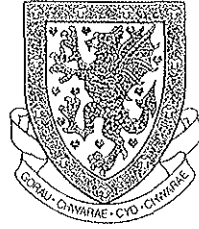


Patron: HER MAJESTY THE QUEEN
President: P. REES
Secretary General: D.G. COLLINS

The
Football
Association
of Wales

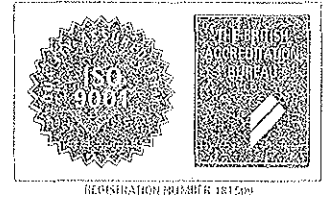


Cymdeithas
Bêl
Droed
Cymru

Cefnogwr: Ei MAWRHYDDI Y FRENHINES
Llywydd: P. REES
Ysgrifennydd Cyflwynod: D.G. COLLINS

By post and by email

David Davies, OBE
Chairman, Free-to-Air Review Advisory Panel
c/o Tony Dyer
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16 June 2009

Dear Mr Davies

*rec'd
30.6*

*David P
Can you please
sean + conclude
to David D or
Panel?*

*Tony
30.6.*

FREE-TO-AIR EVENTS REVIEW

Thank you for the letter from Mr Dyer dated 19 May 2009, inviting me to meet with you and other panel members on the afternoon of 2 June 2009 to provide the views of the Football Association of Wales Limited (FAW) on the listing of events under Part IV of the Broadcasting Act 1996. I regret that I was unable to attend the meeting myself, as I had a conflicting engagement with our international governing body, FIFA. As you are aware, the FAW's media rights adviser/negotiator, Laurence St John of Bridge Television Productions Limited, attended the meeting on my behalf, and he was authorised to speak for the FAW on all matters relevant to your panel's work. As a follow-up to Laurence's submissions at the meeting, I am pleased to provide the following summary of the FAW's views on the issues raised in your consultation paper.

1. Overview

1.1 Founded in 1876, the FAW is the third oldest football association in the world, and has functioned as the national governing body for the sport of association football in Wales continually since that date. The FAW is a member of FIFA (affiliated since 1910) and UEFA (affiliated since 1954) and is one of the five associations (together with FIFA, The FA, SFA and IFA) that make up the International Football Association Board, the guardians of the "Laws of the Game", that apply to the game worldwide. The FAW's patron is Her Majesty the Queen.



Departmental Direct Lines - All 029-20-435-

Secretary General	832	International Dept.	848/839	Registrations	835	Computer & Admin.	834
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Discipline & Welfare	836/837/845/850						

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- 1.2 As national governing body for the sport of football in Wales, the FAW is responsible for the administration, regulation, development and promotion of the game at all levels in Wales, from grass roots level (district league level, youth and women's competitions) up to the professional and/or semi-professional elite (Welsh Premier League and the FAW Welsh Cup). The FAW also runs the Welsh national representative teams, of which there are eight: the Men's senior team and age-group teams (under-21, under-19, and under-17), the women's senior team and age-group teams (, under-19 and under-17), and the semi-professional team. These teams compete in UEFA and FIFA competitions, including the UEFA European Championships and the FIFA World Cup.
- 1.3 The FAW is not a private commercial concern, prioritising the maximisation of profit in order to satisfy investors eager for financial return. Rather, it is the custodian of the sport of association football in Wales, charged with governing and regulating the sport, protecting the integrity of the sport, securing the safety of 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, and the Welsh public, as a whole. (For detailed information on the developmental activities and strategic goals of the FAW, see the Council Strategic Plan for 2009-2013, a copy of which is enclosed with this letter).
- 1.4 To fund those public interest activities, the FAW needs significant funds. For the most part those funds do not come from public sources. Instead, they come from the exploitation of the rights to matches that are controlled by the FAW and that have value in the commercial marketplace.
- 1.5 The FAW is by no means a wealthy body. It is very fortunate to have the support of some excellent and loyal commercial sponsors and suppliers, but (unlike some of its counterparts in other countries) the competitions it controls do not dominate the commercial marketplace. In particular, apart from the strength of rugby union in Wales, the FAW's relatively new domestic club competitions¹ suffer from the loss of the leading Welsh clubs (Cardiff, Swansea, Wrexham and Newport) to the English Football League, so that some of the Welsh Premier League clubs are semi-professional only, and most of the best young Welsh players play their football in English competitions. At the national level, the senior men's team has some excellent players, and has produced some excellent performances, but it has only reached the finals of the FIFA World Cup once (in 1958, qualifying by ballot) and the same for the finals of the UEFA European Championships (1976).
- 1.6 On the other hand, in the qualifying tournaments for the FIFA World Cup and the UEFA European Championships, the FAW controls the broadcasting rights to all of Wales' home matches. And they can be valuable, depending in particular on who is drawn in Wales' group. As a result, the most valuable commercial rights by far owned by the FAW are the broadcasting rights to its

¹ The Welsh National League was formed in 1992. By contrast, the Football League was founded in 1888 and the Scottish Football League was in place for the 1890/1 season.

home matches in the UEFA European Championship qualifiers and FIFA World Cup qualifiers, as well as home friendly matches (the **International Matches**).

