para 5.35 starts by assuming that anyone who pays one or more of the premium charges, transaction charges or data request charges is "in business". It is an indication of Racing's confused stance that this section now considers not just customers who meet all three of the factors it believes indicate "business" use, but customers who meet just one. Consider who could fall into this category:

- Transaction charges only - customers who place many transactions but who are not profitable.
- Premium charges only - customers who place very few bets, perhaps even just back bets they could place with a traditional bookmaker, but who happen to be profitable.
- Data request charges only - individuals who don't even bet with Betfair!

7.21 Para 5.35 refers to the amount of "*liquidity that they provide to the exchange*", without any attempt to explain why this is relevant or what it means.

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therefore a gross number in the context of the Levy, as Levy is charged on annual (net) profits, not on a race by race or market by market basis.

7.22 Para 5.36 claims there is a class of Betfair customer responsible for commission of £400m. It is not clear on what basis Racing could make such an erroneous claim, given that it has already conceded that the commission Betfair Ltd. charges all customers in total on British horseracing is only £60m.

7.23 Further, para 5.36 introduces an estimate on which the remainder of its calculations and all the eventual conclusions in paras 5.40 and 5.41 depend. Racing guesses that 20% of the gross winnings of £2bn of all Betfair customers can be attributed to just the small group of customers it has defined. Based as they are on unsubstantiated guesswork, all the figures quoted in 5.40 and 5.41 are meaningless. So what is the significance of 20%? On what is this estimate based? The answer is that it does not appear to be based on any evidence at all. Racing doesn't attempt to explain or justify why it chose that seemingly random number over any other. Racing's submission describes this number as "*very conservative*", presumably in the hope that the uncritical reader will just accept that description. There is of course nothing whatsoever that is conservative about a random number chosen without providing any rationale or evidence to support it.

7.24 It must be Racing's hope that this number will not be questioned or scrutinised for reasonableness by the Board and just accepted as sounding vaguely plausible. In reality it is anything but.

7.25 Racing's analysis depends on demonstrating that a subset of Betfair's customers has net winnings that are materially significant enough to justify the Board engaging in major and protracted litigation. However, Racing does not have any information about the net winnings of Betfair customers. It does have information about the gross winnings of Betfair customers and at this step of its submission, Racing attempts to convert from “gross” to “net”, although it has offered no basis justifying such a conversion. The fundamental weakness in this step is that gross winnings provides no information about net winnings, as demonstrated at para 7.26 directly below.

7.26 Any betting operator, exchange, traditional bookmaker or pools betting operator, will have any number of customers who are net losers over the course of the year, but who have backed at least one winner; in other words customers who have gross winnings, but even greater gross losses and therefore no net winnings at all. In fact the majority of the gross winnings of customers on all betting platforms are likely to be attributable to customers who have no net profits. There is no possible way to infer their net winnings purely from that gross number. Racing has provided no evidence whatsoever that would reasonably lead to the conclusion that the group of Betfair customers it has defined here, even if they were leviable bookmakers, is responsible for even 1% of the £2bn gross winnings, let alone 20%. Racing presents the Board with no evidence that there is a potential Levy liability of even as little as £100,000, let alone the unsubstantiated guess of £6m, described in paras 5.40 and 5.41.

7.27 Para 5.37 of Racing’s submission concludes that there will be “*some form of distribution curve”* of winnings for Betfair customers, as of course there will be for all betting operators. However the submission contains no evidence on which to construct that distribution and therefore cannot provide a basis for the Board to construct that distribution or draw any substantiated conclusions.

7.28 Footnote 39 is factually incorrect. Transaction and data request charges are not taken into consideration when calculating the premium charge. Any conclusion based on this claim will therefore also be wrong.

7.29 Para 5.39 discusses a customer with gross winnings of 100 and gross losses of 85, incorrectly concluding that that customer has net winnings of 15. As noted, the 100 win incurs commission of 3, therefore the customer's net win would be 12, not 15.

