

The British Horseracing Board and the Jockey Club: a summary of the OFT's case

April 2003

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1 INTRODUCTION

- 1.1 The Office of Fair Trading (the 'OFT') has today issued Notices to the British Horseracing Board (the 'BHB') and the Jockey Club, setting out its preliminary conclusion that aspects of the Orders and Rules of Racing¹ infringe the Chapter I prohibition of the Competition Act 1998 (the Act), which prohibits anticompetitive agreements.² The Orders and Rules form part of a number of agreements notified to the OFT on 28 June 2000.
- 1.2 This paper explains the OFT's provisional findings and conclusions and sets out the possible next steps in the case.
- 1.3 The BHB and the Jockey Club now have the opportunity to put their case against the proposed infringement decision to the OFT. Any representations will be carefully considered before a final decision is made.
- 1.4 The purpose of this summary is to inform third parties, especially in the racing world, about the OFT's proposed action and to make clear the specific aspects of the Orders and Rules in respect of which the OFT has set out its concerns.
- 1.5 In essence, the OFT has taken the preliminary view that certain Orders and Rules infringe the Act, on the grounds that they have the combined effect of:
- limiting the freedom of racecourses to organise their racing, in particular by fixing how often and at what times they stage races and the type of racing they stage
 - fixing the amounts racecourses must offer owners to enter their horses in a race and
 - monopolising the supply of race and runners data to bookmakers by foreclosing competition from alternative suppliers.
- 1.6 The OFT proposes to require the BHB and the Jockey Club to end these apparent infringements of the Act to increase the freedom of racecourses operating under the Orders and Rules to compete and to open up the market for potential competition in the supply of race and runners data.

¹ For simplicity, the term 'Orders and Rules' is used in this summary to cover Orders, Rules, Instructions and/or General Instructions, as appropriate.

² For the purposes of the Act and this document, references to agreements include concerted practices and decisions of associations of undertakings.

2 THE OFT'S TREATMENT OF SPORTS CASES

- 2.1 Agreements between undertakings in the sports sector are subject to the provisions of the Act to the extent that they may affect competition in the UK. The OFT accepts that non-commercial sporting rules, such as specifying the earliest age at which horses can run, how starting stalls should be operated, how jockeys are allowed to use their whips, or how horses are to be tested for doping, are unlikely to affect competition. Additionally, the OFT accepts that the application of the competition rules in the Act to a sport should be sensitive to the distinctive characteristics of that sport. Consequently, the OFT considers that, even if they may have some negative effects on competition, certain sporting rules will not infringe the Chapter I prohibition if they are essential to enable the sport to operate. In particular, the OFT is aware that, in certain sports (e.g. those involving leagues), there may be a need for a degree of co-operation between competing adversaries for the sport to take place.
- 2.2 However, the OFT considers that certain of the Orders and Rules of Racing are not compatible with the Chapter I prohibition on such grounds. First, because the Orders and Rules contain some serious restrictions of competition, such as limitations on organising races and market sharing. These have significant economic and commercial consequences. Second, because the restrictive aspects of the Orders and Rules are not essential for achieving the objectives that the BHB and the Jockey Club maintain they promote.

3 THE PARTIES AND THE AGREEMENTS THEY HAVE NOTIFIED

The Jockey Club

- 3.1 The Jockey Club was founded in 1752, and was, until 1993, solely responsible for the governance and regulation of horse racing in Great Britain. In 1993 the Jockey Club decided to transfer certain functions to a new body, the BHB.
- 3.2 The Jockey Club is responsible for registering and licensing horses, racecourses, owners, trainers and jockeys. A requirement of licensing and registration is that racing participants abide by the Orders and Rules. The Jockey Club is also responsible for the conduct of racing, including: safeguarding the integrity of racing (essentially ensuring the public can trust the racing they are watching and betting on); racecourse medical and veterinary arrangements for riders and horses; employment and direction of its racecourse officials; and disciplinary matters. Through the Racecourse Holdings Trust, the Jockey Club also owns 13 British racecourses.

The BHB

- 3.3 The BHB has four members: the Jockey Club; the Racecourse Association Ltd; the Racehorse Owners Association Ltd; and the Industry Committee (Horseracing) Ltd (representing trainers, jockeys, stable lads and others). The BHB's main responsibilities include: strategic planning of, and formulating policy for, British horseracing; representing the interests of British horseracing to bookmakers; the collection and control of funds required for the administration of racing; central marketing and promotion of British racing; controlling the Fixture List; race planning; and encouraging the breeding of bloodstock.
- 3.4 The BHB and the Jockey Club are responsible for adopting, implementing, operating and enforcing the Orders and Rules.
- 3.5 The BHB and the Jockey Club notified a number of agreements concerning the governance, administration and management of horseracing in Great Britain to the OFT for a decision that the notified agreements did not infringe the Chapter I prohibition or, if they did infringe, for an individual exemption. The documents notified to the OFT included the Orders and Rules.

4 PROPOSED INFRINGEMENT FINDINGS

Limiting the freedom of racecourses

4.1 The BHB controls the allocation of fixtures and the content of race programmes. It is fundamental to competition that each producer, in this case each racecourse, should determine its output (here, horseraces) independently. It is the OFT's preliminary view that the Orders and Rules limit racecourses' freedom to organise races in two ways.

