

HORSERACE BETTING LEVY BOARD

BETTING EXCHANGES - CONSULTATION PAPER

A. Introduction

1. The Horserace Betting Levy Board ("**the Levy Board**") invites responses on various questions relating to and arising out of the issue of whether certain users of betting exchanges should be regarded as being liable bookmakers for the purpose of the Levy. The particular issues on which responses are sought are set out in section J of this paper.
2. Betting exchanges are a relatively new platform by which people may place bets. They were not in existence or even envisaged when the main legislation concerning the Levy (in particular the Betting, Gaming and Lotteries Act 1963) was passed and there have been no amendments made to this legislation to take account of betting exchanges.
3. By contrast, the legislation dealing with taxation and licensing of bookmaking activities has been amended to take account of betting exchanges and their activities.
4. To date, the Levy Board, and the betting and racing industries, have worked on the basis that betting exchanges themselves fall within the definition of "bookmaker" under section 55 of the 1963 Act, and so are liable to pay the Levy. Levy is calculated as a percentage of the betting exchange's gross profits (i.e. the profits earned by the commissions charged to users of betting exchanges). Further, no users of betting exchanges have paid the Levy, except for licensed bookmakers in respect of their use of betting exchanges in the course of their bookmaking business (essentially to hedge their risk).
5. It has been said that betting exchanges account for 17% of the British betting market and the net winnings of those betting through exchanges is in the order of £1.5 billion.
6. It has also been suggested that this has contributed to the fall in levy yield that has been seen in recent years. The levy yield in the last 10 levy scheme periods has been as follows:
39th levy scheme (2000/01): £60.3m
40th levy scheme (2001/02): £72.9m

41st levy scheme (2002/03): £79.9m
42nd levy scheme (2003/04): £110.7m
43rd levy scheme (2004/05): £105.6m
44th levy scheme (2005/06): £99.3m
45th levy scheme (2006/07): £99.2m
46th levy scheme (2007/08): £115.3m
47th levy scheme (2008/09): £91.6m
48th levy scheme (2009/10): £76.5m (estimated)

B. Your views

7. Sections A and D to I of this Consultation Paper are intended to provide a summary of some relevant matters of background and context. Section J sets out possible lines of analysis.
8. Where documents are referred to, their location is identified. Consultees' attention is invited to those materials as well as to the sections below in which they are sought fairly and accurately to be summarised.
9. Insofar as any consultee wishes to make any observations or representations in relation to any part of this Consultation Paper, and including any point which they consider to be relevant and not specifically referred to in this Consultation Paper and/or any practical consequences of the matters being considered, they are encouraged to do so. The Levy Board also welcomes the submission of any evidence by consultees. The Levy Board is keen to take a fully informed view in relation to the matters which are raised in this Consultation Paper.
10. The Levy Board welcome views from all interested parties. A list of particular organisations and individuals to whom this consultation paper has been sent directly is included at Annex A and can be found at www.hblb.org.uk/documents/AnnexA.pdf.

C. How to take part

11. This Consultation Document was issued on 2nd July 2010. The Consultation will close on 20th September 2010. Responses should please reach the Levy Board on or before this date.

12. The Consultation Document will be available electronically from 5th July 2010 at the following website: www.hblb.org.uk. Printed copies of the Consultation Document are available upon request from:

Natasha Rose, Operations Executive
Horserace Betting Levy Board
Parnell House
25 Wilton Road
London
SW1V 1LW
Email: <mailto:consultation@hblb.org.uk>

13. In addition, electronic copies of the various documents referred to in this Consultation Document will be available on the Levy Board's website www.hblb.org.uk.

14. You can choose to reply to just one or all of the consultation questions. Your response should be submitted by letter, fax or email to:

Natasha Rose, Operations Executive
Horserace Betting Levy Board
Parnell House
25 Wilton Road
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SW1V 1LW
Tel: +44 (0)20 7333 0043
Fax: +44 (0)20 7333 0041
Email: <mailto:consultation@hblb.org.uk>

15. Responses to this consultation by email (<mailto:consultation@hblb.org.uk>) are preferred.

16. If you have questions about the issues raised in this document, please contact Natasha Rose, whose contact details are set out in paragraph 14 above.

17. When responding, please state whether you are responding in your individual capacity or representing the views of an organisation. Please make it clear in your response who the

organisation represents, and, where applicable, how the views of its members were assembled.

18. If you have any suggestions of others who may wish to be involved in this process, please contact us at the address below. Please also feel free to forward this document to other potentially interested parties.
19. You may make copies of this Consultation Document without seeking permission. To request further printed copies of the Consultation Document please contact Natasha Rose. Other versions of the Consultation Document in Braille, large print, other languages or audiocassette are available on request.
20. The Levy Board does not intend to acknowledge receipt of individual responses unless you expressly request this in your response.

D. The Levy Scheme

21. The Levy is collected by the Levy Board from bookmakers pursuant to an annual scheme that is promulgated by the Levy Board. The process for determining the terms of each levy scheme is set out in the Betting, Gaming and Lotteries Act 1963 ("**the 1963 Act**") and the Horserace Betting Levy Act 1969. In summary, the Bookmakers' Committee is required to make a recommendation to the Levy Board for the terms of the next levy scheme. The Levy Board then decides whether it approves those recommendations. The Bookmakers' Committee may revise its recommendations in light of the Levy Board's views on these but if approval is not provided by 31 October, the terms of the scheme are determined by the Secretary of State for Culture, Media and Sport.
22. The present scheme is the 49th levy scheme, running from 1 April 2010 to 31 March 2011. The 49th levy scheme sets out various categories of bookmaker and types of betting activity for the purposes of deciding what each bookmaker should pay by way of the Levy. All of the relevant categories for betting exchanges refer to activities that involve British Horserace Betting Business. This is defined as follows:
- "the business of effecting betting transactions by Bookmakers on horse races, where such races take place anywhere in England, Wales, or Scotland, whether such business is carried on personally or through servants or agents and whether carried on by post, telephone or in any other manner whatsoever. This includes the carrying on of such business through the medium of a Betting Exchange or a Bet-broker, carried out by whatever means."*
23. Category 1.4 is a bookmaker who carries on British Horserace Betting Business by use of a betting exchange. Category 1.6 is a bookmaker who carries on British Horserace Betting Business by operating as a betting exchange, where this is carried on in conjunction with any other Betting Activity (as defined in the scheme) other than operating as a betting exchange. Category 3.1 is a bookmaker who carries on British Horserace Betting Business by operating as a betting exchange.
24. The Levy Board has a duty to collect Levy from leviable bookmakers in accordance with the terms of the scheme. In the light of Category 1.4, and quite apart from broader questions as to which the Levy Board has a legitimate interest and concern, the Levy Board is obliged to address and keep under review this question: What, if any,

bookmakers are there who are carrying on the business of effecting betting transactions on horseraces by the use (as distinct from the operation) of one or more betting exchanges?

