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to panel members.



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By post and by email

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Dear Mr Davies

FREE-TO-AIR EVENTS REVIEW

This letter sets out the comments of European Rugby Cup Limited ('ERC') on the issues identified in the DCMS consultation paper regarding the listing of sporting or other events by the UK Government pursuant to Part IV of the Broadcasting Act 1996. ERC would be greatly impacted by any listing of the rugby union competitions that it organises, and we would therefore be grateful if the Advisory Panel would give our comments careful consideration, even at this late stage in the consultation process.

1. **Overview**

1.1 ERC is a private limited company incorporated in Ireland. Its shareholders are the national rugby unions of England (the Rugby Football Union), Scotland (Scottish Rugby Union plc), Ireland (the Irish Rugby Football Union), Wales (Welsh Rugby Union Limited), France (the Fédération Française de Rugby), and Italy (the Federazione Italiana Rugby) (collectively, the 'Unions'). Its stakeholders are those Unions as well as the elite clubs/districts/provinces playing in those Unions' respective national territories.

1.2 The Unions are the custodians of the sport of rugby union in their respective territories, charged with governing and regulating the sport, protecting its integrity and the safety and security of its participants, and promoting and developing the sport both as an amateur pastime and as an elite enterprise, for the long-term good of the sport as a whole.

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- 1.3 The Unions established ERC in 1995 to organise and run annual cross-border competitions below international level for the Unions' respective elite clubs/provinces/districts, i.e., the elite professional teams that provide the players who represent their Unions in international competitions such as the annual Six Nations Championship and the quadrennial Rugby World Cup. The intention was to promote the development of the sport in Europe by increasing exposure to top-class competition and so improving playing standards, but also to ease the conflict between club and country that has bedevilled rugby union since the advent of professionalism, by generating commercial revenues to be distributed to the Unions' clubs/districts/provinces.
- 1.4 In short, ERC is the vehicle by which the Unions and their key stakeholders have decided to promote and develop club rugby in the Northern Hemisphere, on a collective basis, set out in a detailed written accord and agreement that they have all signed up to, in the best interests of Northern Hemisphere rugby as a whole.
- 1.5 ERC's current competitions, acknowledged by the sport's international federation (the International Rugby Board) as the premier European inter-club competitions, are the European Rugby Cup (aka The Heineken Cup) and the European Challenge Cup (together, the '**Tournaments**'). The Heineken Cup is contested annually by 24 teams, organised into six pools of four teams each. Each team plays the others in its pool home and away over six weekends in the pool stage of the tournament, with the top eight qualifying for the knock-out stages, then quarter-finals, semi-finals and the final, over three further weekends. The European Challenge Cup is contested annually by 20 teams organised into five pools of four each, but otherwise has the same format as the Heineken Cup.
- 1.6 The Tournaments have been a substantial success at a sporting level, creating opportunities for cross-border competition that did not exist before, and so improving playing standards as well as broadening access for supporters to top-class rugby union involving the very best players within the six Unions, the stars of the annual international event, the Six Nations Championship. Players, officials and fans alike attest to the significant contribution that the Tournaments have made to the enormous advances that European club rugby has made in the past 14 years, not only in the larger territories of England and France but also in the Celtic Unions and Italy. In this way, the Tournaments have made a significant contribution to the strengthening of the competitive playing base across the Unions in the Northern Hemisphere.
- 1.7 The Tournaments have also been relatively successful at a commercial level. All of the broadcasting and sponsorship rights to the Tournaments are controlled and exploited by ERC centrally. The clubs/districts/provinces keep gate money and advertising revenue generated locally, and also receive their share of central commercial revenues from ERC distributions. In times of uncertainty, attracting major investment from commercial partners has not been easy, but ERC has managed to generate central revenues that have formed vital commercial income for its club/district/province stakeholders, used by those stakeholders to attract the best talent and coaching staff, to

provide safe and comfortable facilities for spectators, and to invest in their own community and other projects.

1.8 It remains the case, however, that ERC remains under intense pressure and scrutiny from its stakeholders to generate as much commercial revenue as possible in what will always be a very competitive marketplace. ERC and the Unions are under no illusion that any material reduction in the commercial revenues generated by ERC and distributed to the clubs/provinces/districts would put the current arrangements under serious pressure. The fact that international matches occupy many of the prime weekends in the rugby union calendar mean that the clubs/districts/provinces (and the English and French clubs in particular) are very concerned to maximise revenues from every single remaining slot in the schedule, and ERC must meet their expectations in order to ensure their ongoing commitment to the Tournaments (and so to the collective development of Northern Hemisphere rugby).