7.30 In summary, Racing does not provide any of the evidence that would be necessary in order to demonstrate any quantum of Levy shortfall (even if its legal points were robust and its definition of "*in business"* sustainable). It therefore relies on unsubstantiated assumptions to derive a number that is not based on any evidence at all (para 5.40). Para 5.41 considers in tabular format what this might mean if this erroneous number was multiplied by various percentages. Needless to say, a meaningless number, multiplied by various percentages, will produce a table of meaningless numbers.

8. Racing's submission makes a number of "straw man" arguments

8.1 Section 4 of Racing's submission at para 4.1(a), (c), (d) and (e) sets out a number of points which paras 4.2-4.6 and 4.24-4.50 then seek to destroy. As neither Betfair, nor to our knowledge any other betting exchange operator, has ever sought to put forward these points, it may seem pointless to spend time addressing "straw men". For the sake of completeness however, Betfair makes the specific following observations and the general comment that many of the points seem to have been badly constructed by Racing, with the object of making it easy to knock them down.

8.2 In the context of licensing under the 2005 Act, para 4.5 claims that an exchange customer "*who does nothing other than take advantage of the services offered by a betting exchange could not be said to himself be "providing facilities for gambling"".* Given the failure of Racing to convince the Commission that a class of exchange customers should be licensed under the 2005 Act, this attempt to diminish the relevance of the Commission/the 2005 Act is understandable. However, this claim ignores the views on this point of both DCMS (as expressed in the Explanatory Notes to the 2005 Act) and the Commission, to be found in its joint consultation paper (with DCMS) of April 2009 concerning fees in connection with a proposed new licence category for those using exchanges "*in the course of business*". The DCMS/Commission position is that any punter is capable of providing facilities for gambling.

8.3 Racing must be acutely uncomfortable that the issue of whether exchange customers act "*in the course of business"* has been addressed in connection with regulation by the Commission and DCMS (as well as in the context of tax by HM Treasury), only for those authorities not to be satisfied that exchange customers are so acting. Racing is clearly aware of the difficulty of its position that liability to regulation and Levy liability will not run in parallel if, as it argues, exchange customers should be paying Levy.[13]

[13] See further Racing's submission re the 50th Levy Scheme, March 2010 at page 52 where it expressly claims that regulatory and Levy issues are "*completely separate*" and its claims at pages 5 and 11 of the Annex to its submission that regulatory issues are "*irrelevant"*. Betfair disagrees.

8.4 The argument in footnote 18 is inconsistent with Racing's claim regarding an exchange customer being liable for Levy, for if the customer is acting in the course of an *exchange's* business under s.33(3) of the 2005 Act, then how can he be carrying on his own business under s.55 and/or be doing so "*on his own account"* under s.27(2)(a)?

Sporting Options

8.5 Paras 4.24-4.36 are concerned with the Sporting Options case. However, Racing seriously misrepresents the relevant judgment of Mr Justice Hooper (now Lord Justice Hooper) in the case. Racing asserts that the Judge's decision in that case was reached purely on procedural grounds and that, as a result, no conclusions can be drawn from the judgment regarding the substantive irrationality of the Board's attempts to introduce a Levy based on the gross profits of successful layers on exchanges.

8.6 In fact, Mr Justice Hooper (see judgment para 201) was clear that "*[t]he argument on substantive irrationality which is tied up with the other grounds, is obviously a strong one"*. He did not need to provide a final ruling on the irrationality point, because he found that the procedural irregularities perpetrated by the Board were sufficient by themselves for the claimant to succeed. In this context, it is tendentious in the extreme for Racing to characterise the judgment at para 4.29 as meaning that "*[i]n the event, none of [the substantive] grounds was successful"*.

8.7 In reality, Mr Justice Hooper was unambiguous in his assessment of the strength of the substantive arguments. In addition to his statement that the "*argument on substantive irrationality…..is obviously a strong one"*, he also said (see judgment para 164) that "*many"* of the substantive arguments raised "*have considerable merit"*.

8.8 In light of these judicial remarks, it is difficult to see how Racing can possibly assert at para 4.30 that, absent the procedural grounds for the Sporting Options decision, "*we are doubtful that the challenge would have been successful"*. The only factor cited by Racing to justify its (claimed) doubt on this point is that Mr Justice Hooper "*did not identify which of the grounds of substantive challenge he considered to be strong"*. Even if this were true (which it is not) then it would still be obvious that the Judge considered that the argument for substantive irrationality was strong as a whole.