- 1.7 Currently none of the FAW's properties are listed pursuant to Part IV of the Broadcasting Act 1996. Instead, the FAW has been left free to exploit its broadcasting rights as it sees fit. The FAW has granted the UK broadcasting rights to its International Matches for seasons 2008/09 to 2011/12 to Sky and S4C. Sky has the exclusive right to broadcast those matches live, but S4C then has the right to broadcast highlights of those matches on its free-to-air service after a short delay (of 45 minutes in the case of a midweek match, 120 minutes in the case of a weekend match). In its agreement with Sky, the FAW has also reserved (a) the right to transmit up to three minutes of highlights of each International Match free on its official website on a 24-hour delay; and (b) the right to grant the live radio rights to the International Matches to the BBC.
- 1.8 The rights fee that the FAW gets from Sky forms a large and essential part of its overall commercial income, which is applied to cover the costs of the governance and regulation of the game and/or ploughed back into the sport as the financing for the FAW's development activities.² Sky also produces the live feed of each International Match, for exploitation by all of the FAW's broadcast licensees free of charge, which generates further valuable revenues for the FAW. It is not an exaggeration to say that without Sky's contribution, the FAW's ability to develop and promote the sport in Wales would be severely undermined. In particular, the FAW's ability to stage youth, women's and even club competitions would be threatened.
- 1.9 The FAW is well aware of the need to use the International Matches as the showcase for the sport in Wales, promoting the game to the widest possible audience. That is one of the reasons why it has insisted on doing a highlights deal with S4C, and also a live radio rights deal with the BBC for the International Matches and the FAW's other properties (which deal includes specific obligations on the BBC to promote the game in Wales).
- 1.10 The FAW also seeks where possible to exploit the value of the International Matches to the benefit of its domestic competitions, selling the highlights rights to the International Matches to S4C in a package with the rights to its domestic club competitions (and age-group and women's international matches), and requiring S4C to produce coverage of those matches and to broadcast that coverage (on a live or delayed basis) on its FTA service, to ensure exposure for its domestic competitions.³

² For detailed information on the developmental activities and strategic goals of the FAW, see the Council Strategic Plan for 2009-2013 at www.faw.org.uk.

³ See also <http://www.s4c.co.uk/sgorio/e/highlights>.

1.11 But the FAW has to balance that objective with the need to raise commercial revenues. The FAW has identified a “Virtuous Circle of Success”, which forms the basis of its development strategy for 2009-2013: a successful international team will generate greater revenues; greater revenues will fund more high quality development programmes; more high quality development programmes will encourage a wider talent base; and a wider talent base will provide the foundation for a successful international team. When viewed from this perspective, the revenues derived by the FAW from exploitation of the broadcasting rights to International Matches form an absolutely essential income stream for the FAW. Without that income, the FAW’s efforts to govern and to grow the game, both at an amateur and at an elite level, would be seriously prejudiced.

1.12 With that background in mind, I turn to the three specific questions you have posed in your consultation paper. The FAW’s position, in short, is that because the listing of the International Matches would strip the FAW of its ability to achieve the full market value of its rights, so denying it commercial income that is essential to its public interest objectives, without any mechanism for adequate compensation for that loss, the FAW is strongly opposed to the listing of events, both as a matter of principle and in particular in respect of its own properties.

2. Question 1: Should listing continue?

2.1 The FAW would not presume to speak for other rights-holders on the issue of listing of events. Focusing only on its own rights, however, the FAW is strongly opposed as a matter of principle to the very concept of listing, for the following reasons.

2.2 First, the only ‘right’ at issue here is the FAW’s property right in the broadcasting of the International Matches. That right should not be interfered with unless there is clear and compelling justification, which is wholly absent here.

2.2.1 The commercial rights to matches played by the Welsh national football team are not public assets, owned by ‘the nation.’ The FAW acknowledges the substantial public interest within Wales in the fortunes of the national football team, and further acknowledges its responsibility, as custodian of the game, to promote the International Matches and football generally. However, the FAW does not accept that there is, or that there should be, a legally enforceable ‘right’ for members of the public to watch the International Matches on free-to-air television.⁴ To the contrary, the only cognisable right at issue

⁴ As your consultation paper itself notes, the provision of free access to sporting events by preventing the grant of exclusive broadcasting rights to those events to subscription platforms is not mandatory under either English or EC laws or regulations. Instead, it is permitted, but only where such restriction is compatible with EC law, i.e., only where it is demonstrably justified and proportionate to the achievement of a legitimate imperative. (Audiovisual Media Services Directive, 2007/0248, Article 3j).