1.9 Absolutely crucial to the generation of those revenues is the successful exploitation of the broadcasting rights to the Tournaments. Neither of the Tournaments is currently listed under Part IV of the Broadcasting Act 1996, and ERC does not have a policy in favour of pay-TV or free-TV, per se. Instead, ERC's only objective is to ensure broad, international-standard coverage of its Tournaments, by broadcasters who are willing to make the same commitment to and investment in the Tournaments as ERC and its stakeholders. This is seen in ERC's current broadcasting arrangements for the Tournaments, which can be summarised as follows:

UK: Currently Sky has live rights, with highlights coverage on free-to-air (FTA) broadcaster S4C.

Ireland: Sky has live rights, with highlights coverage on public FTA broadcaster RTE.

France: Public broadcaster France Télévisions has live and delayed rights. It has sub-licensed certain rights to the Heineken Cup to Canal Plus and certain rights to the Challenge Cup to Eurosport.

Italy: Sky Italia has live and delayed rights.

Overseas: Outside of the host nations, ERC's agency Pitch International distributes the rights to the Tournaments to a broad range of overseas platforms.

1.10 These broadcasters pay ERC significant rights fees for the rights granted to them. They also produce international-quality live feeds and/or recordings of each match in the Tournaments free of charge, for exploitation by ERC, its clubs, and all of its licensees. And they commit to broadcast a minimum number of those matches on their own platforms on a live and/or delayed basis, so guaranteeing a minimum amount of exposure for the Tournaments and their respective sponsors. For example, Sky has committed to broadcast at

least six Heineken Cup matches live and in full in each round of the pool stage of the Tournament, and highlights of all other matches.

- 1.11 ERC and the Unions are well aware that the Tournaments form a showcase for the sport, and that it is in the long-term interests of the sport, and of its stakeholders, to ensure the widest possible access to the Tournaments. ERC has balanced those competing interests by granting the live rights to Sky, but reserving the right to make highlights packages available to free-to-air broadcasters in the UK.¹ In particular, in its latest agreement with Sky, going up to season 2013/14, ERC has retained the right to grant delayed highlights rights not only to S4C and RTE but also to a pan-UK free-to-air broadcaster, such as the BBC or ITV or Channel Five.
- 1.12 The key points that flow from the above account are that (a) ERC and the Unions are well aware of the various (and sometimes conflicting) considerations that impact on decisions as to how to exploit the broadcasting rights to the Tournaments, and are well capable of judging how best to strike a balance between those considerations; (b) while the Tournaments have been successful, club rugby is not yet at a level where it can compete even with international rugby union, let alone football and other elite sports; it is a compelling product for rugby enthusiasts, but not (so far) much beyond that pool; and (c) it is not an exaggeration to say that if Sky's financial contribution was taken away and not replaced, the future success of the Tournaments, and therefore of the development of club rugby in the Northern Hemisphere, would be severely at risk.
- 1.13 The Tournaments are not currently listed, and based on the current listing criteria ERC would suggest no one could properly argue that the Tournaments should be listed. More fundamentally, however, as set out below, because the listing of the Tournaments would strip away ERC's proprietary rights, as well as its right to determine what method of exploitation of those rights is in the best interests of Northern Hemisphere rugby, without any mechanism for ERC to be adequately compensated for the resulting loss, ERC objects to the listing of the Tournaments as a matter of principle.

2. **Question 1: Should listing continue?**

- 2.1 ERC is opposed as a matter of principle to the concept of listing, for the following reasons.
- 2.2 First, the only 'rights' implicated by the broadcasting of the Tournaments are rights that belong to ERC and its stakeholders. Those rights should not be interfered with unless there is clear and compelling justification, which is wholly absent here.

¹ ERC also retains the right to let the International Rugby Board include footage of Tournament matches in its magazine programme, Total Rugby, which is distributed internationally. In addition, from 2009/2010 on, ERC and its clubs will be broadcasting highlights of their matches on their respective websites, accessible without charge throughout the UK and elsewhere. This is in addition to radio broadcasts and broadcast of clips on mobiles, all of which ERC retains the right to do in its agreements with its principal broadcasters.