25. A copy of the 49th levy scheme can be found on the Levy Board's website at www.hblb.org.uk/documents/25_49thLevyScheme.pdf.

E. Relevant Legislation

26. Many of the key issues which this consultation paper raises will be dependent upon or at least informed by this legislation. Set out below are the principal provisions from the 1963 Act that are relevant to the issues being considered in this consultation.

27. The Levy Board considers that it is also important to consider the related legislative regimes relating to general betting duty and gambling licences, which are also relevant when considering a number of the issues being considered in this consultation. The relevant provisions from these regimes are also set out below.

28. The relevant pieces of legislation have been amended over time and therefore consultees may wish to consider with their advisers the way in which the legislation has changed and what significance, if any, this has.

The Levy

29. Section 24(1) of the 1963 Act provides as follows:

"There shall be a Horserace Betting Levy Board ... which shall be charged with the duty of assessing and collecting in accordance with the subsequent provisions of this Part of this Act, and of applying, subject to those provisions, for purposes conducive to any one or more of the following, that is to say -

- (a) the improvement of breeds of horses;*
 - (b) the advancement or encouragement of veterinary science or veterinary education;*
 - (c) the improvement of horse racing,*
- monetary contributions from bookmakers and the Totalisator Board."*

30. Section 27(1) and 27(2)(a) of the 1963 Act provides:

"(1) The contributions such as are mentioned in section 24(1) of this Act to be made by bookmakers shall be paid by way of a levy in respect of each levy period in accordance with a scheme having effect for that period under this section; and in this Act the expression "levy period" means a period of twelve months beginning with 1st April in any year.

- (2) Any such scheme shall include provision—*

(a) *for securing 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;"*

31. The term "bookmaker" is defined as follows (pursuant to section 55 of the 1963 Act):

"bookmaker" means any person other than the Totalisator Board who –

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

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

so, however, that 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;*

and the expression "bookmaking" shall be construed accordingly;"

32. Accordingly, two critical issues when considering whether a person is acting in such a way as to be amenable to pay the Levy and, if so, to what extent they are liable to pay the Levy, are as follows:

(1) Whether they are acting as a "bookmaker", which requires, among other things, consideration of whether that person is carrying on the business of "receiving or negotiating" bets or conducting pool betting operations or whether they are holding themselves out as such a person.

(2) Whether the bookmaker is carrying on, on his own account, a business which includes the effecting of betting transactions on horse races.

General Betting Duty

33. Section 2 of the Betting and Gaming Duties Act 1981 provides that general betting duty (which since 2001, when the basis on which it is charged was changed, has also been referred to as gross profits tax) shall be charged on a bet made with a bookmaker who is in

the United Kingdom at a rate of 15% of the amount of the bookmaker's net stake receipts for the relevant period.

34. Section 5AB of the Betting and Gaming Duties Act 1981¹ makes separate provision for betting exchanges, as follows:

"(1) This section applies where—

(a) one person makes a bet with another person using facilities provided by a third person in the course of a business, and

(b) that business is one that does not involve the provision of premises for use by persons making or taking bets.

(2) General betting duty shall be charged on the amounts ("commission charges") that the parties to the bet are charged, whether by deduction from winnings or otherwise, for using those facilities.

(3) No deductions shall be allowed from commission charges.

(4) The amount of duty charged under this section in respect of bets determined in an accounting period shall be 15 per cent of the commission charges relating to those bets.

(5) For the purposes of this section, and section 5B(4) so far as relating to this section, a person who arranges for facilities relating to a bet to be provided by another person shall be treated as providing them himself (and the other person shall not)."

35. Section 12 of the Betting and Gaming Duties Act 1981 defines "bookmaker" as follows:

"bookmaker" means a person who—

(a) carries on the business of receiving or negotiating bets or conducting pool betting operations (whether as principal or agent and whether regularly or not), or

(b) holds himself out or permits himself to be held out, in the course of a business, as a person within paragraph (a)"

Gambling Licences

36. Prior to 2005, the regime for licensing gambling was set out in the Betting, Gaming and Lotteries Act 1963. In particular section 2, which has been repealed, provided as follows:

(1) No person shall act as a bookmaker on his own account unless he is the holder of a permit authorising him so to act (in this Act referred to as a "bookmaker's permit") which is for the time being in force; and if any person acts as a bookmaker in contravention of this subsection he shall be guilty of an offence:

¹ As amended by the Finance Act 2003, section 7(2).

Provided that this subsection shall not apply to the receiving or negotiating by a registered pool promoter of bets made by way of pool betting.

- (2) *Schedule 1 to this Act shall have effect for the purposes of bookmaker's permits.*
 - (3) *If the holder of a bookmaker's permit, on being required by a constable to produce his permit for examination, refuses or without reasonable cause fails so to do, he shall be liable on summary conviction to a fine not exceeding level 1 on the standard scale.*
37. The Gambling Act 2005 now sets out the gambling licensing regime. The licensing objectives are (under section 1 of the Gambling Act 2005):
- "(a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime,*
 - (b) ensuring that gambling is conducted in a fair and open way, and*
 - (c) protecting children and other vulnerable persons from being harmed or exploited by gambling."*
38. Under section 33 of the Gambling Act 2005, it is an offence for a person to provide facilities for gambling unless, among other things, they hold an appropriate operating licence for that activity. Under section 5 of the same Act, a person provides facilities for gambling if he:
- "(a) invites others to gamble in accordance with arrangements made by him,*
 - (b) provides, operates or administers arrangements for gambling by others, or*
 - (c) participates in the operation or administration of gambling by others."*
39. The definition of "gambling" in section 3 includes "betting", which, in turn, is defined in section 9 to mean "making or accepting a bet" on various outcomes or events.
40. Section 13 of the Gambling Act 2005 provides that a "betting intermediary" means "*a person who provides a service designed to facilitate the making or acceptance of bets between others*". It then expressly provides that "*For the purposes of this Act acting as a betting intermediary is providing facilities for betting*" and therefore it is clear that betting exchange operators require a licence.
41. The Gambling Act also provides that a licence is required only if the above activities are done in the course of business (in section 296).

42. Express provision is also made in the Gambling Act 2005 for remote gambling. This is defined in section 4 to mean gambling in which persons participate by the use of remote communication, which includes communication using the internet, telephone for example.
43. The Gambling Act 2005 provides for various types of licences including a licence to act as a betting intermediary (section 65(2)(e)). It also provides that an operating licence may be a remote operating licence; which authorise activity to be carried on in respect of remote gambling or by means of remote communication (section 67 (1)). DCMS published a consultation paper last year on various licensing issues including a proposal that a new licence category be introduced specifically for persons using betting exchanges in the course of a business (this is discussed in section I below).