8.9 In fact, though, Mr Justice Hooper did address specific attention to certain substantive arguments which he regarded as particularly strong. For example, when discussing the potential for the Board's proposals to damage the stability of exchanges and even enable them to be sabotaged, the Judge said (see judgment para 175): "*Both the Board and the Committee, in argument, cast doubt on the volatility/vulnerability to sabotage argument. It was submitted that procedures could be put into place to avoid sabotage. That submission may be right or wrong (and I suspect that it is wrong), but certainly requires consideration […] The claimant's submissions are clearly strongly arguable*."

8.10 In short, Racing is correct when it says (at para 4.33 of its submission) that "*the Judge […] indicated sympathy with the substantive challenge"*. But, given this admission, it is very surprising for Racing still to insist that a substantive challenge

would not have succeeded and further to seek to argue, as it does in para 7.4, that Mr Justice Hooper's views are capable of providing comfort in respect of the legality of amendments to future Levy schemes which impose discriminatory burdens on exchange customers.

The claimed relevance of Sporting Options in the context of any future applications for Judicial Review taken in the context of betting exchanges

8.11 Racing also observes, that "*the test for bringing a successful substantive challenge to a decision of a public body remains very high*". Mr Justice Hooper would have been well aware of the relevant test when he gave his judgment in Sporting Options. However, he still chose to characterise the case about the Board's irrationality as "*obviously a strong one*", as being "*clearly strongly arguable*" and as having "*considerable merits*". These comments are highly relevant and are impossible to square with Racing's selective and illogical representation of the decision.

8.12 Moreover, the claim that the burden is particularly high seems to have been directed at challenges to the exercise of discretion concerning Wednesbury unreasonableness. Whilst Betfair would not at this stage wish to restrict the bases on which it might have to seek Judicial Review of any decision imposing discriminatory burdens on its customers (or on Betfair itself), it seems at the moment that one very likely candidate would be error of law, a basis to which Wednesbury and the high burden associated with it is entirely irrelevant. Similarly, there is nothing "very high" about the standard required in connection with public law challenges based on the substantive or procedural unfairness of a decision, such as those based on flawed consultations infected by bias or driven by a pre-determined outcome.

9. Racing's submission highlights the Consultation's narrow focus to be flawed

9.1 Although Racing seeks to restrict the focus of its submission exclusively to exchange customers, it is not surprising that when its submission discusses the characteristics of certain betting activity, it strays into territory that cannot reasonably be limited to exchange betting. This reinforces Betfair's opinion that the Board's decision to limit the Consultation to exchange customers was flawed from the outset.

9.2 For example, the beginning of para 3.5 states that the "*hypothetical user considered in this report(sic) makes a living from gambling.*" This raises a number of important questions; what if he does so partly from non-exchange activity?[14] What if his winnings are derived from gaming rather than betting? What if his profits arise from football, tennis or any non-British horseracing activity? The simple point is that even if the Board should be erroneously tempted by any of the arguments in Racing's submission, it would be unreasonable to categorise this hypothetical user, as a result of any gambling activity which is not related to British horseracing; yet the "report" does not seek to limit itself to considering only that area.

9.3 Further, each of the "*techniques*" deployed by the "*hypothetical user*" referred to by Racing in para 3.5, could apply to exchange or non-exchange betting activity. "Bots" are not limited to exchange betting; nor is "*trading*" an event. When Racing refers to

[14] Indeed para 3.5 towards the end admits this possibility; it accepts that the hypothetical user may use non-exchange platforms.

"*arbitrage"*, it specifically recognises that this activity may involve betting with a high street bookmaker. As for being "*shrewd"*, the idea that such a characteristic can be limited to exchange customers, (or offers any sensible basis on which a betting exchange customer, or customer of other betting platforms could be said to be acting "in business"), defies logic.

9.4 As referred to at para 4.16 above, Racing's submission mistakenly claims that the Betfair poll cited in para 3.41 of its submission, related exclusively to Betfair betting activity. It might suit Racing's agenda to misread the question in this manner, but the question was clearly not operator specific, nor even platform-specific.