- 2.2.1 The Tournaments are not public assets, owned by ‘the nation.’ Rather, they are privately owned and organised events, the commercial rights to which are owned by ERC and its stakeholders. It is of course a key objective of ERC to consolidate and build upon the interest of rugby supporters in viewing the Tournaments, and ERC would love to expand interest in the Tournaments beyond the sport’s traditional supporters to the wider public. However, ERC does not accept that there is, or that there should be, a legally enforceable ‘right’ for members of the public to watch the Tournaments on FTA television.
- 2.2.2 Instead, the only rights at issue here are ERC’s own proprietary rights to sell the broadcasting rights to the Tournaments (including the copyright that it owns in the live broadcasts and the films and recordings of the Tournaments) as it sees fit. And as with any other property right, those rights are the subject of legal protection. See Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms: ‘*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one may be deprived of his possessions except in the public interest and subject to conditions provided by law. ...*’.
- 2.2.3 Clearly ERC’s rights are not unqualified: as Article 1 expressly states, they may be compromised ‘*in the public interest and subject to conditions provided by law.*’ However, Article 1 establishes a clear starting-point for analysis: the proprietary rights of ERC and its stakeholders should not be interfered with unless justified by a clear and compelling public interest. If such compelling justification cannot be clearly demonstrated, then no interference with ERC’s rights is warranted.
- 2.2.4 ERC submits there is no such justification: see paras 2.3 and 2.4, below. But even if there were, then the interference with ERC’s rights would have to be limited strictly to what can be shown to be proportionate to the legitimate objectives identified, and must be subject to proper conditions as to transparency, compensation, etc. (which do not exist under the current scheme -- see para 2.5).
- 2.3 The public interest arguments in favour of the listing of events have always been overstated, and have now in any event been overtaken by technological developments.
- 2.3.1 The public interest arguments in favour of the listing of certain events rely on various wholly subjective concepts, such as the assertion (made without reference to empirical evidence) that televised sport is a ‘*force for cohesion*’ in society. As noted below, however (see para 3.3), ERC does not believe these vague and subjective criteria form a proper basis for regulatory intervention (to the contrary, they demonstrate that the only proper way to demonstrate the public interest in an event is to ensure that there is a fair and open competition on the market for the broadcasting rights

to the event – if there truly is a compelling public interest in FTA access to the event, then the BBC will be constrained to use its public funding to acquire the rights). But even taking the *'force for cohesion'* argument on face value, ERC does not accept that without regulatory intervention that alleged *'cohesive'* effect would be lost.

2.3.2 For one thing, it by no means follows that de-listing would lead to a migration of previously listed events to exclusive pay-TV coverage. Instead, rights-owners can and should be trusted (see para 2.6, below) to make an appropriate judgment as to how to balance the need to generate commercial revenues with the desire to showcase their events to the widest possible audience.

2.3.3 Further, even were some listed events to transfer to subscription services, ERC believes that arguments that exclusive live coverage by subscription services hinders the *'cohesive effect'* of sporting events are grossly overstated:

2.3.3.1 First, while more homes have access to FTA television than to subscription-based television, Sky's subscription base is growing (approximately 8 million subscribers now), and its services are also widely available in pubs, clubs and sports centres. Those that wish to watch events on subscription services often do so with friends, either at a subscriber's home or in local pubs and clubs.

2.3.3.2 Second, live coverage on television is by no means the only available method for the public to follow sporting events. Television highlights programmes, radio broadcasts, news access (protected under EC law pursuant to the Audiovisual Media Services Directive), Internet and print media, all serve to keep sports enthusiasts and the wider public fully informed of major sports events.²

2.3.3.3 Third, a phenomenon of the past decade has been the establishment of large outdoor screens (or fan festivals) to show live sporting events. ERC has itself organised outdoor screening of matches in the Tournaments, which have proven hugely popular.

2.3.4 In addition, the public interest arguments previously advanced in favour of a system of listed events are increasingly anachronistic in an age where multi-channel television is the norm, scheduling is being increasingly replaced by on-demand content, and the concept of paying for premium content is increasingly accepted. New technology has emerged to challenge the dominance of the television as the primary form of content delivery in the United Kingdom. The

² ERC has been keen to embrace new means of content delivery to rugby union fans. For example, highlights from Tournament matches are made available on ERC's website and, from next season, on participating clubs' websites as well.

rise of the Internet, the proliferation of mobile phones, the possibility of transmission of video content by phone lines, delayed transmission services and personal video recorders, all serve (amongst other developments) to increase options for broadcasters and viewers alike. The digital switchover, scheduled for 2012, will further increase the range of television channels available within every home in the United Kingdom. This expansion of choice in both content and means of delivery ensures that the relationship between viewer and broadcaster will alter fundamentally. A viewer will no longer be bound to consume whatever is scheduled but will select what he wishes to receive, when, and how. The concept of limiting the broadcasting of certain events to qualifying FTA platforms runs counter to the trend of viewer (as opposed to state) choice as to accessibility of content.