F. How Betting Exchanges Work

44. A description of the manner in which betting exchanges work was set out in a judgment given in a judicial review claim brought by Sporting Options Plc against the Levy Board in 2003 (discussed further in section G below). A copy of the judgment can be found on the Levy Board's website at:
www.hblb.org.uk/documents/44&55_SportingOptions_v_HBLB_Judgement.pdf.
45. In particular, the Judge stated that "*Betting exchanges such as the claimant are very new. Without the internet and without sophisticated software, they could not exist*" (see paragraph 2 of the judgment). The Judge then set out a description of how betting exchanges operate given by the Managing Director of Sporting Options Plc, as follows (in paragraph 6):

"In the past three years, a completely new form of betting business has been developed known as "bet brokers" or "betting exchanges". With a betting exchange, the business does not enter into the bet with the better at all, but merely facilitates the better to enter into a bet with another person, unrelated to the business. When a better seeks to enter into a bet, he can do so either as a "backer", that is betting that a particular outcome will occur, or as a "layer", that is betting that a particular outcome will not occur. In this way, the backer enters into the traditional role of the gambler and the layer enters into the traditional role of the bookmaker. Accordingly, the betting exchange business takes no risk in the bet. The risk lies between the backer and the layer. The betting exchange makes its money solely by charging commission on the winner of the bet [whether backer or layer] for having brokered the transaction by introducing the backer and the layer to each other."

46. This was followed by a description of the advantages of betting exchanges as the Managing Director of Sporting Options saw it (in paragraph 7):

"A betting exchange business offers three advantages to betters as follows:

Because the betting exchange does not enter into any bet itself, it does not have to enter into the complex process of calculating odds on the outcome of a sporting event. The odds are purely a matter for the respective betters, the backer and the layer. This saves the betting exchange very substantial costs and means that it can provide the service at a very significantly lower net cost than traditional bookmakers.

A better has the option of being a layer as well as a backer. With a traditional bookmaker, the better can be only a backer.

Once a bet has been entered into between a backer and a layer on a betting exchange service, either party may then seek to trade his position as the odds change.

For example, if a backer bets £10 that Horse A will win a race at odds of 2 to 1, he may subsequently be able to lay (that is bet against) the same amount on the same horse at shorter odds, of say 6 to 4. If the horse wins, he receives £20 for the bet where he was a backer and pays £15 for the bet where he was a layer, meaning that he wins £5 overall. Conversely, if the horse loses, he makes and loses £10 so he breaks even overall.

Typically, an individual may enter into a number of individual bets on one aspect of the outcome of a sporting event. This process in itself adds to the challenge and excitement of betting for some betters."

47. The Judgment (in paragraph 8) then set out extracts from Sporting Options' website, as follows:

"6. Be the Bookie: Sporting Options has a 'Be the Bookie' feature that allows you to 'lay' multiple bets in a single process. To use this facility you would select your maximum payout and your odds for each selection in a betting market. 'Be the Bookie' will automatically calculate the various backers stakes you would need to 'lay' in order to achieve a proportionate set of prices. The system also calculates the guaranteed percentage return associated with your chosen prices. Please see the 'Betting Help' for a more detailed description of Be the Bookie."

8. Liquidity: Betting 'liquidity' or betting volume is vital to the success of a betting exchange. Sporting Options has carried out months of negotiations with several key groups of liquidity providers. These groups include numerous independent bookmakers both on and off-course, several on-line bookmakers, and many former City of London colleagues who enjoy trading sporting and financial markets on a regular basis."

48. Finally, the Judge set out a difficulty for betting exchanges, as put forward by Sporting Options (in paragraph 9):

"The disadvantage for a betting exchange to betters is that sometimes there may not — at any one time — be a counterpart better prepared to take a particular bet (a backer may not be able to find a layer or vice versa). By contrast, a bookmaker will always be prepared to accept a bet, albeit only at the odds he sets. This disadvantage is particularly acute with a small betting exchange business which has fewer members. This is one reason why any betting exchange starting up seeks to build up a substantial subscriber base as soon as possible."

G. Sporting Options Judicial Review

49. The first levy scheme to address betting exchanges was the 41st levy scheme (which operated from 1 April 2002 to 31 March 2003). Prior to that no express reference was made to betting exchanges in levy schemes. Under the 41st levy scheme, the Levy Board charged traditional bookmakers and betting exchanges on an equivalent basis (this scheme was adopted by way of a determination by the Secretary of State as the Levy Board had been unable to accept the Bookmakers' Committee's recommendations). Traditional bookmakers were charged 10% of their gross profit and betting exchanges were charged 10% of their commission receipts (which were considered to represent the equivalent to gross profit for betting exchanges).
50. The Bookmakers' Committee recommended for the 42nd levy scheme (for the period 1 April 2003 to 31 March 2004) a revised system for assessing exchanges for Levy. In particular, they recommended that each betting exchange pay Levy equivalent to 10% of the gross profits achieved via that betting exchange by individual successful layers on British horserace betting business with no offset for any losses made by such persons backing horses or for any losses made by such persons laying horses through other exchanges. This recommendation was approved by the Levy Board on 31 October 2002.
51. That decision by the Levy Board was challenged by way of the judicial review proceedings brought by Sporting Options. Betfair, the largest betting exchange operator, also wrote to the Levy Board to complain about the decision and submitted evidence in support of Sporting Options' claim (a copy of the letter sent by Betfair's solicitors objecting to the Levy Board's decision, dated 26 November 2002, as well as the response sent by the Levy Board's solicitors dated 9 December 2002, is available on the Levy Board's website at www.hblb.org.uk/documents/51_Betfair&HBLB_Solicitor_Letters.pdf).

52. Sporting Options commenced their judicial review proceedings against the Levy Board on 31 January 2003. The Bookmakers' Committee and the British Horseracing Board participated in the proceedings as interested parties.
53. Sporting Options estimated that the effect of the new charging regime for betting exchanges in the 42nd levy scheme would be to increase its liability to pay the levy to about 40% of its commission receipts. It challenged the Levy Board's decision to approve the new scheme on both procedural and substantive grounds. The procedural grounds are not relevant to the issues raised in this consultation.
54. Following a hearing in the Administrative Court in June 2003, the Honourable Mr Justice Hooper decided that the Levy Board's decision to approve the Bookmakers' Committee's recommendations for the 42nd levy scheme was unlawful. The basis for this decision was the manner in which the Levy Board reached that decision and in particular various aspects of the particular process that had been followed by the Bookmakers' Committee and the Levy Board which lead to the Levy Board's decision.
55. Consultees are invited to review a copy of the judgment, which is available on the Levy Board's website at:
www.hblb.org.uk/documents/44&55_SportingOptions_v_HBLB_Judgement.pdf. The following passages from the judgment are of particular note in the context of this consultation:
56. **Paragraph 12:** The Judge noted that "*there has been some debate whether betting exchanges (and also spread betting firms) are bookmakers as defined in section 55 of the Betting, Gaming and Lotteries Act 1963 ... and thus require a permit under section 2 of the Act to operate lawfully*". The judgment set out the definition in section 55 and then stated that: "*Betfair had apparently insisted that it was not a bookmaker. The betting exchanges, including Betfair, have, in fact, applied for and been granted permits as bookmakers. As such they are liable to pay the horseracing betting levy*".
57. **Paragraph 13:** The Judge stated that:

"there has also been a more heated debate about whether those who lay bets on betting exchanges fall within the definition of bookmakers and thus require a permit. To the extent to which permit-holding bookmakers use the exchanges to lay bets there

is no problem. Whether the others or some of the others fall within the definition of bookmaker remains an issue, although no proceedings have been taken against such layers for aiding and abetting unlawful bookmaking. The traditional bookmakers have argued vociferously that layers on betting exchanges are bookmakers and are required to obtain a permit (see paragraph 16 of witness statement of Mr Williams). At a meeting of the Board on 12 September, Mr Ross (an observer from the Committee) said that the Committee had received legal advice to the effect that, in the context of betting exchanges, the activity of the layer was illegal and, therefore, the activities of the bettor and Betting Exchange operator were illegal too. I should add that the current view of the Department as expressed in an April 2003 position paper is that exchange users who are layers should not need to be licensed to achieve the Government's regulatory objectives."

The DCMS position paper referred to above was in fact issued in May 2003 and is discussed in section I below. A copy is also available on the Levy Board's website at www.hblb.org.uk/documents/57&93_DCMSPositionPaperMay2003.pdf.

58. **Paragraph 171:** The Judge stated:

"Even if that were right, why should the levy be related to successful layers? The answer given by the Committee on October 30, was that layers on betting exchanges are like bookmakers. There was no recorded discussion of this issue (or indeed of the change in the position of the Committee since September), except in so far as it was raised by Mr Jones when he said that he believed that the Committee was attempting to align the payment by betting exchanges with the payment by bookmakers, to which the Chairman gave the enigmatic answer: "that it was important not to double guess the Committee's motivation" (see paragraph 117 above). There was no recorded discussion of section 27(2)(a) which provides 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. Without giving a definitive answer to the question of the lawfulness of the proposed scheme in so far as successful layers are concerned, there must, at the least, be doubts. Given that layers, other than those in the business of effecting betting transactions, are not bookmakers then the rationale given by the Committee (and by Mr Bartlett in his first witness statement) for the assessment of the levy on the gross profits of layers on betting exchanges would appear to be considerably weakened."

59. **Paragraph 200:** The Judge referred to the allegation from Sporting Options that the Bookmakers' Committee was "*motivated in their proposals by an improper desire to alter the competitive balance between the traditional bookmakers and the betting exchanges and that the Board adopted the recommendation to achieve this*". The Judge rejected this ground.

60. **Paragraph 201:** The Judge commented, with regard to Sporting Options' alternative arguments that the Levy Board's decision was "*substantively irrational and that there was*

a breach of both domestic law and the EC Treaty" that "the argument on substantive irrationality which is tied up with the other grounds, is obviously a strong one, but, given my conclusions, I do not need to resolve these issues and could not on the material available to the Board".

H. Previous Consideration of the Issue of Levying Betting Exchanges

47th Levy Scheme Determination

61. Following the Sporting Options case, Levy has continued to be charged to betting exchange operators at a rate of 10% of their gross profits.
62. The next time that the issue of betting exchanges was considered in any detail in the context of the Levy was during the determination by the Secretary of State of the 47th levy scheme (for the period 1 April 2008 - 31 March 2009).
63. Submissions were made by the British Horseracing Authority ("BHA") and Betfair to the Secretary of State. Copies of their submissions are available on the Levy Board's website at www.hblb.org.uk/documents/63_BHASubmission.pdf and www.hblb.org.uk/documents/63_Betfair_response_to_BHA_submission.pdf.
64. In summary, the BHA argued that betting exchanges have a different business model to traditional bookmakers and therefore they should be treated differently for levy purposes. They put forward calculations which they claimed showed that by levying betting exchanges on the basis of gross profits, the result was that betting exchanges accounted for 17% of net winnings but paid only 5% of the Levy whilst traditional bookmakers accounted for 83% of net winnings but paid 95% of the Levy. They argued that betting exchanges ought to be paying £20 million in Levy rather than the £6 million paid in 2006/07.
65. The BHA therefore proposed that levy be imposed on betting exchanges at a rate equivalent to 1.15% of the net winnings of their customers. They argued that this would mean that bets placed on betting exchanges and traditional bookmakers were being levied to the same degree - i.e. that one betting pound delivers the same amount of levy irrespective of the platform upon or service via which the bet was placed.

66. Betfair opposed the BHA's proposal that betting exchanges pay the Levy at a rate equivalent to 1.15% of their customers' net winnings. In summary, they argued that the business model of a betting exchange is the same as for a traditional bookmaker, subject to one difference, namely that a betting exchange uses technology to eliminate its risk. They also argued that layers on betting exchanges are not acting as traditional bookmakers. In particular a lay bet was simply the other side of a bet on a horse to win a race (i.e. backing the field to win). Further, customers will back or lay an outcome depending on whether he or she believes that the market has underestimated or overestimated that outcome's prospects. They argued that the BHA's proposal would amount to a levy for betting exchanges based on turnover, which would be discriminatory compared with the basis used for traditional bookmakers, whose levy is based on gross profits. Betfair also argued that as a result of that elimination of risk, Betfair always makes a profit and therefore always pays levy on every bet (unlike for traditional bookmakers).

67. The Secretary of State determined the 47th levy Scheme and decided that there should be no change to the way betting exchanges are levied. A letter from the Minister of Sport dated 20 February 2008 explained:

"that it would not be appropriate to seek to impose the Levy on the turnover of betting exchanges rather than on the commission charged on betting transactions. In reaching this conclusion, I was mindful of the Treasury's conclusion when assessing whether to impose Gross Profits Tax on betting exchanges turnover, that it was correct to apply GPT on commission only because the commission is the operator's gross profit and the consumers' net spend."

The review by HM Treasury is discussed in section I below.

Investigation and report of Sir Philip Otton QC

68. Following that determination, the Minister for Sport, Gerry Sutcliffe, established a Racing Funding Review Group. The key priority for that group was to find a mechanism for funding horseracing that would not involve the Government in any further levy determination but the Minister also said the group would be a useful forum for addressing other issues, including betting exchanges.

