

EXPLANATORY MEMORANDUM TO
THE HORSERACE BETTING LEVY REGULATIONS 2017

2017 No. 589

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Culture, Media and Sport ('DCMS') and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 These Regulations extend the Horserace Betting Levy ('the Levy') to all gambling operators who offer bets on horseracing in Great Britain, including operators required to hold a remote operating licence (within the meaning of the Gambling Act 2005).¹ The basis on which the levy is calculated is changed to a fixed rate; that rate is 10% of the amount by which an operator's profits on bets that relate to horseracing in Great Britain made by a person in Great Britain exceed £500,000. The Regulations make provision for the levy rate to be reviewed within seven years; they also make consequential changes to the powers of the Horserace Betting Levy Board ('Levy Board') to enable it to properly administer the new Levy scheme.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory

- 3.1 These Regulations are being made using the power in s.2 of the Gambling (Licensing and Advertising) Act 2014 ('2014 Act') and section 2(2) of the European Communities Act 1972. Section 2 of the 2014 Act is a broad power giving the Secretary of State power to make provision 'so as to secure' extension of the levy to bookmakers liable to pay the Levy under s.27 of the Betting, Gaming and Lotteries Act 1963 ('1963 Act') required to hold a remote operating licence. The Levy is a pre-existing State aid and European Commission approval is needed to be able to implement extension. The State aid context was explained during the passage of the 2014 Act.² So as to secure extension, the Department is required to make additional changes to the Levy to make it compatible with State aid rules. To the extent necessary to do so (in particular in relation to the criminal offences being extended) s.2(2) of the European Communities Act 1972 is also relied upon.

¹ Remote gambling means using the internet, telephone, television, radio, or any other kind of electronic or other technology for facilitating communication.

² See relevant Hansard links:

[Lords Committee Stage](#)

[Lords Report Stage \(amendment 5\)](#)

[Lords Third Reading](#)

[Commons Programme Motion and Ping Pong](#)

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland.

4. Legislative Context

4.1 The Levy was established by the 1963 Act. It is a pre-existing State aid, being in place before the United Kingdom's accession to the European Economic Community in 1972. As such it has not been subject to assessment under State aid rules. Extension of the Levy to offshore bookmakers is a material change to the existing scheme, which requires approval from the European Commission. In assessing compatibility the Commission will be assessing the entire Levy scheme as it would be extended. In June 2013 the Commission approved a similar horserace betting levy in France (the French Parafiscal Levy) (see C34/2010).³

4.2 DCMS considers the following changes are necessary to make the Levy compatible with EU State aid rules:

- i. adopting a transparent and objective (i.e. fixed rather than annually agreed) rate at which the levy is charged,
- ii. ensuring the rate at which the levy is charged is limited to the mutual interest between racing and betting in the organising of British horseraces on which bets are taken (i.e. the basis of approval for the French parafiscal Levy), and
- iii. ensuring there are no discriminatory elements in the operation of the scheme.

4.3 The State aid context of Levy reform was clear to Parliament during the debates on the 2014 Act.⁴ The power in s.2 of the 2014 (under which these Regulations are being made) was introduced as a Government amendment in the House of Lords. In introducing the amendment the DCMS Lords' Minister, Lord Gardiner of Kimble, stated:⁵

- i. the Department's view is that the Levy is a State aid (as confirmed by the French Parafiscal decision),
- ii. as such the European Commission's approval is required before the UK could implement extension of the Levy to bookmakers required to hold a remote operating licence from the Gambling Commission,
- iii. changes to the Levy scheme would likely be necessary to be made to the Levy scheme before extension could be implemented compatible with State aid rules,
- iv. the power being inserted into the Act (as s.2) was broadly drafted to enable the Secretary of State to make those changes.

4.4 The United Kingdom notified its proposal to extend the Levy to the European Commission on 13 January 2017. These Regulations are being laid in advance of that approval being given. If these Regulations are approved by Parliament they will not be made until that approval has been obtained. Therefore the commencement provision is expressed in the alternative. Regulation 3 makes provision if the Regulations

³ [European Commission decision of 19 June 2013 on State aid No SA.30753 \(C 34/10\) \(ex N140/10\)](#).

⁴ See Hansard references at footnote 2.

⁵ Amendment introduced at [Third Reading](#).

commence after 1st April 2017. If that happens the 56th Levy Scheme will run until these Regulations are made and thereafter fall to be finalised under existing rules.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales and Scotland.

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6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for Sport and Tourism, Tracey Crouch MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Horserace Betting Levy Regulations 2017 are compatible with the Convention rights.”