9.5 Remarkably, para 7.2 states that a revised Levy scheme could "*provide for the exchange to be liable to pay levy made by any profitable user (taking into account both back and lay bets) in the levy year in question*....". Notwithstanding the inconsistency between this suggestion and para 3.4,[15] if Racing is really saying that any exchange customer whose British horseracing betting on a specific exchange is profitable at the end of a Levy year should pay Levy, it must surely intend that this principle is applied to winning gamblers on all platforms.

9.6 Indeed, document 17 of the FOI Bundle from which Racing quotes selectively, includes the following in para 4.20: "*We do not tax professional gambling in the UK and to single out betting exchange users from other professional gamblers would lack a convincing rationale and could open us up to accusations of discrimination*." It would seem that HM Treasury at least, was aware of the difficulties arising from the application of a tax on betting activity being conducted on one platform in isolation.

9.7 That Racing fails to distinguish between exchange customers who it claims are in the business of receiving or negotiating bets and professional punters more generally, goes to the heart of its difficulty in the Consultation.

10. Competition law matters

10.1 We note that, perhaps by way of alternative to imposing a discriminatory obligation to pay Levy on the customers of betting exchanges (as compared with traditional bookmakers), Racing proposes that future Levy schemes be amended to increase the Levy obligations of exchanges either by increasing the percentage of gross win so that exchanges are charged at a higher rate than traditional bookmakers (paras 4.47 and 4.48) or, as set out in para 7 by requiring exchanges to pay Levy not only on their own profits but also on those of all of their profitable customers. Apart from the fact that, as para 7.3(a) suggests, the latter suggestion is predicated upon the assumption that exchange customers are not bookmakers but that exchanges should pay Levy as if they were, it is transparent that the implementation of either proposal would (just as the imposition of Levy liability on exchange customers would) be of substantial competitive disadvantage to exchanges, as compared with the status quo, and by reference to (i) their competitors among the traditional bookmakers in the UK; and (ii) competitors based outside the UK.

[15] Para 3.4 includes the following: "*Clearly, a user at the other end of the spectrum of exchange activities [from the hypothetical high volume user] would not be carrying on such a business and so would not be liable to pay the levy."*

10.2 It would be highly questionable under domestic and European competition law for representatives of the primary commercial competitors of betting exchanges to agree, in the context of the Bookmakers' Committee, to take steps which so manifestly disadvantage exchanges.

10.3 Certainly, the inclusion of such discriminatory provisions in any future Levy scheme would inevitably result in complaints to competition authorities and most likely, antitrust litigation in the UK and before the EU courts. One is reminded of the comment from a former Board member, referred to in the Sporting Options judgment, that "*The Levy is not there for commercial advantage*."[16]

10.4 Moreover, for a public body, including the Board to adopt either proposal would offend the concept of fiscal neutrality resulting in the imposition of higher Levy on exchanges being clearly unlawful.[17]

11. Racing assumes the *Norwich Pharmacal* process to be more applicable than is in fact the case

11.1 We note Racing's insistence that the Board should pursue the information necessary to identify those exchange customers who, it says, should be obliged to pay Levy, by means of *Norwich Pharmacal* applications against betting exchanges. A pre-requisite for obtaining a *Norwich Pharmacal* order is the identification of some "wrongdoing", in the sense of a breach of law of some kind (whether crime, tort, breach of contract, breach of trust, etc), in which the respondent has become involved. This represents a huge, potentially insurmountable, hurdle to the success of any *Norwich Pharmacal* applications brought by the Board against betting exchanges.

11.2 In particular, in order to establish some wrongdoing by customers of exchanges in not paying Levy, the Board will have to show that failure on the part of those customers to pay Levy somehow constituted a breach of law. The only way this can be done is by demonstrating that these individuals are leviable bookmakers under s.55 and s.27(2)(a) of the 1963 Act. Consequently, it would seem that these will be issues on which the Board would have to persuade a court before *Norwich Pharmacal* relief could be available. As such, any *Norwich Pharmacal* applications will be heavily burdened by contentious legal questions.

