

PDR/ces

28th October 2008

Sir Philip Otton
20 Essex Street
London WC2R 3AL



Dear Sir Philip,

Completion of your advice to the Horseracing Betting Levy Board ("Levy Board") - third submission on behalf of Racing

It was a pleasure to see you again on 31st October. Thank you again for your assistance in the process that led to agreement of the 48th Scheme. As you know, we concluded that process on the basis that it was a staging post in achieving the overarching objective of a modernised Levy. We very much welcome the completion of your advice to the Levy Board on the "value" issues, i.e. the test by which the return to Racing under the Levy should be established under the modernised Levy process.

As background, the Levy Board has of course already recommended to Ministers a new overarching Levy process in its letter dated 2nd October 2008 (copy attached). We fully support this. As we understand it, your advice will set the framework and criteria within the new process by which the return to Racing would be decided by the arbitration panel in the event that it cannot be agreed by negotiation. It therefore sets the ground rules for Racing and Betting to value the fixture list in negotiations which, for the 2010 fixture list, have to conclude by July 2009. The early completion of your advice is therefore most welcome, as the time is short for the Minister to establish the new framework, which we believe will need to be in place by the end of May 2009 at the latest.

You have previously received our submissions dated 8th and 25th October 2008, which we will be pleased to build on when we meet next week. As matters stand, we hope that the team will comprise of myself, David Thorpe, Paul Dixon, Nic Coward, Stephen Atkin and Michael Harris. Further thoughts, following your supplemental advice on exchanges dated 20th October 2008 and the Levy Board's request for information entitled "The Way Forward" dated 13th November 2008, are set out below.

We assume that the conclusion of your advice will enable the Minister to establish the mechanisms, process and criteria by which the calculation of the Levy return will be arrived at at the relevant time, as opposed to now seeking to establish values. For instance, in relation to FOBTs, as you stated in our conversations, it will be necessary to establish the process by which the percentage of, we assume, gross win, will be determined. As you are aware, Racing cannot provide to you any information requested by the Levy Board concerning the monetisation of gaming machines, virtual racing, overseas racing and other betting products in licensed betting offices ("LBOs"), because this data and most importantly the plans and strategies behind them are known only to the bookmakers.

1. "The Test"

- 1.1 As part of our contribution to the process in relation to the 47th and 48th Schemes and in our submissions to you of 8th October 2008 and 25th October 2008, we set out our views on the proper test that a reasonable Secretary of State ought to apply when called upon to determine a particular Levy Scheme. Our position on these issues has not changed and we will happily address any further questions you may have in this regard.
- 1.2 We would ask you to note that our views have been unequivocally endorsed by leading counsel, Lord David Pannick QC. Lord Pannick's advice also refutes the relevant arguments of Mr De Haan QC and Mr Saini QC put before you by the Bookmakers' Committee ("BC"). We attach a copy of Lord Pannick's advice dated 28th October 2008.
- 1.3 We would make two further observations arising from Lord Pannick's advice and from your own conclusions to date:
- 1.3.1 First, in our view, provided that a Secretary of State is satisfied that any part of a bookmaker's business "relates to" (i.e. has some connection with) betting transactions on horse races (e.g. FOBTs, virtual racing or any other product exhibiting a relationship), then it appears to us that the proper construction of Section 27(2)(a) of the Betting, Gaming and Lotteries Act 1963 (the "1963 Act") **requires** the Secretary of State to regard such activities as leviable. In short: once he is satisfied that a relationship exists, his discretion then exists only to set a reasonable rate of levy return to be applied to such revenues. The process by which the Minister does this is vital.
- 1.3.2 Second, even if the Secretary of State were to conclude that no relationship of the sort referred to in paragraph 1.3.1 exists, and from the information already presented by both sides we do not regard that as being possible, Lord Pannick has in any event confirmed our view that the Secretary of State is still entitled to take account of revenue from FOBTs and other sources whilst considering, inter alia, the bookmakers' capacity to pay as part of the process of determining the amount of the Levy.
- 1.4 We would also ask you to note that although the "Way Forward" document talks only about "needs" and "capacity", your initial advice did of course state that these are not the only criteria, and that there are also fiscal, economic and social factors which should be considered. The "Way Forward" omitted reference to this important matter.