here is the FAW's own proprietary right to sell the broadcasting rights to the International Matches as it sees fit. That right, like any other property right, is entitled to 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. ...'*

2.2.2 Clearly this right is not absolute; as Article 1 expressly states, it may be compromised *'in the public interest and subject to conditions provided by law.'* But the point is that this is not a question of balancing the competing rights of the national governing body on the one hand and the public on the other hand. Rather, the starting-point of the analysis should be that the proprietary rights of the FAW 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 the FAW's rights is warranted. And even were such justification to be established (which is disputed), then the interference with the FAW's rights must be limited strictly to that which can be shown to be proportionate to the legitimate objectives identified, and must be subject to proper conditions as to transparency, compensation, etc.

2.3 Second, the public interest arguments in favour of listing of events are outmoded.

2.3.1 Those in favour of the listed events system commonly assert, without empirical evidence, that televised sport is a *'force for cohesion'* in society. The FAW does not dispute the unifying effect that certain sporting events can have within the United Kingdom. However, it does not believe that removing the listed events system would result in a departure of every listed event from FTA television to subscription services. Instead, the major effect would be a greater competition for rights and the award of contracts at a fair market price, whether to subscription services or FTA services (rather than at an artificially depressed price to a qualifying FTA broadcaster) which might itself be said to be demanded by the public interest. (See below).

2.3.2 Further, even were some listed events to transfer to subscription services, the FAW does not consider that the fact that more homes have access to FTA television than to subscription-based television supports the argument that live coverage on FTA channels in some way promotes greater societal cohesion than subscription services:

2.3.2.1 First, 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,⁵ internet and print media, all serve to keep sports enthusiasts and the wider public fully informed of major sports events.

2.3.2.2 Secondly, 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.

2.3.2.3 Third, a phenomenon of the past decade has been the establishment of large outdoor screens (or fan festivals) to show live sporting events.

As a result, the FAW believes that arguments that exclusive live coverage by subscription services dramatically hinders the 'cohesive effect' of sporting events are grossly overstated.

2.3.3 In addition, whatever public interest arguments may previously have been advanced in favour of a system of listed events, those arguments look increasingly anachronistic in a television 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 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, amongst other developments, all serve 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 content.

2.4 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

⁵ News access is protected under EC law pursuant to the Audiovisual Media Services Directive (2007/0248).

ready, willing or able to match the investments 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. And those regulators have repeatedly examined the market for sports broadcasting rights, with a view to ensuring that rights grants (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.⁶
- 2.4.2 The FAW would endorse the view that, as in any other sphere of industry, competition in the market place serves to encourage innovation and the maintenance of high standards, which can only be in the public interest. Undoubtedly, the competition that Sky and now Setanta have introduced into the UK market for sports broadcasting rights has improved investment in production and therefore in the quality of the sports product by all sports broadcasters, including FTA broadcasters, for the benefit of all stakeholders, including in particular the viewing public.⁷
- 2.4.3 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. The regulators have struck a careful and considered balance between the need to promote investment and innovation and the need to ensure other platforms

⁶ 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 between broadcasters (pages 216, 217), and indeed was necessary to enable a new entrant to differentiate its service and drive subscriptions (page 188).

⁷ 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.')

have a fair opportunity to obtain the rights. To interfere with that balance, artificially constraining 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 By constraining competition artificially, the listing of events depresses the market value of the rights, and so limits the price paid for the rights, without any consideration being given to proper compensation to fill the ensuing funding gap. Given the current dependence of the FAW on broadcasting income, this issue is of paramount concern to Welsh football.

2.5.1 The emergence of subscription platforms such as Sky and (more 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. However, a subscription platform must have exclusive rights to the event, for the simple reason that people will not pay to watch on one channel what they can view for free on another channel. Accordingly, any derogation from exclusivity can seriously compromise demand (and therefore competition) for the rights in question, if not destroy it altogether.

2.5.2 Listing an event substantially circumscribes exclusivity. Most obviously, placing an event on List A, so that Sky and Setanta (and other subscription broadcasters) are not permitted to bid for the exclusive live rights, removes two of 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 (albeit that it is preferable to placement on List A on the basis that at least the FTA broadcasters know that the subscription services could bid for the exclusive live rights, and react accordingly). 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. To date, the FAW has taken that loss as the price of getting broader coverage of its competitions. But that should remain its decision to take; the decision should not be taken away from it.

2.6 At the very least, the FAW's commercial rights should not be interfered with unless proper compensation is provided,⁸ particularly when that interference prejudices a vital income stream without which the FAW would be unable to discharge their governance and developmental responsibilities as custodian of the sport. But the current legislative scheme does not prove any adequate compensatory mechanism.