11.3 Moreover, *Norwich Pharmacal* applications against exchanges, even if successful, are likely to yield the Board inadequate information. In order to assess properly the Levy liability of any exchange customer who, on Racing's analysis, should be paying Levy, the Board is likely to meet resistance from individuals and as a result of that will probably require detailed information on not just exchange betting, but also betting with traditional bookmakers, betting in betting shops, pool betting, racecourse betting and telephone betting. *Norwich Pharmacal* applications against betting

[16] From a letter of 28 October 2002, from Mr Keith Brown to the then Board Chairman, referred to in para 90 of the Sporting Options judgment.

[17] In this context, also notable is HMRC's consideration of the competitive issues which might impact exchanges in 2003, had it pursued a betting exchange duty model as was being advocated by certain parties at the time. This was expressed in the following terms: "*Had the duty been based on the aggregated profits of winning layers the effective rate of tax for exchanges during 2001-02 would have exceeded 30%, threatening the business model."* Taken from "*The Modernisation of Gambling Taxes: A report on the evaluation of the gross profits tax on betting*", May 2003.

exchanges could do no more than identify the exchange betting of certain persons – it is very doubtful that this would provide the whole story on those persons' betting and collateral disputes will inevitably arise as to which betting those people can include in any calculation being carried out for the purposes of assessing them to Levy.

11.4 Furthermore, a *Norwich Pharmacal* application is not intended to be used as a fishing expedition. It is Betfair's understanding that Racing has sought to have Betfair's traditional bookmaker competitors fund the proposed *Norwich Pharmacal* exercise, but was unsuccessful in securing such support.

12. Pursuing Racing's proposal will inevitably result in a protracted legal battle

12.1 We note that, at paragraph 6.1 of its submission, Racing states that "*there are practical and effective means for the Levy Board to identify leviable bookmakers and take action against them to recover the levy due"*.

12.2 It appears that, in addition to proposing a course of action that will inevitably lead the Board into protracted administrative law challenges, potentially in multiple jurisdictions, Racing also wishes to encourage the Board in extensive litigation targeting individual exchange customers.

12.3 At its very least, the web of litigation which Racing is proposing that the Board undertake include three major elements:

(i) *Norwich Pharmacal* applications against exchanges.

We have discussed the complexities inherent in and uncertainty surrounding such applications at paras 11.1-11.4 above.

(ii) "*Bringing proceedings against exchange users who are potentially leviable bookmakers, if necessary by test cases to establish the principles of who is and who is not a leviable bookmaker*" (para 6.1(b) of Racing's submission);

Racing does not specify what form these proceedings against individual users might take. In any event, it must be anticipated that many of these individuals would not acquiesce in any attempt by the Board to subject them to Levy. As such, any decision of the Government Appointed Members assessing such an individual to Levy may well result in the individual either challenging the decision before the Levy Appeal Tribunal or by way of Judicial Review.

The prospect of challenge in this regard will mean that the Government Appointed Members of the Board will have to inform themselves in a very detailed manner of the factual background to any individual determination and can expect to have their decisions on assessments challenged by the individuals in question.

Moreover, determinations of the Levy Appeal Tribunal or on Judicial Review could be subject to appeals.

(iii) Enforcing awards against individual exchange customers by means of "*garnishee proceedings against the exchanges holding money on account on behalf of such users*" (paras 6.10-6.15 of Racing's submission);

Orders under CPR 72 - in which sums owed to a judgment debtor can be frozen in the hands of a third party and seized for the benefit of the judgment creditor, are usually made only against banks and are among the rarest enforcement orders made.

It should also be noted that, under CPR 72.1.1, the third party who owes the debt to the judgment debtor would have to be within the jurisdiction of the court for a third party debt order to be made against it. As a result, such orders would not be available against overseas-based exchanges. This point is not brought to the Board's attention by Racing.

12.4 In addition to the foregoing, it cannot be discounted that any decision on the part of the Bookmakers' Committee or the Board, the ultimate object or effect of which is to require exchange customers to pay Levy (or indeed any attempts to enforce such a decision) might well be the subject of numerous complaints to domestic and European antitrust authorities. This could lead to years of investigation by responsible authorities and litigation before domestic courts and before the General Court and the Court of Justice of the European Union on the legality of the discriminatory imposition of Levy as a matter of competition law.