7. Policy background

What is being done and why

7.1 The Levy was established by the 1963 Act. Provision about the Levy is also made in the Horserace Betting Levy Act 1969 (‘1969 Act’) and the Horserace Betting Levy Act 1981 (‘1981 Act’). The Levy is paid by bookmakers for the purposes of aiding the horseracing and equine sector; it recognises the mutual interest racing and betting share in a thriving racing industry. It is assessed, collected and applied by the Levy Board, an arm’s-length body of the DCMS.

Extension of the Levy to all betting operators

7.2 It is doubtful the 1963 Act extends to bookmakers based outside Great Britain. Therefore those bookmakers based offshore who take bets on British horseracing are not currently liable to pay the statutory Levy. The result has been an unfair two-tier system whereby a bookmaker physically based in Great Britain must pay the Levy, whereas bookmakers who are based offshore do not, in otherwise identical circumstances. The statutory Levy also does not currently extend to betting exchange providers as they do not fall within the definition of the current definition of bookmaker in the 1963 Act.⁶

7.3 All of the major gambling operators active in the British market are based offshore and remote gambling (primarily via the internet) is now the largest gambling sector. This has contributed to a significant (and ongoing) decline in Levy receipts, with the statutory Levy falling from £115 million 2007/08 to £54.5 million in 2015/16.

7.4 Attempts to implement a non-legislative solution have been unsuccessful. There have been a number of efforts over the last decade to broker voluntary deals to ensure that betting exchange providers and offshore bookmakers benefitting from the British racing product contribute to the industry. During this time some of these operators have made voluntary contributions to the Levy, but no satisfactory solution has been found. The Government therefore concluded that there is no alternative but to take legislative action.

⁶ This was confirmed by the decision of the Court of Appeal in *R (William Hill & Anor) v Horserace Betting Levy Board & Ors.* [2013] EWCA Civ 487.

- 7.5 These Regulations extend the Levy to all operators who take bets related to horseracing in Great Britain as a bookmaker (including pool betting and spread betting operators) and/or as a betting exchange provider. This includes those who are required to hold remote operating licences from the Gambling Commission.

Basis of calculation for the levy

- 7.6 The Levy amount payable is now determined by reference to a fixed rate. This is a change from the current regime where the Levy scheme is agreed on an annual basis by the Levy Board on recommendation of the Bookmakers' Committee, or determined by the Secretary of State where the parties are unable to agree.⁷
- 7.7 That rate is 10% of profits on leviable bets which exceed £500,000 in any Levy period as a bookmaker or betting exchange provider (see s.27(1) to s.27(1D) of the 1963 Act). Levy periods run from 1 April to 31 March in any given year. A leviable bet is defined in s.29A(1) of the 1963 Act as a bet which relates to horseracing in Great Britain made by a person (whether in person or remotely) who is in Great Britain when the bet is made.
- 7.8 A bookmaker's horseracing betting profits are determined in accordance with the following formula, in relation to bets taken on British horseracing (see ss.27A and 27B of the 1963 Act):

$$SM + OA - W$$

where—

SM (stake money) is the aggregate of the stake money falling due to the bookmaker in the levy period. Specific provision is made in respect of bets made in pursuance of a free offer from a bookmaker. An amount that would otherwise have had to be staked when taking up the first offer is to be treated as stake money. But conditional winnings from a previous free offer is not to be included as stake money.

OA (other amounts) is the aggregate of any other amounts accruing to the bookmaker in the levy period. This captures that money which is not ordinarily understood as stake money. For example, the revenue share payable across general bets and pool bets. It is also intended to future proof the legislation insofar as it is broad enough to apply to new (as yet unknown) business models and bet types, such as already occurs in relation to participation fees in poker and American fantasy sports betting.

W (winnings) is the aggregate of any winnings paid by the bookmaker in the levy period including winnings in money or kind.

- 7.9 Betting exchange providers are liable to pay levy on commission charged to any party to a bet made using the betting exchange facilities (see s.27C).

Levy rate of 10%

- 7.10 In arriving at a rate of 10% DCMS considered a range of sources including responses to the previous consultations, and Gambling Commission statistics on the levels of betting activity on racing and profit levels on both the remote and land-based market.

⁷ Since 2010 it has fallen to the Secretary of State to determine the scheme on three occasions: 2011, 2015 and 2016.