69. The Levy Board commissioned Sir Philip Otton QC as a consultant to advise it on various issues regarding the future funding of the levy. Sir Philip Otton was also requested to prepare a supplemental piece of advice specifically on betting exchanges. Sir Philip Otton

was not asked to advise any particular approach and therefore his report, dated 20 October 2008, was limited to identifying and narrowing the issues in dispute, which it did based on the submissions provided by the BHA and by Betfair. Sir Philip's report summarises the submissions he received from the BHA and Betfair. A copy of Sir Philip Otton QC's report and the submissions received the BHA and Betfair are available on the Levy Board's website at www.hblb.org.uk/documents/69_SirPhilipOttonQC'sReport.pdf, www.hblb.org.uk/documents/63_BHASubmission.pdf and www.hblb.org.uk/documents/63_Betfair_response_to_BHA_submission.pdf.

Further Consideration and Referral to DCMS

70. The BHA wrote to the Levy Board in July 2008 arguing that the Levy Board should itself seek to collect the Levy from all persons carrying on trade as a bookmaker through betting exchanges and that DCMS should carry out a review of the impact of betting exchanges. They stated that:
- "... it is a characteristic of the exchange model that users are able to both lay and back bets in large volumes across a number of outcomes for one event (and across multiple events), all with an objective of locking in a profit. Proprietary software, known as 'bots', is used by exchange customers to achieve this. All these are characteristic of people who are 'trading' ..."*

A copy of their letter is available on the Levy Board's website at www.hblb.org.uk/documents/70_BHA_letter_to_HBLB_16thJuly08.pdf.

71. The Bookmakers' Committee also wrote to the Levy Board on 4 September 2008 urging the Levy Board to approach the Gambling Commission and DCMS with a view to initiating a review by the Gambling Commission into the issue of whether those laying bets on betting exchanges by way of a business should be required to hold a licence and whether such users should be required to pay duty and levy. A copy of their letter is available on the Levy Board's website at www.hblb.org.uk/documents/71_Bookmakers'Committee_letter_to_HBLB4thSept08.pdf.
72. Betfair objected to the Bookmakers' Committee's request arguing it would be discriminatory to look at the definition of "in the course of business" by looking at the betting exchange market in isolation. They also objected to the suggestion that anyone that simply lays an outcome on a betting exchange is a "bookmaker". A copy of their

letter is available on the Levy Board's website at www.hblb.org.uk/documents/72_Betfair_response_to_Bookmakers'Committee_letter22ndSept08.pdf.

73. The Levy Board wrote to DCMS on 2 October 2008 setting out its view and the view of the BHA that DCMS should set up a meeting with the Gambling Commission to encourage the Gambling Commission to undertake investigations into business users of betting exchanges and DCMS should lead a review into the mechanism by which betting exchanges pay levy. A copy of that letter is available on the Levy Board's website at www.hblb.org.uk/documents/73_HBLB_letter_to_DCMS_2ndOct08.pdf.

74. DCMS responded on 20 February 2009 stating that "*we do not consider it appropriate at this stage to revisit the fundamental basis on which betting exchanges pay Levy. This issue was last considered during the Ministerial determination for the 47th Levy Scheme*" and then quoting from the determination of the Minister for Sport of the 47th Levy Scheme (as referred to in paragraph 67 above). The letter also then stated:

"However, you also raised the question as to whether there are individuals who are effectively bookmakers, as defined in the Betting, Gaming and Lotteries Act 1963, that currently use betting exchanges but who are neither properly licensed as required by the Gambling Act 2005 or consequently paying Levy. We are pursuing this issue, and have had initial discussions involving others in Government and the Gambling Commission."

A copy of that letter is available on the Levy Board's website at www.hblb.org.uk/documents/74_DCMS_response_to_HBLB_letter20thFeb09.pdf.

75. The Levy Board wrote to the betting exchange operators on 7 April 2009 to inform them that it, DCMS and the Gambling Commission were considering the issue of whether there are individuals who are using betting exchanges in such a way that they constitute bookmakers under section 55 of the 1963 Act who should be paying the levy. Copies of those letters are available on the Levy Board's website at www.hblb.org.uk/documents/75_HBLB_letters_to_betting_exchange_operators7thApril09.pdf.

76. Further correspondence took place between Betfair and the Levy Board on 21 April, 28 April and 12 May 2009, with Betfair arguing that none of Betfair's customers, by virtue of

their betting activity on Betfair alone, are 'bookmaking'. Copies of those letters are available on the Levy Board's website at

www.hblb.org.uk/documents/76_HBLB&Betfair_Correspondence.pdf.

77. DCMS' review included meeting with officials from the Levy Board, Gambling Commission and HMRC on 3 December 2008, meeting with representatives of Betfair and the Gambling Commission on 30 March 2009. A second meeting was held by DCMS with officials from the Levy Board, Gambling Commission and HMRC on 29 June 2009.

78. DCMS set out its conclusions in a letter dated 25 August 2009 to the BHA, copied to the Levy Board, the Gambling Commission and HMRC. A copy of that letter is available on the Levy Board's website at

www.hblb.org.uk/documents/78_DCMS_letter_to_BHA25thAug09.pdf. DCMS

concluded that *"there remains insufficient evidence at this time of a significant risk to the revenue for HMRC to justify the consideration of enforcement activity or a further investigation in this area. HMRC's belief is that these actions would inevitably be costly and difficult exercises which would be disproportionate to any little yield that might be achieved, if at all."*

79. The letter also explains that: *"In relation to the 2004/05 Treasury review, HMRC felt that although technology may have moved on since then, and the overall numbers of betting exchange customers will have undoubtedly increased, an improved case has not yet been put to them which would advance the arguments made previously"*.

80. DCMS also stated that:

"We consider that we have taken this work as far as we can for the present time. If your own research in this area produces new and substantive evidence, we would of course be willing to revisit the 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 2004/05. 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 the Gambling Act 2005".

Examples of use of betting exchanges

81. Evidence on how betting exchanges are being used by customers is welcomed from consultees. In the meantime, the Levy Board notes, by way of example, the following:

(1) Software is available to download (for example, from Bet Angel) which claims to assist customers on betting exchanges. For example, it claims to enable customers to place orders faster and more effectively and provides a charting function to help see where the betting market is going. More details are set out on Bet Angel's website: www.betangel.com.

(2) The Gambling Commission engaged the National Centre for Social Research to conduct a study on its behalf in 2009 to provide insight into gambling behaviour, albeit across all types of gambling, not just through the use of betting exchanges. A copy of the report is available on the Levy Board's website at www.hblb.org.uk/documents/81_NCSR_2009_Report.pdf. The study identified four types of gambling comprising "peripheral gambler", "gambling enthusiast", "business gambler" and "compulsive gambler". Consultees are invited to review the further details of each type of gambler set out in the report.