2.4 Third, the public interest in access to premium sporting events is adequately protected by existing competition law, which ensure that sports broadcasting rights are exploited on a level playing-field, in a fair and transparent manner that achieves a fair market value and also encourages innovation and investment in a rapidly-changing sector. There is no justification for interfering with that balance to favour those FTA broadcasters that are not ready, willing or able to match the investments in sporting events that subscription platforms are willing to make.

2.4.1 This Government has emphasised repeatedly that there is a clear and compelling public interest in free and fair competition in the markets for the acquisition of goods and services. That is reflected in the strong prohibitions against anti-competitive conduct set out in the Competition Act 1998 (which tracks the same prohibitions in the Treaty of Rome), and in the enforcement and sanctioning powers given to the competition regulators, the Office of Fair Trading and the Competition Commission and (at the EC level) the European Commission.

2.4.2 And those regulators have repeatedly investigated the market for sports broadcasting rights, with a view to ensuring that the grant of broadcasting rights to particular events (including exclusive rights grants) do not operate to restrict competition in that market or to stifle innovation and investment. In so doing, they have recognised that grants of exclusive rights to premium sports events to any television platform need to be limited in scope and duration, to avoid excessive foreclosure of competition on the market for such rights. However, they have also recognised that prohibiting the grant of exclusive rights to subscription platforms completely is likely to prevent the emergence of new subscription platforms and so to undermine (not to promote) competition and innovation.³

³ See eg the decision of the Restrictive Practices Court in Re Televising Premier League Football Matches, [2000] EMLR 78, where the court upheld the Premier League's exclusive grant of broadcasting rights to Sky, on the basis that the acquisition of exclusive rights promoted competition

- 2.4.3 ERC would endorse the view that, as in any other sphere of industry, free competition in the market for sports broadcasting rights serves to encourage innovation and the maintenance of high standards, which can only be in the public interest. Undoubtedly, the competition that Sky and others have introduced into the UK market for sports broadcasting rights has improved investment in production and therefore in the quality of the sports programming product by all sports broadcasters, including FTA broadcasters, for the benefit of all stakeholders, including in particular the viewing public.⁴
- 2.4.4 Where the market for the broadcasting rights to premium sports events is open and fair, then the public interest in access to those events is safeguarded. If there is truly a sufficient public interest in free access to such events, i.e., on FTA television, then a FTA broadcaster (in particular the BBC, using the public funds represented by licence fee income) can vindicate that interest by bidding the most for the rights. In this way, the free market provides a clear and objective mechanism for identifying the public interest in access to premium sports events that regulators struggling with vague and subjective concepts of '*national resonance*' and '*social cohesion*' could never hope to emulate.
- 2.4.5 In short, the competition rules already place sufficient limits on the nature and scope of exclusivity of rights to a premium sports event that may be granted to a subscription platform, and guarantee fair access to those rights for all. The regulators have struck a careful and considered balance between the need to promote investment and innovation and the need to ensure other platforms have a fair opportunity to obtain the rights. To interfere with that balance, artificially denying the right of subscription platforms to bid on a level playing-field for exclusive rights to premium sports events, simply because FTA platforms may not be ready, willing or able to match the investments the subscription platforms are prepared to make in those events, is antithetical to proper competition policy, and not in the public interest.
- 2.5 Fourthly, where interference with an event-owner's proprietary rights would prejudice a vital income stream without which it cannot discharge its governance and developmental responsibilities as custodian of the sport, such interference cannot be justified unless the scheme includes proper, meaningful

between broadcasters (pages 216, 217), and indeed was necessary to enable a new entrant to differentiate its service and drive subscriptions (page 188).