2. FOBTs

- 2.1 As we say, the issue to be resolved is how to evaluate the *extent* of the "causal link" between betting transactions on horse racing in LBOs and the use of FOBTs, virtual racing and other products in such LBOs. As we understand it, the *existence* of such a link is established: this is set out in your preliminary advice

and was confirmed by the research made available to you by both Racing and the BC in our earlier submissions¹.

2.2 We note that, since our last submission, the Gambling Commission has issued an additional consultation paper² concerning the "primary gambling activity" undertaken in, inter alia, LBOs. In this paper, the Gambling Commission firmly concludes that, under the Gambling Act 2005, betting premises are licensed for the "primary gambling activity" of betting, and that the availability of gaming machines is ancillary to this primary purpose. In our view this further demonstrates the close interrelationship between betting transactions on horseracing and gaming machines. You will no doubt be aware of the substantial press coverage in recent weeks of betting business performance and the significance of gaming machines and betting on racing. We set out relevant quotes from Coral in our 25th October letter.

2.3 Whilst it is clear that the relationship and the evaluation process is complex, we strongly reject any suggestion that that should then be taken to mean that it is too complicated or equivocal for consideration as part of the Levy process. That offends the entire basis for the Levy and the inherent complexities of the task as was always envisaged. In our view:

2.3.1 a proper assessment of a fair rate of Levy depends on full disclosure of machine/virtual racing performance, objectives and promotional strategies (including detail of plans, in-store marketing and disclosure of how LBOs operate to promote FOBT and other business alongside racing) by the BC. This information is in the ownership of the bookmakers themselves³. ; and

2.3.2 the task is best undertaken under full confidentiality by economists/accountants under a formula to be established by the Minister assisted by your advice.

3. "Needs"

3.1 Our submissions for the 47th Scheme determination⁴ and in relation to the 48th Scheme⁵ contain extensive sections highlighting Racing's "needs" and we will not duplicate these points, although if you require specific further information we are happy to provide that to you on request. We were grateful for your kind words

¹ we have addressed the BC's most recent arguments on this issue in section 3.4 of our letter to you of 25 October 2008.

² Gambling Commission consultation paper on "Primary Gambling Activity", 31 October 2008: <http://www.gamblingcommission.gov.uk/Client/mediadetail.asp?mediaid=422&id=2>

³ In a rights-based environment, for instance in negotiations or Copyright Tribunal evaluations, this is of course what does happen

⁴ Section 3.1 of the Submission of British Horseracing in respect of the Determination of the 47th Horserace Betting Levy Scheme

⁵ Paragraphs B4.5 and D2.3 of our first submission to you of 8 October 2008 and paragraphs 1.2 and 3.5 in our supplemental letter to you of 25 October 2008.

about our letter dated 25 October 2008 in which we addressed these issues. We would make only the following additional points:

- 3.1.1 The assessment of needs, economic, social, fiscal factors has to be addressed at the relevant time, which will be in the 2nd and 3rd quarters of 2009. As will be clear, matters will be very different now to then.
- 3.1.2 In your initial advice to the Levy Board dated 13th October 2008 you made reference to Racing's submissions in relation to integrity, regulatory and prize money costs. You also identified one task of the Government appointed members of the Levy Board as being to scrutinise Racing's case with care. In the context of the 48th Scheme, and based on the information before it, the Levy Board has prioritised Racing's needs in relation to prize money, and has in successive years also approved Racing's needs in relation to regulatory and integrity spending at current levels. Our letter dated 25th October 2008 and the points we made therefore still stand. Since there have been no developments which would reduce Racing's costs in any of these areas, we have not, for the moment, provided further information in this submission. However, if you have any specific questions, we will be happy to provide any information you require including our budget for 2009. As we have set out, the economic outlook is very bad. On this basis, Racing's "needs" will, in all likelihood, go up as other income lines fall despite our best efforts.
- 3.1.3 In relation to marketing, the Levy Board has itself identified the need for additional support and resource in this area, on top of existing commitments. As an example, we would ask you to note that the British Bloodstock Marketing team has separately met with the Levy Board and all understand Racing's need for marketing spend, in particular international marketing spend.
- 3.1.4 Finally, we do not understand the comment "(not demands)" in the "Way Forward" document. In response, we have the very clear view that the Levy return should be set at a reasonable level and we believe we have established that on any analysis, our proposals are reasonable. The modernised process is intended to achieve this, as far as possible replicating market conditions, where negotiation would establish the amount, but under the unique conditions that the Levy mechanism creates. The current level of return we say is and has been unreasonable. We stand by our previous submissions and would be happy to reply to any points in this regard.