I. Reviews of Betting Exchanges in Other Related Contexts

82. The question of how betting exchanges and their customers should be regulated and taxed is an issue that has been considered before by HM Treasury and HM Customs and Excise, in the context of general betting duty, and DCMS, in the context of the Gambling Act 2005.

General Betting Duty

83. The general betting duty regime was first amended in order to take account of betting exchanges in October 2001. This change took place at the same time as a wider change to move general betting duty from a tax based on turnover to being based on gross profits (hence from this time onwards general betting duty has often been called 'gross profits tax'). Under the changed system, betting exchanges were charged duty on the basis of the aggregated winnings of those customers laying bets on the exchange.

84. HM Customs and Excise conducted a consultation in late 2002 on the first year of gross profits tax. It reported in May 2003. Copies of the consultation and their report are available on the Levy Board's website at www.hblb.org.uk/documents/84_HM_Customs&ExciseConsultation2002.pdf.
85. The report concluded that general betting duty should be imposed on the basis of commission charges. Accordingly, from 1 June 2003, general betting duty has been (and continues to be) charged to betting exchange operators at a rate of 15% of their commission charges. The report also added that those using exchanges to do business must also pay general betting duty on any gross profits.
86. In the 2004 Budget, the Chancellor of the Exchequer announced that the government would work with the industry to settle a fair and equitable tax treatment for betting exchanges and their clients. Following this announcement, a review was conducted by HM Treasury in 2005.
87. HM Treasury received submissions from various interested parties, including traditional bookmakers, the racing industry and betting exchanges. Copies of such submissions and HM Treasury's own papers were disclosed to Betfair under the Freedom of Information Act 2000 and are available on the Levy Board's website at www.hblb.org.uk/documents/87_Responses_to_HMCustoms&ExciseConsultation2002.pdf.
88. In a letter dated 5 December 2005 to the Betting Exchange Trade Association from John Healey MP, HM Treasury reported its conclusions (a copy of this is available on the Levy Board's website at www.hblb.org.uk/documents/88_Letter_to_BettingExchangeTradeAssociation5thDec05.pdf). It explained that the review looked at two main questions:
- (1) Whether the application of general betting duty to the betting exchange's commission was a fair basis on which to tax them compared to traditional bookmakers; and
 - (2) Whether betting exchange users were acting as bookmakers and should therefore be brought into the tax net.

89. With regard to betting exchanges themselves, HM Treasury concluded that taxing betting exchanges' commission "*is the fairest way*" as "*this reflects the fact that the commission is the exchange's gross profit in the same way as net stakes receipts are for bookmakers. Taxing the commission therefore ensures parity between exchanges and bookmakers to maintain competitiveness and provide value to punters whilst making a fair contribution to tax revenues*".

90. With regard to the tax treatment of betting exchange users, HM Treasury considered that this raises two issues, as follows:

- (1) Whether they "*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*". The letter 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."

- (2) "*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 concluded that:

"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."

91. HM Treasury also decided not to make any changes to the tax treatment of hedged bets "*because of the tax avoidance risks this would create*".

Gambling Act 2005

92. The process that led to the enactment of the Gambling Act 2005 began with a report issued in July 2001 by an independent Gambling Review Body, chaired by Sir Alan Budd. The Body was appointed by the Home Secretary to conduct a review of the laws governing gambling. The report contained 176 recommendations for changes to gambling law and regulations but did not contain any recommendations regarding betting exchanges or their users. A White Paper, *A Safe bet for Success*², was issued in response which, likewise, did not address the specific issue of betting exchanges. Copies of both the report and the White Paper are available on the Levy Board's website at www.hblb.org.uk/documents/92_GamblingReview.pdf and www.hblb.org.uk/documents/92_WhitePaper_A_Safe_Bet_for_Success.pdf.

93. In May 2003, DCMS published a position paper on the licensing of betting operators. This stated its intention to create a new category of operator: betting intermediaries, which would include betting exchanges. An annex to the paper set out the proposals for licensing betting exchanges in more detail. This stated, regarding users of exchanges that:

*"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."*

A copy of this paper is available on the Levy Board's website at www.hblb.org.uk/documents/57&93_DCMSPositionPaperMay2003.pdf.

94. DCMS then issued a policy paper in November 2003 on the draft Gambling Bill³ in which they confirmed that with the new licence for betting exchanges in place, the government considered it unnecessary to license betting exchange customers.

² Cm 5397, March 2002

³ Cm 6014 - IV

95. During the passage of the Gambling Bill 2004 through Parliament, a report prepared by the Joint Committee on the draft Bill recommended, amongst other things, that "*those using betting exchanges to lay bets professionally are identified, regulated, made subject to the appropriate levy arrangements, and have their status checked*" (at paragraph 511 on page 133 and Recommendation 107)⁴.
96. The Government's response was that it agreed that those who use exchanges to conduct betting operations in the course of business should be regulated but that no distinction should be made between backers and layers as "*any such distinction would, in the Government's view, be arbitrary and introduce unnecessary and unwise regulatory loopholes*". It also responded that it "*is not persuaded that the current law should be amended to bring exchange users within the scope of the horserace betting levy arrangements, bearing in mind the proposed abolition of those arrangements in the Horserace Betting and Olympic Lottery Bill*" (at pages 37 and 38)⁵.
97. The definition of providing facilities for gambling in section 5 of the Gambling Act 2005 is wide and appears potentially to be capable of including anyone who offers a bet or accepts a bet on a betting exchange, if such activity is carried on "*in the course of business*" (given the exception in section 296 for such activity done other than in the course of a business). The Explanatory Notes to the Act also state the following regarding section 296:
- "Sections 295 & 296: Private betting and gaming**
750. *These sections enable people to participate in and offer facilities for betting and gaming, including on premises, without committing any offence under the Act, provided their activity meets the various conditions for private gaming and betting. Schedule 15 sets out the various conditions.*
751. *In addition, these sections contain protection for people who bet, but who are not doing so in the course of a business. The definitions set out in Part 1 of the Act mean that both parties to a bet (sometimes known as the "backer" and the "layer") are capable of providing facilities for betting. This means that, ordinarily, anyone who offers a bet, or accepts a bet will be committing an offence under Part 3, unless he has authorisation under the Act.*
752. *Where a person is offering or negotiating bets in the course of a business, (commonly known as "bookmaking"), he will require a betting operating licence under Part 5. Similarly, if someone is using betting as a way of earning a living, so that it renders it a business activity, that too may require a licence. However, there*

⁴ HL 63/HC 139, 7 April 2004

⁵ Cm 6253

is no regulatory requirement for people who use the services of a betting operator on a non-commercial basis to obtain a licence. Nor should private bets, i.e. between friends, require any form of express authorisation. These sections make it clear that a person does not commit any offence under the Act if he makes or accepts a bet, or offers to do so, provided he is acting in a personal capacity, and not in the course of business.