⁴ See again the decision of the Restrictive Practices Court in Re Televising Premier League Football Matches, [2000] EMLR 78, at page 187 ('*while it is clear to us that Sky enjoys a very strong position in the provision of specialised sports channels ... the argument that this has improved, sharpened or enabled competition seems to us to be more convincing than the arguments that it has distorted or discouraged it.*').

provision for full compensation.⁵ But the current legislative scheme does not prove any adequate compensatory mechanism.

2.5.1 The emergence of subscription platforms such as Sky and (until recently) Setanta has galvanised the market for the acquisition of UK broadcasting rights to sports events, ensuring a steady and much-needed rise in rights fees since the early 1990s. New entrants to the market for those rights, such as ESPN, are to be welcomed to provide further competition. However, a subscription platform must have exclusive rights to the event, because people will not pay to watch on one channel what they can view for free on another channel. Accordingly, any derogation from the ability to grant such exclusive rights to pay-TV platforms can seriously compromise the value of the rights to pay-TV platforms, if not destroy it altogether.

2.5.2 Listing an event substantially circumscribes exclusivity. Most obviously, placing an event on List A, so that subscription broadcasters are not permitted to bid for the exclusive live rights, removes the most important contenders for the rights from the marketplace in one fell swoop. The detrimental effect on the price paid for rights is substantial. However, even listing an event on List B has significant adverse consequences for the value of rights. A subscription-based channel drives subscriptions by being the only place where a fan can watch key sports events. If a fan can see the events on another channel for free, albeit after a short delay, then a significant part of the value of the rights is lost for the subscription channel, with a direct consequential impact on its interest in the rights.

2.5.3 While it is commonly accepted that English law provides less than adequate protection to sports event organisers looking to protect and exploit the commercial value of their events,⁶ to date the Government has not responded to requests to assist sports bodies in their efforts to improve that position.⁷ While that is of course its

⁵ An analogy might be drawn with compulsory purchase schemes, whereby landowners whose property is acquired in the furtherance of the public interest (e.g., to permit the building of a new airport runway) are paid a fair market value for the property and (in appropriate circumstances) compensation to reflect the loss of amenity or disruption caused to the enjoyment of their property. Similarly, ERC would submit that interference with its proprietary broadcasting rights is only justified if the Government ensures that adequate compensation is received by ERC.

⁶ Because of its refusal to recognise any proprietary rights *per se* in a sports event: see Victoria Park Racing v. Taylor, (1937) 58 CLR 479 (HCA). Hence, for example, the need for special legislation for the London 2012 Olympic Games, recognising a *sui generis* right of association with the Games, owned by the local organising committee and not to be exploited by any third party without the permission of that local organising committee. See generally *Sport: Law & Practice*, Lewis & Taylor, eds. (2nd Edn, Tolley's, 2008), chapters G1 (Proprietary Rights in Sports Events) and H2 (Tackling Ambush Marketing of the Olympic Games and Paralympic Games – London 2012: A Case Study).

⁷ For example, the Government has rebuffed requests to extend to other sporting events the special legislative protection afforded to the IOC against ambush marketing and ticket touting at London 2012. Similarly, to date it has not supported requests to recognise a sports betting right to fill the gap left by the ECJ's refusal to recognise database rights in event data.

prerogative, it makes it all the more important that any proposal to strip away the value of a sports event organiser's commercial portfolio is approached with caution and not even contemplated unless the justification is overwhelming and there is proper and meaningful provision for full compensation for any resulting loss in revenue. There is no such provision in the Broadcasting Act 1996.

2.5.3.1 The scheme established by the Broadcasting Act 1996 contemplates that the rights to the listed event must be made available to a FTA broadcaster *'on fair and reasonable terms.'*⁸ According to Ofcom, *'What is a fair price will depend upon the rights being offered and the value of those rights to broadcasters.'* The Code then provides a non-exhaustive list of criteria to determine the fairness and reasonableness of the price demanded,⁹ which requires Ofcom to engage in a complex economic assessment of the perceived value of the rights to both FTA and subscription services. This exercise is fraught with difficulty: there is no industry-accepted method for the valuation of sports broadcasting rights; instead, the only proper indicator of the value of the rights is what a free and unrestricted market is prepared to pay.¹⁰ It is impossible to understand how a price could be arrived at as *'fair'*, unless it is that market price.

2.5.3.2 In 2001, the House of Lords was called upon to interpret and apply these provisions. It ruled that the legislative scheme requires that FTA broadcasters be given an opportunity to purchase the rights based on what that category of broadcaster *'could reasonably be expected to pay for them'*, which (it said expressly) does not necessarily mean at market value.¹¹ The House of Lords

⁸ Ofcom's Code on Sports and Other Listed and Designated Events, revised 2 September 2008 (the *'Code'*), section 1.13.