The allocation of fixtures

4.2 The Orders and Rules give the BHB the power, at its discretion, to fix the dates on which all races may be held and to cancel or alter these, again at its discretion.

4.3 The Orders and Rules deprive racecourses of the freedom to organise their own fixtures, by giving the BHB the exclusive power to do this. The OFT has reached the preliminary view that this infringes the Chapter I prohibition of the Act on three grounds, because it:

- restricts racecourses' output – most racecourses wish to race more often and have the capacity to do so, but are restrained by the BHB; racecourses cannot re-schedule fixtures to meet demand; successful racecourses cannot expand; and entry of new racecourses is restricted
- restricts and distorts the balance between racing codes – this allows the BHB, for example, to decide what is the appropriate balance between national hunt racing, flat and all-weather racing, independent of actual customer demand and
- shares the market between racecourses – for example, the BHB's policy and practice is to ensure that racecourses located within 50 miles of each other do not stage racing at the same time under the same code.

Content of programmes

4.4 The OFT has also identified Orders and Rules that control courses' programme content. These include:

- setting the maximum number of races a racecourse can include on a racecard

- determining the mix of races on a racecard – e.g. the number of handicap races allowed
- restricting how races can be classified and
- preventing racecourses from racing at the same time of day as other courses.

4.5 The evidence before the OFT suggests that, in the absence of centralised BHB control of racecards, racecourses would be free to respond to consumer demand by increasing the number of races on a card; changing the mix of races; changing the way they classify races; and providing more racing opportunities for lower rated horses. The OFT’s preliminary view is that, by denying courses freedom to respond to demand in this way, the Orders and Rules infringe the Chapter I prohibition.

Fixing the price of racing

4.6 The OFT has also identified some Orders and Rules restricting the freedom of racecourses with respect to the net price of racing for racehorse owners that, in its preliminary view, infringe the Act. These can be grouped under five headings:

- regulations setting minimum prize money
- regulations determining how racecourses should allocate prize money across different types of race
- regulations requiring racecourses to allocate prize money across placed horses in a certain way
- regulations setting a maximum prize level for racing that would otherwise compete with the top races (known as ‘Pattern’ races) and
- regulations specifying minimum and maximum stakes that can be charged to owners.

4.7 The OFT proposes to find that these are forms of price fixing that seek to restrict, and/or have the effect of restricting, price competition. The OFT also proposes to find that the setting of maximum prize levels for non-Pattern racing is also a form of market sharing, as it prevents competition with Pattern races. As a result, the OFT proposes to find that these regulations infringe the Chapter I prohibition.

Preventing entry into the market for race and runners data

- 4.8 Currently, British racecourses cannot independently exploit the basic, but commercially most important, information relating to their activities, namely race and runners data. This is the essential data concerning an individual race and the horses running in it that a bookmaker needs to take bets on a race. This is a key asset, as all bookmakers need this data. This data is currently only available from the BHB. While a bookmaker may buy live coverage rights direct from racecourses, it must go to the BHB for the corresponding data. Racecourses are therefore dependent on the BHB for the largest part of their income. There is an effective monopoly in the supply of this data, a position that the OFT considers is created and maintained by the operation of the Orders and Rules.
- 4.9 The Orders place an obligation on owners and trainers to notify prospective runners in a race to the Racing Calendar Office ('RCO') (currently the BHB's agent, Weatherbys). This provides the BHB with a complete database of race and runners, access to which it then sells to bookmakers. For a racecourse (or other party) independently to supply such data, that racecourse would first have to compile its own set of race and runners data. However, the Orders and Rules have the effect of preventing racecourses (and third parties) from being able to gather the necessary data to compete in the market for the supply of runners and riders data to bookmakers.
- 4.10 The OFT considers that the Orders and Rules underpin the BHB's monopoly supply of race and runners data and stop both racecourses and third parties from collating and supplying race and runners data on a commercial basis directly to bookmakers in competition with BHB. As a result, the OFT proposes to find that the Orders and Rules relating to race and runners data infringe the Chapter I prohibition.

5 EXEMPTION

- 5.1 The OFT may exempt an agreement from the Chapter I prohibition if it (i) contributes to improving production or distribution or (ii) promotes technical or economic progress, while allowing consumers a fair share of the resulting benefit; **provided that** the agreement does not (iii) contain any restrictions that are not indispensable to the attainment of those objectives or (iv) allow the undertakings concerned substantially to eliminate competition. The OFT does not consider that these requirements are met in this case.
- 5.2 The OFT recognises that customers – including bookmakers, owners and racegoers – want orderly and trustworthy racing. Racecourses will respond to this. As a result, the OFT considers that the Orders and Rules currently go beyond what is indispensable to ensure a viable, orderly and trusted British racing industry.

6 NEXT STEPS FOR THE BHB AND THE JOCKEY CLUB

- 6.1 The BHB and Jockey Club have now been notified that the OFT proposes to make a decision that certain of the agreements notified to it by the BHB and the Jockey Club infringe the Chapter I prohibition, for the reasons summarised above, and do not qualify for an exemption.
- 6.2 The BHB and the Jockey Club will now be given access to the OFT's case file (excluding internal documents and documents containing confidential information) and will have an opportunity to make written and oral representations to the OFT. After it has received these representations, the OFT will decide whether to proceed with a final infringement decision.

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