12.5 It is notable in this regard that Racing seeks to encourage the Board to embark upon this possible panoply of proceedings, at potentially enormous cost, without any predictability of recovery.[18]

13. Conclusions

13.1 The Board might be tempted from a superficial reading of Racing's submission to consider that it contains issues which require further consideration. In particular in this regard, the following matters are relied upon.

13.2 Racing's analysis of the fundamental statutory provisions is misconceived and is in direct conflict with the conclusions reached by HM Treasury. Any approach to s.55 of the 1963 Act which seeks to characterise phrases as meaningless or which strains the language beyond its reasonable and natural meaning, must be rejected. Any resort to claims that the language has failed to keep up with technological advances and therefore must be rewritten, should also be rejected unless supported by the most compelling arguments. None are advanced by Racing.

13.3 Consistent with Racing's cavalier approach to the interpretation of the wording in s.55, it is also noteworthy that it has chosen not to analyse in any detail the provisions of s.27(2)(a) of the 1963 Act.

[18] The Board itself is aware of the fact that any sums involved may be modest. In its letter of 2 October 2008 to DCMS its Chief Executive stated: *"Licensed bookmakers laying on betting exchanges already pay Levy, although minimal amounts because losses and gains tend to cancel themselves out."*

13.4 Racing has expended much effort in examining the contents of the FOI Bundle supplied to it in 2009 by Betfair. However various passages quoted by Racing therefrom, clearly undermine its arguments and even those which appear to support those arguments must, to the extent that they conflict with the contents of the HM Treasury letter dated 5 December 2005, be treated with the utmost caution. Not only are they merely personal views and/or matters for discussion but they must have been ultimately rejected by HM Treasury. They cannot assist the Board in making decisions arising from the Consultation.

13.5 Moreover, it is necessary to ask why Racing has ignored the conclusions of various independent public bodies on matters which are germane to the core issues of the Consultation. As set out above no mention is made of the views/decisions of DCMS in 2003, of the government in 2004 and of DCMS/the Commission in 2009. The only reasonable answer is that Racing has realised that those matters cause great damage to its arguments and that, as they cannot be countered, they should be treated as if they did not exist.

13.6 DCMS stated in a letter to BHA dated 25 August 2009: "*If your own research in this area produces new and substantive evidence, we would of course be willing to revisit this issue. Any new evidence would need to demonstrate how the situation has changed since the time of the previous review of the tax treatment of betting exchanges and their users in 2004/2005. It would also need to more clearly identify and quantify the specific harms that there might be caused by illegal bookmakers using betting exchanges, for instance in terms of Levy yield and tax revenue lost, and of regulatory risks under the relevant regimes, including under the Gambling Act 2005"*.

13.7 Even though it has had over a year since that request/warning and despite the CP asking for evidence, Racing has completely failed to provide any such evidence to the Board. Whilst Racing's submission on at least six occasions makes assertions about what *must* be the case, it provides no evidence from which any reasonable person could reach any conclusions contrary to exchanges. Perhaps Racing's low point in this area is the statement made at the top of page 2 of the Annex to its submission. There it states: "*We consider that it is very likely that there are customers of betting exchanges who can properly be regarded as leviable bookmakers"*.

13.8 That phrase piles assertion upon opinion; consistent with the remainder of the submission, it contains no evidence of breach of the statutory provisions. Nor is Racing's submission generally able to provide any evidence of harm or regulatory risk as sought by DCMS. The Board can act only on evidence and on reasonable inferences drawn from evidence. It cannot act on mere theory or assertion.

13.9 It is understandable that in an effort to encourage the Board to take some form of action at its behest, Racing would want to put a number on the supposed Levy shortfall caused by the use of exchanges. However, Racing has sought to identify a shortfall based on highly dubious assumptions and consequently its efforts in this respect, set out in section 5 of its submission, are particularly flawed.