⁹ Namely: (i) previous fees for the event or similar events; (ii) time of day for live coverage of the event; (iii) the revenue or audience potential associated with the live transmission of the event (e.g., the opportunity to sell advertising and sponsorship; the prospects for subscription income); (iv) the period for which rights are offered; and (v) competition in the market place.

¹⁰ Which will in turn be determined by the objectives each potential bidder has set and the relative priority it accords to factors including advertising, enhanced subscription levels or public service broadcasting commitments. It is absurd to suppose that Ofcom can second guess what would be a *'reasonable'* price for any given broadcaster, given the myriad factors and commercially sensitive information that would inform a particular broadcaster's approach.

¹¹ See *R. v. Independent Television Commission, ex parte TV Danmark 1 Ltd*, [2001] All ER (D) 344, para 37: *"[T]he ITC also makes it clear that it will have to be satisfied that the public broadcasters had the opportunity to acquire the rights on "fair and reasonable terms." It can be said that the market price for the rights is what they will fetch on the open market and prima facie an opportunity to buy at the market price is an opportunity to buy at fair and reasonable terms. But this principle, if generally applied, would, as I have said, make the whole regulatory machinery in Part IV*

expressly acknowledged that this would cause significant loss to the rights-owner, but could see no way around that: *'It may be, as the Court of Appeal suggested, that a regulatory system in which a pay-TV broadcaster has to offer to share the rights with a public broadcaster means that any event which the latter wishes to broadcast will be unattractive to the pay-TV broadcaster and that the value of the rights will be depressed. But that is a consequence which inevitably follows from the protection which the Directive was intended to confer upon the public right of access to such events.'*

2.5.3.3 Therefore, the requirement that a FTA broadcaster must pay a fair price is actually applied as a protection for the benefit of the FTA broadcaster, and not as a mechanism for compensating the rights-holder for the loss in value caused by the listing of its event. This has effectively been acknowledged by the BBC. In its evidence to the Review of the BBC's Royal Charter, submitted on 9 November 2005, the BBC commented: *'[t]he BBC supports the system by which some events are currently reserved for analogue television ... Although we always pay fair and reasonable prices for our rights, it also helps deliver value-for-money for the licence payer by avoiding the premium on rights fees generated by the subscription model of pay television.'* It is this 'premium' which is presently denied to rights-holders by the operation of the listed events system and for which the present listed events system makes no attempt to provide compensation. In other words, where the legislation refers to the need for the rights to be acquired on 'fair and reasonable' terms, this is not to preserve value for the rights-owner but rather to drive down the price to what the FTA broadcasters are willing to pay. The need to compensate the rights-owner for the resulting loss of income is not even acknowledged, let alone addressed.

2.6 Fifth, the listing of events is contrary to the fundamental principle that Government should leave the running of sport to those with the necessary experience and expertise.

fairly pointless. The code makes it clear that the ITC will form a view of the value of the rights "to the broadcasters," in other words, what that category of broadcasters could reasonably be expected to pay for them. Of course the ITC may consider that the answer should be the same for both categories; the public broadcasters are not without resources and market power and the ITC may take the view that the rights in question should simply be left to fair and open competition. But the clear purpose of Part IV is, if necessary, to protect the public interest in free access to important sporting events against market forces. The ITC is engaged in a delicate balance of the interests of broadcasters, sports organisers and the general public."