4. Turf TV

- 4.1 We believe that this issue – in terms of the "set off" argument – is now gone. However, for completeness, we should record that Racing set out our comments on the impact of Turf TV in our submissions dated 8th October 2008 and 25th October 2008. Our submissions sought to demonstrate that the impact of introducing a second picture service to LBOs was much lower than claimed by the BC, and that any residual impact was the consequence of direct and indirect action by the betting industry's own collective organisation, BAGS.

- 4.2 Since those submissions, the Levy Board has received an independent report from KPMG, which is under the heading "*Project Anatis*". This further confirms Racing's analysis of the competition in picture supply for the reasons set out below.
- 4.3 We have used the figures in the Project Anatis report to recalculate the impact of the new picture supply arrangements. There are attached two schedules:
- 4.3.1 Schedule 1: an analysis of the impact of SIS/Turf TV; and
- 4.3.2 Schedule 2: the true loss in value of SIS product.
- 4.4 KPMG has estimated the cost of the Turf TV service and of the SIS service both before and after the introduction of Turf TV. Schedule 1 presents the effect of this information in detail. In summary:
- 4.4.1 The headline costs have increased by £29,632,000.
- 4.4.2 Rights payments to British racecourses have increased by £9,600,000.
- 4.4.3 Rights payments for all other products have increased by £12,400,000.
- 4.5 We would make the following comments on this information:
- 4.5.1 It would be entirely unreasonable for the Levy to be adjusted for any part of the increase in costs resulting in the increase in rights fees for other products, whether greyhound racing, overseas horseracing or otherwise. Consequently the effect reduces from £29,632,000 to £17,232,000.
- 4.5.2 Similarly, it is without precedent that the Levy should be reduced to take account of increases in rights fees to British racecourses. These increases have occurred regularly over the past two decades, with no impact on the Levy. For example, in 2002 the payments to British racecourses increased from approximately £12,000,000 pa to approximately £30,000,000 pa. It is notable that the estimated increase in 2008 is lower in both nominal and percentage terms⁶. The estimated impact of the introduction of Turf TV should thus be further reduced, by £9,600,000. This produces a revised impact of £7,632,000 (i.e. £17,232,000 less £9,600,000).
- 4.5.3 Although Racing has made this point several times, the BC has failed to address these questions and has simply reiterated the headline impact, which (for the reasons we have set out to you in our earlier submissions) we regard as significantly overestimated.
- 4.6 In our earlier submissions, we also considered the role of SIS. There is one further aspect of that role we would highlight. SIS is significantly influenced by the views of its two largest shareholders and customers, Ladbrokes and William Hill. We submit that as a consequence of this, SIS has not adjusted its pricing to

⁶ It is also highly arguable that British LBOs still underpay for the picture rights for British racecourses when compared to the rights paid for other product

reflect the loss in value of the product it is supplying LBOs. This is clearly illustrated by Schedule 2, as follows:

- 4.6.1 SIS has lost approximately 26.2% of its product value (46% x 57%).
- 4.6.2 The monetary value of the lost product is £24,455,000.
- 4.6.3 The value of the reduction by SIS in its prices charged to British LBOs is approximately £11,168,000.

It follows that, had SIS adjusted its pricing to properly reflect the loss in value of the product it is supplying LBOs, SIS would have passed onto customers a further £13,287,000 in value lost. Indeed, if only £7,232,000 had been passed onto customers that would have eliminated the residual impact of Turf TV entirely.

- 4.7 We believe that this demonstrates that the activities of SIS have distorted the true impact of Turf TV on the cost to LBOs. It is noteworthy that, contrary to what might have been expected by the introduction of competition, SIS's profits have **increased**, and SIS has recently announced an **increase** in its charges to customers. The BC will be in a better position to provide evidence to you on this matter. In our view, it would be wholly incorrect to reduce the Levy so as to compensate bookmakers for the additional cost of Turf TV where the impact of that cost is distorted by the actions of the bookmakers themselves, including their profit-taking from related companies such as SIS.
- 4.8 We regard it as noteworthy that whilst we have made similar arguments in both our previous submissions, the BC has so far failed to address the matter in its submissions.
- 4.9 Finally, the BC has claimed that the introduction of Turf TV increased bookmaker costs by £40 million pa, and Ladbrokes and William Hill provided audit certificates which, they claim, support this figure. This information was provided confidentially to you and shown on that basis to us in the mediation. Mr Atkin will write separately and confidentially to you on this matter.