753. *These provisions apply equally to those using the services of a betting intermediary i.e. an internet betting exchange. The intermediary will require an operating licence under Part 5, but the users of the exchange will benefit from the exemption in these sections, provided their use is in a non-business capacity."*

98. DCMS and the Gambling Commission issued a joint consultation on 8 April 2009 entitled "Proposals for Gambling Commission Fees from 1 August 2009". This stated the following in a section dealing with fee proposals:

"2.71 We have identified that operators using exchanges 'in the course of a business' require a remote betting intermediary licence. However, such operators and their activities do not pose significant additional risk to the licensing objectives as the main risks are handled by the betting exchanges. We also recognise that existing operators holding general betting licences (whether remote or non-remote) may already use betting exchanges 'in the course of a business' and that this is already addressed within the existing regulatory work and fees.

2.72 A new category of licence is proposed for operators that use exchanges 'in the course of a business':

- For those using exchanges 'in the course of business' but not already holding a gambling operator licence, the application fee will be £198 and the annual fee will be £280, the same as for a category A, non-remote betting intermediary.*
- Operators that already hold a general betting licence, whether remote or non remote, also require a remote intermediary licence to use exchanges 'in the course of business' - for example for hedging. However, this will not involve the Commission in any additional cost and operators should not have to carry any additional costs. On their next renewal, therefore, all betting operators will be issued with the necessary additional licence or licence variation at no cost to the operator; the annual fee for such operators will be set at zero as the additional compliance costs are negligible."*

A copy of the consultation paper is available on the Levy Board's website at www.hblb.org.uk/documents/98_DCMS&GamblingCommission_JointConsultation2009.pdf.

99. Copies of the responses submitted to DCMS / the Gambling Commission from Betfair, the BHA, BACTA (representing the British Amusement Industry), the Federation of Racecourse Bookmakers Limited, the Association of British Bookmakers, Business in Sport and Leisure, the Remote Gambling Association, and the Salvation Army have been

made available on DCMS' website and are available on the Levy Board's website at www.hblb.org.uk/documents/99_Responses_to_DCMS&GamblingCommission_JointConsultation.pdf.

100. The Summary of Responses issued on 20 August 2009 by DCMS and the Gambling Commission, stated the following regarding the proposals referred to above:

"The consultation document addressed the possibility of introducing a new fee category for those using betting exchanges "in the course of business". We recognise that some elements of the original proposal are incorrectly specified. For example, some respondents raised concerns that the new licence should apply to all remote betting platforms rather than being confined to betting exchanges. We also recognised that it was incorrect to suggest that a remote betting intermediary licence was the licence type required to cover this activity.

In the light of the consultation responses received, we intend to give further consideration to this issue and discuss with stakeholders before reaching a final view."

"Consultation question 5: What are your views on the proposed new licence category for those using exchanges "in the course of business"?"

- *Principle of free licence should be extended to other linked licences in the machines sector*
- *Should actively pursue exercise to identify business users other than licensed bookmakers"*

A copy of the summary of responses is available on the Levy Board's website at www.hblb.org.uk/documents/100_Summary_of_Responses_to_DCMS&GamblingCommission_JointConsultation.pdf.

J. Possible lines of analysis

Introduction

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

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

(1) Exchange Customers are liable

103. Under this line of analysis, a customer of a betting exchange can properly be seen as a liable bookmaker for the purposes of section 27(2)(a) of the 1963 Act and Betting Activity 1.4 of the 49th Scheme, for the following main reasons.
104. First, a person or entity may conduct activities on a betting exchange which are (i) in the nature of business activities and (ii) carried on their own account: see section 27(2)(a) and section 55(1). Each of these is necessary, but not sufficient. They engage questions of fact, and cannot be said to be incapable of being met in the case of exchange customers. There is room for different views as to how to approach and apply these questions and it is necessary to grapple with those questions.
105. Secondly, the position can be seen to be as follows, that: (i) the betting exchange is acting as a broker, providing a platform where the backer and layer bet direct with each other; (ii) the layer therefore receives the bet from the backer; (iii) the layer calculates the odds; (iv) the layer undertakes the risks; and (v) as it has been said, the layer can “be the bookie” (see section F, paragraph 47 above).
106. Thirdly, the activities of the layer, at least, can be seen to be one of “receiving” bets and, if necessary, as “negotiating” bets – though either characterisation would suffice (section 55(1)). They can in turn be seen, as they would also need to be, as “effecting” betting transactions: section 27(2)(a).
107. Fourthly, this analysis is supported by the way in which traditional bookmakers (eg. Ladbrokes or William Hill) are treated as liable bookmakers in respect of their (‘hedging’) activities when using betting exchanges. In relation to those activities, such

entities are treated as covered by section 27(2)(a) and Betting Activity 1.4 of the 49th Scheme. That establishes the principle. It cannot be explained by the fact that the traditional bookmaker is a leviable bookmaker in relation to its activities off the Exchange. That does not suffice: the Levy is payable "only in respect of so much of the business of the bookmaker as relates to such betting transactions" (section 27(2)(a)). Putting it another way, if a customer of a betting exchange cannot be a leviable bookmaker then it is very difficult to see how the traditional bookmakers could properly be leviable in relation to their activities on the exchange. Betting Activity 1.4 of the 49th Scheme would not be applicable to anyone.

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

109. Sixthly, it is no answer to say that betting exchanges have, and their customers have not, been recognised as licensed bookmakers for the purposes of the bookmaker's permit under section 2 of the 1963 Act. That position was never tested, still less in the context of consideration of the special position of evolving categories of business users of the exchanges. The true position is that there has been licensable bookmaking activity by betting exchange customers alongside their leviable bookmaking activity, which was not recognised as it could and should have been. The fact that it was not does not undermine the need to apply the law correctly, once the question is squarely faced. In the context of

licensing, the Gambling Act 2005 stepped in and repealed section 2 of the 1963 Act. The 2005 Act makes express provision for licensing of a “betting intermediary” (section 13, section 65(2)(e)). That provision was intended to apply to betting exchanges, who do not “partake in the bet” (see Explanatory Notes §66). The reform of the statutory provisions in the context of betting exchanges underlines the difficulty in applying the established statutory concepts (like “bookmaker”). Moreover, insofar as illumination is to be had from the licensing regime, it lies in the most recent proposal for a special category of licence for business customers of betting exchanges, whether or not they were already licensable.