13.10 We expect that instead of recognising the deficiencies of its own calculations in this regard, Racing will claim that it is incumbent on betting exchanges to be forthcoming with data to disprove its claims. Should this be the case, Betfair would remind the Board that a full time team of HM Treasury officials considered, on a bet by bet

basis, the betting activity of Betfair's highest volume gamblers over a 20 month period between 2004-05. No class of gamblers has had their betting scrutinized to the extent that Betfair's customers have. The manner in which Betfair customers use the exchange has not changed since the conclusion of HM Treasury's Review in December 2005. This reality is something which Betfair has previously pointed out to the BHA.[19]

13.11 The position of Government from 2004, is that a change in law would be required to bring a class of exchange customers within the Levy.[20] Perhaps the extensive efforts made by Racing to shoehorn exchange customers into existing Levy arrangements, is recognition that nothing has been provided that might convince Government that a change in law is justified or necessary.

13.12 The advice proffered to the Board by Racing about topics such as disclosure and enforcement matters, is expressed in remarkably bullish terms. No doubt the Board will, if necessary, seek advice from its own legal advisers and will not merely rely on the views of Racing's solicitors. Moreover, as well as the points raised above concerning, inter alia, the *Norwich Pharmacal* jurisdiction and competition law, the Board is surely bound to take into account practical matters and commercial reality. On 19 June 2009 it was sent a document written by Patrick Nixon, then the Secretary to the Bookmakers' Committee. That document raised the question of the desirability of expending "*scant resources"* in pursuing "*What the [Board's] Chairman described as a chimera in seeking to extract Levy from some, as yet undefined, and, as experience shows, undefinable group of betting exchange customers*." Nearly a year later, in June 2010 the Board discussed the issue of such a pursuit in the realisation that the costs involved could run into many millions. It is a matter for the Board to consider whether such expenditure would constitute a proper use of Levy monies.

13.13 In case the Board is tempted by Racing to believe that exchanges are a cause of the Levy decline in recent years and that, accordingly, some action against them should be taken, it will no doubt also consider the following:

(i) the statement to the contrary set out in document 12 in the FOI Bundle (a document to which Racing does not refer in its submission) as follows: "*One of the more influential lobbying groups in the debate over the impact of Betfair has been horse racing. They have been persuaded by the bookmakers that betting exchanges are responsible for falling revenues from horse race betting.*

However our analysis has clearly shown that whatever impact betting exchanges may have had on bookmakers, even more significant has been the change in the product mix in a betting shop. Whereas a betting shop once basically facilitated betting on horse races it now offers a range of gambling opportunities of which horse racing is only one. While it may suit the bookmakers for horse racing to believe that betting exchanges are entirely to blame for any falls in levy revenue, the government should resist making any such simple connection".

The Board should similarly resist doing so.

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[19] For example, in a letter from Edward Wray of Betfair to Paul Roy, BHA Chairman, dated 9 January 2009.

[20] See para 6.3 above where the Government's position in this regard is described in more detail.

(ii) the statement made by the ABB in its 2010 paper "*The Levy: A Living Fossil"*. Having anticipated the current decline in the size of the Levy it continues under the heading "*Why such a drop?"*

"*Although horseracing is a tremendous British tradition and the racing here is among the best in the world, it is not something that appeals to the younger generation in the way that it used to, so the customer base is not being replenished*.

"*Numbers" games, football, virtual racing and gaming machines are all now vying with traditional pursuits for customers' attention. Horseracing is seen as "too difficult" by many younger customers who may not want to commit the time to studying form and learning the language of racing. Quite reasonably, they prefer to bet on sports they already know a lot about such as football, or to play computer-based simulated games on the machines.*

This, together with the deepest economic recession the betting industry has ever seen, has caused a dramatic downturn in betting on horseracing and, indeed, on greyhound racing as well."

It is noteworthy that the ABB, not an organisation which has ever resiled from an extreme anti-exchange position, does not ascribe the Levy decline to exchanges.

(iii) It is also noticeable that the Board in its 2009/10 Annual Report, published on 14 October 2010, does not include exchanges as one the reasons for the drop in Levy yield. This is, of course, consistent with its approach in the previous Annual Report. It must not now covertly adopt a different view.

Betfair, 21 October 2010.