5. Exchanges

As noted in the Levy Board's paper "The Way Forward", the issue of betting exchanges is currently with DCMS and we would of course not advocate any duplication of work in this regard. We understand that Government is now addressing the mechanism by which persons trading on exchanges will be identified and assessed for Levy (and, we assume, tax). However, the Levy Board also indicated that the conclusion of your advice would encompass the issue of betting exchanges, and so for the record, we would like to set out the following additional comments on your supplemental advice dated 20th October 2008.

5.1 Your summary

We are grateful for your summary of the arguments made by Racing and Exchanges (Betfair). In general, we believe your summary to be a fair reflection of the key points we have made. We would make only the following comments:

5.1.1 Are "Layers" bookmakers for the purpose of the Levy?

In your paragraph 10, you state that "Layers" operating on Betting Exchanges are not "bookmakers". In paragraph 12 you state that "It is clear that no individual can be "in the course of business" on Betting Exchanges if "being in the course of business" requires some kind of customer interaction.

In order to examine these statements, it is necessary to consider the relevant law.

- (a) The Levy applies to "*bookmakers and the Totalisator Board*"⁷.

A bookmaker is defined (at Section 55 of the 1963 Act) as 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" (our emphasis).*
- (b) Section 27(2)(a) of the 1963 Act further provides that a Levy Scheme may secure payments only from a bookmaker "*who carries on on his own account a **business** which includes the effecting of betting transactions on horse races*" (our emphasis).
- (c) Under the Gambling Act 2005, a person who makes or accepts a bet does not commit an offence by providing facilities or premises for gambling

⁷ Section 24(1) of the 1963 Act states that the Levy Board shall be charged with the duty of assessing and collecting monetary contributions "from bookmakers and the Totalisator Board"

where he acts "*other than in the course of a business*"⁸. Notwithstanding that the Gambling Act 2005 superseded the 1963 Act for licensing purposes, in relation to the Levy, the concept of "*bookmaker*" has not been removed⁹. Therefore, the key factor which determines any liability to pay the Levy remains whether a person is acting as a "*bookmaker*" under the 1963 Act. The fact, for example, that a trader, or bookmaker, is not correctly licensed under the Gambling Act does not diminish its liability to pay the Levy.

- (d) We are aware of no Levy-specific case law or legislation which assists us to interpret the phrase "*carrying on on his own account a business*". However, as the Gambling Commission has stated¹⁰:

"The concept of 'in the course of a business' is well understood in relation to tax law. Clearly anyone regarded by the tax authorities as trading 'in the course of a business' would need to be licensed as otherwise they would be providing facilities for gambling illegally" (our emphasis)¹¹.

- (e) We can see no relevant difference between the natural meaning of the phrases "*in the course of a business*" and "*carries on on his own account a business*", and we are not aware of any requirement that acting "*in the course of business*" requires any kind of "*customer interaction*" (although in this context the meaning of that phrase is, in any event, unclear to us and may therefore not in itself add anything not already encompassed by the phrases above).
- (f) Tax legislation and relevant case law do not make reference to entities or individuals acting "*in the course of business*". However, the legislation does refer to the carrying on of a trade, the profit of which would be subject to UK tax. A trade has been defined as "every trade, manufacture, adventure or concern in the nature of trade"¹². "Business" is a wider term than trade. However, a taxable trade is a "business" and so traders can be said to be "*acting in the course of a business*".

⁸ Section 296(c) of the Gambling Act 2005.

⁹ The concept is retained by virtue of a Statutory Instrument made in 2007 (The Gambling Act 2005 (Horseshoe Betting Levy) Order 2007) which grandfathers all the relevant provisions from the 1963 Act. I have not found any subsequent legislation which alters this position.

¹⁰ March 2006 Consultation Document.

¹¹ This is taken from Section 10.4 of the Consultation, *ibid*, which looks specifically at the licensability of users of betting exchanges. Although the Gambling Commission makes it clear that they would take action against any unlicensed user of betting exchanges who is brought to their attention (for example by the tax authorities) as trading "in the course of a business", their view is that it is not appropriate or proportionate to extend this so as to require other individual layers to have Gambling Commission operating licences (although, in the November 2006 "Responses Document", they did confirm that they would "keep this area under review and will reconsider our position should subsequent events so dictate".)