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

(2) Exchange Customers are non-leviable

111. Under this line of analysis, a customer of a betting exchange cannot properly be seen as a leviable bookmaker for the purposes of section 27(2)(a) of the 1963 Act and Betting Activity 1.4 of the 48th Scheme, for the following main reasons.
112. First, there is a difficulty with a necessary premise: that there are customers of a betting exchange who are carrying on a business (section 27(2)(a)). That is ultimately a question of fact which would need to be demonstrated and in truth cannot be. Leaving aside that fatal initial objection, the following further points arise.

113. Secondly, the true and proper focus is on the betting exchange as the leviable bookmaker, and not the customer. The customer is not 'making the book', or 'selling the bet'. It is the betting exchange which is the business which makes the arrangements for the bets. It receives, negotiates and "effects" them. It exercises responsibility and control. Bookmaking is not defined by risk or the action of laying. The laying customer does not deal directly with the backing customer, still less arrange for the bet. Moreover, it is artificial and unsatisfactory to focus on the 'layer' on the exchange. In the context of a two-horse race, both parties to the bet are effectively both laying and backing.
114. Thirdly, it is no accident that the position is well-established that it is the exchange who is the leviable bookmaker, and required the bookmaker's permit. As explained in the *Sporting Options* judgment (see §12), the position had originally been controversial, but it was recognised and resolved. It was rightly recognised that the betting exchange is itself in the business of "receiving or negotiating bets" (section 55(1)); "effecting ... betting transactions" and "on [its] own account" (section 27(2)(a)). Were it otherwise, Betting Activities 1.6, 3.1 and 3.2 would be ultra vires.
115. Fourthly, it would be a surprising position to find that customers of the betting exchange are themselves leviable bookmakers. One logical consequence of that approach to the statutory scheme is that there would have been persons who were committing criminal offences from the time when betting exchanges began to operate, up until the change of licensing legislation in 2005. That is because it was an offence for a person to "act as a bookmaker on his own account" without holding a bookmaker's permit (section 2(1) of the 1963 Act, prior to its repeal). That was never the view, for good reason.
116. Fifthly, if the focus is to be put on the customer there is the unavoidable question-mark as to whether the betting exchange could itself continue to be a leviable bookmaker. Parliament has recognised that a "betting transaction" can involve "one or more of the parties ... acting as a bookmaker" (section 55(1)). But that is doubtless because "bookmaker" can include someone acting "whether on his own account or as servant or agent to any other person" (section 55(1)). However, the leviable bookmaker must be acting "on his own account" (section 27(2)(a)). If it is to be said that the betting exchange is broker and agent, then it could not itself be leviable. That will leave very many betting transactions as involving no leviable bookmaker: eg. where the layer on the exchange is not carrying on a business.

117. Sixthly, it is no answer to say that traditional bookmakers (eg. Ladbrokes) are treated as leviable bookmakers in respect of their activities when laying on betting exchanges. That has happened because the traditional bookmaker is recognised as a bookmaker in relation to its other activities. Presumably, that is thought to suffice, perhaps together with the fact that its activities on the exchange "relate to ... betting transactions" (section 27(2)(a)). If, on reflection, that is wrong because the traditional bookmaker is not in the business of "effecting ... betting transactions" when it acts as an exchange customer, so be it. The correct analysis may be that only the exchange is a leviable bookmaker in those situations, and Betting Activity 1.4 of the 49th Levy Scheme would not be capable of application.
118. Seventhly, it is instructive to consider the position of general betting duty. There is a proper parallel to be drawn between the issues which arise in relation to the Levy and those which arise in relation to general betting duty. Questions which arise include whether the focus should be on the exchange or its customers, or both, and which customers. Concerns have included the suggested loss of betting duty through the growth of exchanges and the activities of their customers. This has been carefully considered over the years. The customers of the exchanges have not been equated with the bookmaker for general betting duty purposes, including in clarificatory legislation (the Finance Acts) in which Parliament responded to the special position of betting exchanges by making express provision. The legislative design is as revealing as the policy choice. The statutory amendments arose precisely because there was no bet "with" the betting exchange so duty was not payable by it as the bookmaker. Had the betting exchange customer been a bookmaker, since there was a bet "with" that person, betting duty would have arisen payable by that person. But that was rightly never regarded as plausible, still less desirable.

K. Other matters

What happens next?

119. A full analysis of responses will be undertaken and published following the consultation, and we may contact you if we need clarification on any comments made. Based on the responses received during the consultation period, the Levy Board will consider what conclusions it ought to draw and what next steps are appropriate.
120. A summary of responses will be made accessible via our website at <http://www.hblb.org.uk> or by request to Natasha Rose. This summary will include a list of names of all organisations which responded, but not individuals' personal names, addresses or other contact details.

Access to information and confidentiality

121. Information provided in response to this Consultation Document, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are currently primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). Alternatively, we may publish all responses subsequent to completion of the consultation process. Please indicate if you would like information, including any personal data which you provide, to be treated as confidential.
122. If you do not want your response – including your name, contact details and any other personal information – to be publicly available, please say so clearly and explain to us the reasons why in writing when you send your response to the consultation. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances (and confidential responses will be included in any statistical summary of numbers of comments received and views expressed). An automatic confidentiality disclaimer generated by your IT system will not count as a confidentiality request and will not be regarded as binding on the Levy Board.

123. The Levy Board will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation Criteria

124. This Consultation is being conducted in line with the Code of Practice on Written Consultation (the Code). The Code's Criteria are listed in Annex B. The full Code can be accessed at: <http://www.bis.gov.uk/files/file47158.pdf>.

Comments or complaints

125. If you have any comments or complaints about the way in which this Consultation has been conducted, these should be sent to Natasha Rose at:

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Annex A

Organisations and Individuals who have received the Consultation Document

Nic Coward, Chief Executive, British Horseracing Authority

Stephen Atkin, Chief Executive, Racecourse Association

Will Roseff, Chairman, Bookmakers' Committee

Stu McInroy, General Secretary, Bookmakers' Committee

Michael Harris, Chief Executive, Racehorse Owners Association

Trevor Beaumont, Chief Executive, Horserace Totalisator Board

Patrick Nixon, Chief Executive, Association of British Bookmakers

Alan Morcombe, Chief Executive, The Horsemen's Group

Thomas Murphy, General Counsel and Company Secretary, William Hill plc

Martin Cruddace, Legal Director, Betfair

Malcolm Gray, Chief Executive, World Bet Exchange Limited

Sham Dedlani, Chief Executive, Ibetx Limited

Robert Unwin, Chief Executive, Open Vantage Limited

Brian O'Sullivan, Chief Executive, Global Betting Exchanges UK Limited

Viv Johnson, Head of Racing, Sports Betting and Spectator Policy, Department for Culture, Media and Sport

Jenny Williams, Chief Executive, Gambling Commission

Annex B

Code of Practice on Consultation - Consultation Criteria

Criterion 1: When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Duration of consultation exercises

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3: Clarity of scope and impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4: Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5: The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6: Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.