- 2.6.1 Even while recognising the substantial interest of the UK public in sport, and the potential that sport has to drive wider public policy goals such as social inclusion, equality, and health, the UK Government has consistently taken the position that as a matter of principle *'[t]he Government does not and should not run sport.'*¹² Instead, the Government has left that responsibility on the shoulders of the national governing bodies of sport in each home nation, including (in relation to rugby union) the four Unions of England, Wales, Scotland and Ireland. And indeed it provides public funding to them to do so, via their respective Home Country Sports Councils.
- 2.6.2 Thus, the Government relies upon the Unions to organise, manage and regulate the entire conduct of rugby union in the United Kingdom, including governance of the sport on a democratic and inclusive basis, ensuring the safety of participants and spectators (e.g., equipment issues, on-field conduct), protection of the integrity of the sport (anti-corruption, etc), and promotion of the long-term development and growth in participation in the sport at both amateur and professional level. These are complex and burdensome tasks, of substantial 'public' interest and the Unions require substantial funds to carry out their role as custodian of their sport, to cover their governance functions, to provide the first-class stadia and facilities required for their stakeholders, and to finance investment in the future development of the game.
- 2.6.3 Broadcasting rights are one of the few elements of a sports event organiser's commercial portfolio that can be properly exploited for a reasonable commercial return. Indeed, as noted above, the revenues that ERC has been able to generate from the sale of the broadcasting rights to the Tournaments form an essential income stream for the Unions and their stakeholders. Without that income stream, the Unions and their stakeholders would not be able to maintain the current level of investment either in their domestic competitions or their other development activities. As a result, then (among other adverse consequences) the standard of the clubs participating in the Tournaments would fall, diminishing the attractiveness of ERC's sporting product to both spectators and broadcasters.
- 2.6.4 As noted above, ERC appreciates that the need for television revenues must be balanced with broadening the exposure of Tournament matches in order to promote and grow the game of rugby union. However, the issue of broadcasting revenue cannot be addressed in isolation. Broadcasting rights agreements are not negotiated in a vacuum, but rather play a central role in the design and implementation of a coherent commercial programme across the event, involving the making of news access arrangements and the granting of mobile, internet and other new media rights packages, as

¹² Tony Blair, Prime Minister, *A Sporting Future for All – The Government's Plan for Sport* DCMS PP374 (March 2001).

well as a package of sponsorship and supplier deals that have a symbiotic relationship with the media rights profile of the event.¹³ It is in the interests of the Tournaments, and therefore of Northern Hemisphere rugby union, that a holistic approach to the commercialisation of the Tournaments is adopted, rather than the fragmented approach which would result from any restriction on the right of ERC to deal freely with all commercial rights.

2.6.5 ERC would respectfully suggest that it is ERC and the Unions, and not the Government, who are best-placed to determine the balance to be struck between the various competing factors, based on their judgement of what is in the best long-term interests of the development of Northern Hemisphere rugby. Given the Government's recognition of that experience and expertise in all other spheres, it is very difficult to see why it should take a different approach in this area.¹⁴

3. **Question 2: Are the current listing criteria right?**

3.1 For the reasons set out above, ERC believes that there is no justification for the Government to supplant ERC's own analysis of what broadcasting deal is in the best interests of its stakeholders and of Northern Hemisphere rugby generally, still less to strip away its proprietary rights without proper compensation. As a consequence, ERC considers that as a matter of principle the Tournaments should remain unlisted.

3.2 Without prejudice to that argument, if the concept of listing is to be maintained, then in order to provide certainty and transparency, and to ensure satisfaction of the requirement of a clear and compelling justification for legislative intervention, as well as to ensure that the resulting expropriation of assets is strictly limited to what is absolutely necessary and proportionate, the criteria should be narrowed and made far more specific and verifiable than is currently the case.

¹³ For example, there is obviously no advertising on BBC channels, while the BBC Charter restricts the ability of sponsors to promote their brands, goods and services via the BBC's coverage of the event, particularly when compared to the opportunities available on commercial platforms. As such, the broader exposure that coverage on the BBC may bring does not necessarily mean higher sponsorship revenues.

¹⁴ In part, this is just a reflection of the general principle that Government does not and should not run sport, but instead sensibly and properly leaves it to specialist and experienced sports governing bodies to judge what is in the best interests of their sports. In addition, however, in the complex and fast-developing world of sport, broadcasting and new media, central regulation is too cumbersome and slow to react to emerging trends and new industry practices. In the ten years since the listing of events was last reviewed by Government, there have been substantial developments in technology in this market-place. And the explosion of interest in any given sport generated by success (for example, rugby union following England's victory in the 2003 World Cup, or cricket following the 2005 Ashes), new events (for example Twenty20 in cricket), new broadcasters or new media can be similarly unpredictable and fast-moving. The national governing bodies, the rights-owners and their commercial partners are sufficiently flexible to respond to those developments in a way that (respectfully) an ad hoc Free-To-Air Review Advisory Panel is simply unable to do.