¹² ICTA 1988 s.832(1)

- (g) In light of the above, our view is that if an Exchange user is acting as a "trader" he can be said to be acting "in the course of business". We are advised that the main indicators are motive, eliminating risk, working to a margin rather than gambling on open positions, and the frequency of transactions. Based on these indicators, there is clear evidence from the patterns adopted by some Exchange users that they are acting as traders.

As further evidence, the Gambling Commission's issues paper on In-running betting of May 2008 talked of "specialist and knowledgeable", "experienced" and "frequent" users, and referred to people who "trade"¹³. The same paper has a section devoted to "Trading Rooms", which it notes are "becoming increasingly popular" and "offer all the advantages available to assist betting customers in utilising their skill to make a profit from in-running betting"¹⁴.

An article from the Racing Post of 11 November 2008 (copy attached) provides a perfect illustration – just one of many - of the issue of "racing traders". Further, one of Betfair's own founders, Andrew Black, upon the introduction of premium charges on the betting exchange in September 2008, referred to those being affected by such charges as those running "aggressive bots" (proprietary software, employed to help lock in profits) or "traders".¹⁵

- (h) Betting Exchanges do not dispute that they are bookmakers or that they are "acting in the course of business"¹⁶. It is Racing's position that users who fulfil those requirements, should and must be "leviable" and levied. Currently their income is not. This appears to us both legally incorrect, and unfair. Racing believes betting exchanges require separate treatment under the Levy. Betfair's own advertising at times plays on the fact that they are different: "unlike (at) traditional bookmakers, Betfair punters bet against each other ... and matching a bet means that they choose their own odds", as a television-based campaign ran in October 2007.¹⁷
- (i) It may be that, in making the comments referred to at the top of this paragraph 5.1.1, you are simply summarising positions taken by the

¹³ Second paragraph, section 2.10

¹⁴ Section 3.31

¹⁵ <http://www.bertsblog.co.uk/horses/feeling-sheepish.html>

¹⁶ Although the concept of "bookmaker" as a licensable category has been removed under the Gambling Act 2005, the "grandfathering" provisions which retain the relevant provisions of the 1963 Act for the purposes of operating the Levy retain the old definition of "bookmaker" for these purposes. Other definitions under the 1963 Act are similarly grandfathered by these provisions. So although Betfair is a betting intermediary under the new Act (they now hold a "remote" betting intermediary licence) - for Levy purposes they are still treated, in the first instance, as a bookmaker (they held a bookmaker's permit under the old law).

¹⁷ <http://uk.youtube.com/watch?v=JEFvb69-zmo>

Betting Exchanges. Based on the above analysis however, our view is that neither comment is correct. In summary:

- (i) a user of a Betting Exchange is a bookmaker if he satisfies the requirements referred to at paragraph 5.1.1(a) above. Our position is that many users of Betting Exchanges demonstrably do satisfy those requirements; and
 - (ii) in appropriate cases, the user of a Betting Exchange can be said to be acting in the course of business¹⁸.
- (j) We would refer you to the Association of British Bookmakers and the Federation of Rails Bookmakers, both of whom support Racing's case regarding activity on exchanges.

5.1.2 Racing's other arguments

At paragraph 13 of your supplemental advice you note that "*BHA emphasise that their position is confined to unlicensed bookmakers*". You are quite correct that this is a fact presented to you, as any licensed bookmaker should and will be paying Levy already. However we would also emphasise the other arguments set out in our paper to you dated 17th October 2008.

5.1.3 Increasing Betting Exchanges gross profit contribution

At paragraph 14 of your supplemental advice you have indicated that one solution proposed by Racing would be to increase the gross profit contribution payable by the Betting Exchanges themselves. Whilst you are correct that this outcome would be acceptable to Racing, the appropriate contribution, if calculated from gross profit, would be higher than the additional 1.15% you indicate in your supplemental advice. As we have stated, this route is suggested if it were to be considered administratively convenient and appropriate by the authorities. Our primary position is that traders should themselves be assessed.