The government considered the betting industry's commercial payments to the racing industry, including media rights, in arriving at the rate

- 7.11 The Government also commissioned an independent economic report into racing's costs and income, which considered a three year period. The report was one of a range of sources used to determine the rate payable under the reformed Levy. We estimate that a rate of 10% would have produced a yield of between £72 and £84 million, based on the Government's analysis of the market in 2015/16. This estimate includes a number of assumptions and caveats, and is not an assessment of future yield. In setting the rate as a percentage of horserace betting profits it ensures that levy payments are affordable for betting operators, as their payments will adjust in line with the level of benefit they derive from the racing product.

Levy exempt amount

- 7.12 The current Levy regime contains a number of systems of discounts, for example the headline rate of is 10.75% of a bookmaker's gross profits on British horseracing, on-course bookmakers pay a flat fee, and spread betting firms pay a reduced percentage rate (2.5%). DCMS recognises the need to continue to minimise the burden on operators with lower profits on racing, both land-based and offshore. This will reduce the risk of disproportionate costs or administrative burdens falling on smaller operators and reduce the risk of the Levy acting as a barrier to betting operators entering the market. Therefore an exempt amount of £500,000 has been adopted (see s.27D of the 1963 Act). DCMS considers that this strikes an appropriate balance; the effect is that the majority of small and medium-sized operators will not incur levy liability. It is estimated that the total amount of Levy foregone by this *de minimis* threshold would be less than 5% of the total estimated yield.
- 7.13 The exempt amount applies to single undertakings. Where an operator is a parent or subsidiary of another operator (within the meaning of the Companies Act 2006) the group is entitled to a single exempt amount between them for the levy period. The group may allocate the exempt amount between them as they think fit and are required to notify the Levy Board as to the allocation (see s.27D of the 1963 Act).

Review of the levy rate

- 7.14 To ensure that the Levy rate can be responsive to future changes in the market, the Secretary of State must, within seven years, review whether the levy rate in s.27(1A) of the 1963 Act remains appropriate to achieve the Levy purposes in s.24(1)(a) to (c) of the 1963 Act (see regulation 5). This does not prevent the Minister reviewing the rate if necessary before seven years. The period of seven years is intended to strike a balance between providing certainty for the betting and racing industries to allow them to plan commercial strategies and long-term investments with confidence, while ensuring the Levy can respond to changes in the market.

Levy Board powers necessary to administer the Levy

- 7.15 Under the current Levy regime the powers of the Levy Board to administer levy schemes depend on the contents of the levy scheme agreed between the Levy Board and Bookmakers' Committee. There is a need to bring those powers out of the scheme into the 1963 Act so as to ensure the Levy Board has the powers it requires to be able to administer the Levy in the manner it is currently administered. The powers being given to the Levy Board are therefore not new; the intention has been to closely mirror the existing regime. They are to:

- obtain information from betting operators which is necessary to properly assess an operator's liability to levy under the 1963 Act (see s.27E of the 1963 Act); and
- require payments on account to ensure continuity of funds (see s.1 of the 1981 Act). The current process by which Government-appointed members of the Board determine the amounts to be paid on account has been retained. Those amounts are then reconciled at the end of the levy period upon assessment (see s.28 of the 1963 Act).

Betting operators' representative on the Levy Board

- 7.16 As the annual process for agreeing the Levy scheme is ceasing, the requirement for the Bookmakers' Committee falls away. As such the Chairman of the Bookmakers' Committee will no longer hold a position on the Levy Board. DCMS considers betting operators should retain a presence on the Levy Board. Therefore the Regulations provide for two betting trade bodies, the Association of British Bookmakers and the Remote Gambling Association, to nominate a representative to the Levy Board to represent bookmakers' interests (see s.24(2)(d) of the 1963 Act).

Enforcement

- 7.17 No changes are made to the existing enforcement mechanisms. The Levy Board will continue to be able to pursue non-payers via civil recovery (see s.28(7) of the 1963 Act) or through the Gambling Commission licence (see Gambling Act 2005 (Horserace Betting Levy Order 2007 (S.I. 2007/2159)). It is also noted that s.28(10) of the 1963 Act has been redrafted as s.28A and s.4(3) of the 1981 Act amended to extend the benefit of those provisions to all operators liable to the Levy.

Future changes

- 7.18 Finally, DCMS notes for the information of the Committee that these changes constitute the first phase of changes intended to the Levy. A second phase will make changes to the administration of the Levy and abolish the Levy Board. It is intended those changes will be enacted by way of a Legislative Reform Order.

Consolidation

- 7.19 There is no intention to consolidate the relevant legislation. However, to assist the Committee with its consideration of this instrument, we attach a keeling schedule showing consolidated changes being made in the Schedule to the 1963, 1969 and 1981 Acts.