- 3.3 At present, the essential criteria are that *'the event has a special national resonance, not simply a significance to those who ordinarily follow the sport concerned; it is an event which serves to unite the nation; a shared point on the national calendar.'* These factors are obviously completely subjective and therefore inherently open to inconsistent application. The popularity of a particular sporting event depends on the vagaries of popular sentiment, and in particular on the success of the national team in that event. As such, it is a movable feast, and therefore references to *'national resonance'* and *'shared points on the national calendar'* cannot reliably measure whether the public interest warrants intervention or not. It is simply not good enough to say *'the sense of community through televis[ing of sports events] ... is an elusive thing but we know it when we feel it.'*¹⁵
- 3.4 It follows from what ERC says above that it believes that the best way of identifying those events in which there is an overwhelming public interest in favour of FTA coverage is to place no restrictions on the market for the rights to those events, and see how much the public service broadcasters are prepared to pay. In particular, if there truly is an overwhelming public interest in an event, then the BBC as a public service broadcaster has massive funding in hand (in the form of licence fee income) to vindicate that interest. And the public can hardly complain at this use of public funds, if it is accepted that the Tournaments are an integral part of the national fabric to which everyone should have free access. In short, if the public wants FTA access to the Tournaments, then the public should absorb the cost, not the event owner which stages the matches and owns the associated commercial rights. Whereas, if the BBC decides not to outbid its competitors in these circumstances, that is the best indication there could be that the public interest in the event is not strong enough to warrant FTA coverage.
- 3.5 Without prejudice to that basic position, if there is to be a listing system and therefore there have to be criteria for listing, it is ERC's belief that (a) the requirement that the event must have significance *'not simply ... to those who ordinarily follow the sport concerned'* must be maintained; as must (b) *'the impact of reducing the income or potential income of the sport, and the consequences of that reduction for its investment in increasing participation and/or improving levels of performance and/or in creating safe facilities.'* In particular, no event should be listed unless it can be shown, by means of a detailed and costed study, that such listing will not have a material adverse impact on the ability of the sports body in question to carry out its governance and regulatory functions as custodian of that event and/or sport.
- 3.6 ERC also believes the existing principle that *"extended events such as season-long championships involving many matches will not normally be listed in their entirety"* should be maintained.

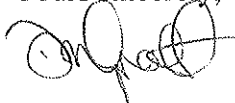
¹⁵ Speech by Andy Burnham MP, DCMS Minister, 26 September 2008.

4. **Which events should be listed?**

- 4.1 If the concept of listing is to be maintained, ERC strongly submits that there is absolutely no justification for adding the Tournaments to either List A or List B, particularly given the clear adverse impact that such a move would have on the value of the rights to those properties, and therefore on the commercial income that ERC can expect to receive, and on which it relies so much to ensure the maintenance of revenue flows to the Unions (which in turn secure the competitiveness of Northern Hemisphere rugby and future participation in the sport).
- 4.2 ERC does not dispute that certain matches in the Tournaments are capable of attracting significant television audiences, relative to other individual matches in other events. (Indeed, ERC relies upon and is very grateful for the enthusiasm and dedication of supporters of the Tournament). However, while the Tournaments capture the imagination of the rugby-following public, they cannot be said to be either an *'event which serves to unite the nation'* or *'a shared point on the national calendar'*. Both Tournaments are still relatively recent entries in the sporting calendar, and national teams are not represented in either Tournament. They are paradigm examples of events which are only of *'significance to those who ordinarily follow the sport concerned'* and, as such, clearly do not qualify for listing.
- 4.3 Furthermore, the Tournaments each comprise a series of matches played over a period of 8 months. As noted above (see para 3.6), the current criteria explicitly acknowledge that such a format is unlikely to be compatible with listing.
- 4.4 In any event, the potential for a large television audience is not the same as saying that there is a clear and compelling public interest in the Tournaments being shown live on television. In particular, populist appeal is insufficient justification for interfering with ERC's proprietary rights. Nor is there any other sufficient justification.
- 4.5 ERC is certainly not aware of any public outcry about the fact that Sky holds the exclusive right to broadcast live coverage of the Tournaments in the UK. The public accepts that Sky has an important role to play in the UK sports broadcasting market, and that ERC has a right and responsibility to exploit the commercial rights to the Tournaments as it thinks fit. For those who do not have access to Sky, the ability to watch highlights of the matches free-to-air on S4C or RTE or on the Internet is clearly sufficient.

I hope that these submissions are helpful. If the Advisory Panel has any questions, or would like further information on any particular point, we would be happy to assist.

Yours sincerely,



Derek McGrath
Chief Executive Officer