5.2 Betfair's arguments

We believe no purpose is served in providing to you our arguments in response to Betfair at this stage, but we do take issue with many of their points and reserve the right to respond in the context of any determination exercise.

5.3 Process and the determination of the 47th Scheme

- 5.3.1 The BC's recommendation in relation to Betting Exchanges is that they "*should continue to be assessed for levy on the basis of 10% of their gross profit on British horseracing business*" (i.e. akin to the BC's position in respect of internet bookmakers). In the case of Betting Exchanges this

¹⁸ We see a useful analogy to the professional gambler who places bets at a bookmaker on course; Insofar as we are aware, there is no suggestion that other such professional gamblers are not "acting in the course of business".

means that they would pay 10% of the commission deducted by the exchange from amounts paid out to those placing or laying bets via that exchange. Racing's position is that this approach is unfair for reasons fully ventilated in relation to the 47th Scheme, which you have seen.

5.3.2 As you know, in large part the bookmaking community also regards the position presently advocated in the BC's recommendation as unfair. Indeed, in relation to the 42nd Levy Scheme, the BC had recommended, and the Levy Board approved, an approach which would have seen an exchange's liability assessed on the gross win of those of its customers who won money on the exchange whilst acting as bookmakers as well as on their own commission. One betting exchange, Sporting Options, successfully challenged this decision via Judicial Review (*R (Sporting Options) v Horserace Betting Levy Board* [2003] All ER (D) 560), on the basis that they were inadequately consulted. This was at a time when Betting Exchanges were not represented on the BC.

5.3.3 In his determination of the 47th Scheme, Gerry Sutcliffe gave the following statement in relation to Betting Exchanges:

"I have been able to reach a view on some of these new considerations. Firstly, I have concluded 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 Treasury concluded that there was no real justification for changing exchanges' tax base or tax rate, and I have taken the same view in relation to the Levy. Furthermore I am satisfied that any move to broaden the scope of the Levy scheme in this way would necessitate a full consultative process, which has not occurred."

In short then, Mr Sutcliffe concluded: (a) that it would be inappropriate (in light of the Treasury's conclusion) to levy Betting Exchanges' turnover; and (b) that any such change would require consultation. Racing believes that conclusion was incorrect, and resulted from the flawed process undertaken in the context of the 47th Scheme. However, in any event, Racing believes the position on both issues has materially developed since the last determination. We will consider each in turn.

5.3.4 Levy on "turnover"

We would make the following points:

- (a) As you have correctly identified at paragraph 14 of your supplemental advice, Racing does **not** seek to impose the Levy on the turnover of Betting Exchanges at all. Instead, Racing simply believes the Levy should be payable on the income of those bookmakers who choose to use the platform offered by the Betting

Exchanges, as well as on the direct profits of the Betting Exchanges themselves.

- (b) Betting Exchanges have the means of collecting such levy from those bookmakers by applying the mechanisms which they already deploy to implement their own charging structures. Alternatively, Betting Exchanges can bear the cost of this themselves from their own profits.
- (c) Racing strongly views this profit participation as consistent with the aims and terms of the 1963 Act.

In our view, these points fully address the Secretary of State's first concern with assessing the issue of Betting Exchanges, and consequently we submit that Betting Exchanges should be considered afresh.

5.3.5 Consultation

Since the determination of the 47th Scheme, the BC has resisted every effort made by Racing to address the issue of Betting Exchanges¹⁹. Whilst we accept that the BC is entitled to take a view that it does not wish to seek any alteration in the current position on exchanges, it would in our view, and in the view of our Leading Counsel Lord David Pannick QC be:

"incorrect for the Bookmakers' Committee to adopt the position that it has no legal power to explore the matter further".

We believe it would be most unfortunate and wrong in principle if the BC were permitted to stifle a debate about Betting Exchanges. Moreover, notwithstanding the BC's position, your analysis of Betfair's arguments demonstrates that Betting Exchanges have been fully consulted in this process. However, since the issue is actually in relation to the Levy assessment of users/traders, not the exchange operator company, we think the point falls away.

5.3.6 Conclusion

Racing believes the current treatment of betting on an exchange to be at odds with the law, and unfair to Racing. Racing also feels that the position has materially changed since the determination of the 47th Scheme.