8. Consultation outcome

- 8.1 The previous Government held three public consultations on the Levy in 2014/15. The options explored through the consultation ranged from extending the existing Levy to a more radical approach of replacing it with a rights-based model:
- The first consultation was titled 'Extending the Horserace Betting Levy' and ran for eight weeks from 26th June 2014 to 21st August 2014, generating 23 responses.

- ii. The second consultation was titled ‘Modernising the Horserace Betting Levy - A consultation on reform or replacement’ and ran for 10 weeks from 27th August 2014 to 5th November 2014, generating 101 responses.
 - iii. The third consultation was titled ‘Horserace Betting Right: A consultation on potential structure and operation’ and ran for four weeks from 5th February 2015 to 12th March 2015, generating 143 responses.
- 8.2 Responses to all three consultations were received from a range of respondents including individual members of the public, companies involved in the betting and racing sectors and trade associations. Overall, responses to the consultations were divided with very different outcomes favoured by the two industries. The vast majority of respondents from the betting industry argued there was no need for a statutory Levy, but if there was, they favoured retaining or reforming the current Levy system. The racing industry’s overarching aim was to secure a fair contribution for the sport from offshore betting operators.
- 8.3 Through the consultation process it was argued that there should be more research and economic modelling of the racing industry. The Government agreed the importance of ensuring a robust analysis, and in August 2015 commissioned an independent report of the funding of horseracing. The report was one of a range of sources used by Government to inform the policy design of the new measure.
- 8.4 In March 2016 the Government published a response to the consultation process. The Government decided that reforming the current levy was the most appropriate way to achieve the key policy objectives of ensuring that all operators that benefit from British racing contribute to the sport, and remove Government as far as possible from day-to-day involvement in the Levy.
- 8.5 This approach addressed the principal issues raised during the consultation process: the betting industry had significant concerns with proceeding to a rights-based model, and the racing industry’s overarching objective was to secure a fair contribution from offshore betting operators. A full analysis of the consultation responses is available on the Government website at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508313/Implementing_the_replacement_for_the_Horserace_Betting_Levy.pdf
- 8.6 DCMS Ministers and officials have continued to engage with both industries on further detail of the reform. For example on 14 October 2016, the Minister issued a letter to the parties indicating the detail of the reforms she was minded to make and seeking further representations by 4 November. Both racing and betting responded to that letter. Racing supported the Levy reform proposed. The betting industry argued that a rate of 10% was too high and failed to take account of the commercial deals in place between the industries. Betting argued that the rate should be substantially lower. A further letter was sent on 28 November 2016 relating to treatment of spread betting and on-course bookmakers. Responses to these letters were considered before final decisions were made, and Ministers and officials have also met with representatives from both industries on numerous occasions to discuss levy reform and have sought to build consensus where possible.

9. Guidance

- 9.1 The Horserace Betting Levy Board, as the independent arm’s-length body responsible for assessing and collecting the Levy, will provide guidance as appropriate to

operators liable to pay the Levy. The Levy already applies to operators based in Britain. Therefore the actual number of operators who are not familiar with the Levy is small and likely to be limited to remote operators wholly based offshore.

10. Impact

- 10.1 This measure does not increase the annual net cost to business, as the Levy represents a transfer from one industry (betting) to another (racing). However there will be a small saving due to the abolition of the Bookmakers' Committee, and therefore we estimate the annual saving to business to be a net total of £0.2m. There is no impact on charities or voluntary bodies.
- 10.2 There is no impact on the public sector.
- 10.3 As this measure relates to the setting and administration of a levy, the Regulatory Policy Committee has advised that this is not a regulatory provision and therefore an Impact Assessment is not required.

11. Regulating small business

- 11.1 The instrument applies to activities that are undertaken by small businesses.
- 11.2 The levy exempt amount will reduce the risk of disproportionate costs or administrative burdens falling on operators that make relatively modest profits on British racing, and will reduce the risk of the Levy acting as a barrier to operators entering the market. The Government estimates that this measure will remove the vast majority of small businesses from the requirement to pay.

12. Monitoring & review

- 12.1 The responsible Minister will conduct a review of the Levy rate within seven years of the instrument coming into force. A provision to enable this review is included in this instrument in regulation 5. The impact of this measure will be monitored by the DMCS which is responsible for gambling regulation in Great Britain.

13. Contact

- 13.1 David Hughes at the Department for Culture, Media and Sport. Telephone: 020 7211 6335 or email: david.hughes@culture.gov.uk can answer any queries regarding the instrument.