6. **Overseas Racing**

- 6.1 We understand that the Chairman of the BC has asserted the existence of a "deal" with Racing to end the Levy on overseas racing. We reject any such suggestion:

¹⁹ Our concern is that the current attitude of the BC on this issue, as in a number of other areas, is simply intended to stifle debate. We regard that as unhelpful in the context of a wide reaching review on the future of the Levy.

6.1.1 Firstly, we do not accept in principle that acquiescence by Racing with a previous scheme which excluded the Levy from overseas racing constitutes a "deal" which should, or can, restrict subsequent schemes. The Levy is a statutory scheme agreed on an annual basis. Indeed, if this analysis were correct, the BC's acceptance of the 48th Scheme would surely prevent any further argument in relation to other contentious issues such as Turf TV.

6.1.2 Secondly, we have considered the reasons for removal of the Levy on overseas racing. We refute the notion of any such "deal". Rather, Racing accepted that in an environment where the exploitation of intellectual property rights in pre-race data by way of commercial licences would provide a commercial relationship with operators wanting to offer a bet on British racing, the payment of a levy by UK bookmakers on overseas racing would be anachronistic. As you will be aware, the possibility of monetising such rights at a substantial level was prevented by William Hill's successful challenge at the ECJ of intellectual property rights in pre-race data. As a consequence, the Levy remains, the principled position is as it was, and the market conditions upon which overseas racing was removed from the Levy do not apply²⁰.

6.2 On the contrary, for the reasons set out at paragraph 1.3 above, our view is that the income received by bookmakers from overseas racing *must* be leviable. This is because Section 27(2)(a) unambiguously provides that the levy is payable on any part of a bookmaker's business which "relates to" betting transactions on *horse races*. No distinction is drawn in the 1963 Act between betting transactions on races which take place in Great Britain or elsewhere. In our view, the only remaining question is to set a reasonable rate of levy return to be applied to such revenues.

7. "48 Hour Declarations"

7.1 We note that the Levy Board has requested information in relation to "Racing's case for the continuation of 48 Hour declarations". However, we have nothing to add to our previous submissions in this regard. Indeed, we have separately confirmed to Mr Erskine-Crum that we are perplexed as to why the issue of "48 Hour Declarations" is included in this process at all. "48 Hour Declarations" are a Rule of Racing, like many others which set out entries, declarations etc. Many, if not all, of these Rules could be said to have a bearing on the sport as a betting product. It seems odd that attempts should be made to "value" an apparent claim that there should be a reduction in Levy in the absence of a very clear positive "valuation" of what Racing's product is worth to the betting industry.

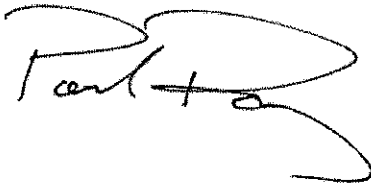
7.2 The modernisation process and your advice are intended to address how Racing should properly be compensated for the "value" of its product to the betting industry, whether in the context of 48 Hour declarations or otherwise. As you

²⁰ see also paragraph 3.2.4(a) our Racing's submission to the Secretary of State for the 47th Levy Scheme dated 26 November 2007.

know, Racing believes that the future for the funding of British horseracing lies in a system which rewards Racing for the commercial value it provides to the business of bookmakers and other stakeholders, and we further believe that the breadth of discretion given to the Secretary of State to determine the Levy allows such "value" issues to be taken into account now when determining the Levy. This approach has been consistently rejected by the BC, notwithstanding that their submissions include several value-based arguments, of which 48 Hour declarations is one example²¹, and which we say was further reinforced by their very strong demands for additional races on Sundays, late afternoons and early evenings.

We remain at your service to provide any further documentation or other assistance which you require, and look forward to seeing you on Tuesday.

Kind regards,

A handwritten signature in black ink, appearing to read 'Paul Roy', with a large, sweeping flourish at the end.

Paul Roy
Chairman

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cc: Douglas Erskine-Crum, HBLB

²¹ in relation to overseas racing, the BC asserts in its letter of 24 October 2008 that British racing does not deserve a return from a product generated by racing authorities elsewhere. That is clearly a "value" argument, as is their complaint that "Racing has never invested in marketing to benefit bookmakers." (Paragraph 76 of the Bookmakers' Committee Memorandum in response to the written submissions made to the Secretary of State for Culture, Media and Sport concerning the determination of the 47th Levy Scheme by the Government-appointed members of the Horserace Betting Levy Board and the British Horseracing Authority, 7 January 2008).