2.6.1 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.*"⁹ According to Ofcom, "*the price sought for the rights must have been fair, reasonable and non-discriminatory as between the two categories of programme service. 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,¹⁰ 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: in the absence of a free market for sports broadcasting rights there is no industry-accepted method for the valuation of those rights; instead, the only proper indicator of the value of the rights is what a free and unrestricted market is prepared to pay.¹¹ It is impossible to understand how a price could be arrived at as "fair", unless it is that market price.

2.6.2 In fact, the House of Lords (considering the guidance issued by Ofcom's predecessor, the Independent Television Commission, which was in substantially similar terms to Ofcom's current guidance) has clarified that the legislative scheme requires that FTA broadcasters be given an opportunity to purchase the rights not at

⁸ An analogy might be drawn with compulsory purchase schemes, whereby landowners whose property is acquired in the furtherance of the public interest (eg, 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, the FAW would submit that interference with its proprietary broadcasting rights is only justified if the Government ensures that adequate compensation is received by the FAW.

⁹ Ofcom's Code on Sports and Other Listed and Designated Events, revised 2 September 2008 (the Code), section 104(1)(b).

¹⁰ 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.

¹¹ 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.

market value but rather based on what that category of broadcaster “could reasonably be expected to pay for them.”¹² Thus, the requirement that a FTA broadcaster must pay a fair price is properly viewed 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.¹³ The need to compensate the rights-owner for the resulting loss of income is not even acknowledged, let alone addressed.

2.7 In addition, contrary to the fundamental principle that Government should leave the running of sport to those with the necessary experience and expertise, listing of events improperly supplants the judgment of the FAW as to how best to discharge their twin responsibilities of promoting their sport to the public at large and generating as much revenue as possible to finance their governance and developmental roles.

2.7.1 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.”¹⁴ Instead, the Government has left that responsibility on the shoulders of the national governing bodies of sport in each home nation.

¹² *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 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.”

¹³ The distinction between market price and a “fair and reasonable price” under the Code, and the advantage this gives to FTA broadcasters, has 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.

¹⁴ Tony Blair, Prime Minister, *A Sporting Future for All – The Government’s Plan for Sport* DCMS PP374 (March 2001).

- 2.7.2 Thus, the Government relies upon the FAW to organise, manage and regulate the entire conduct of association football in Wales, 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, but the Government would not dream of intervening to regulate them, preferring instead to rely on the long experience and expertise of the self-regulating FAW to determine what is in the best long-term interests of the sport as a whole.
- 2.7.3 The FAW requires substantial funds to carry out its role as custodian of their sports, to cover their governance functions, to provide the first-class stadia and facilities required for their teams to play in the Championship (and for spectators to watch in safety), and to finance investment in the future development of the game. FIFA and UEFA provide some limited funding of grass-roots football, but it is otherwise left to the FAW to generate the funds it needs in whichever way it can.
- 2.7.4 Furthermore, 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,¹⁵ to date the Government has not responded to requests to assist sports bodies in their efforts to improve that position.¹⁶ While that is of course its 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.
- 2.7.5 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 the FAW has been able to generate from the sale of the broadcasting rights to the International Matches form an essential

¹⁵ 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 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).

¹⁶ 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.

income stream. Without that income stream, the FAW would not be able to maintain the current level of investment either in its domestic competitions or its other development activities. Nor would it be able to maintain the current level of investment in the national teams, which would therefore become less competitive, which would in turn diminish the attractiveness of the FAW's sporting product to both spectators and broadcasters.

- 2.7.6 As noted above, the FAW appreciates that the need for television revenues must be balanced with broadening the exposure of matches involving Welsh teams in order to promote and grow the game in Wales. As stated in the FAW's Consultation Document for 2008-2012: *'The sustainability of good TV revenues, balanced with good exposure, is crucial to the growth objective of the game. The FAW has engaged a policy of contracting with both types of broadcaster ensuring coverage on both platforms because it believes that to be the best way of ensuring the correct balance of revenues and exposure. However, the FAW will continue to monitor the situation.'* This balancing exercise is a nuanced and delicate one,¹⁷ which is why FAW has considered the matter holistically, as part of an overall strategic plan for 2009-2013. It is the firm and unequivocal opinion of the FAW that it is the FAW, as custodian of the sport, and not the Government, that is best-placed to determine future priorities.
- 2.7.7 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 periodic centralised regulation is simply unable to do.

¹⁷ For example, 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 well as a package of sponsorship and supplier deals that have a symbiotic relationship with the media rights profile of the event.

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

- 3.1 For the reasons set out above, the FAW believes that there is no justification for the Government to supplant the FAW's own analysis of what broadcasting deal is in the best interests of the sport, still less to strip away its proprietary rights without proper compensation. As a consequence, the FAW considers that as a matter of principle the matches of the Welsh national football team 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 quantifiable than is currently the case.
- 3.3 At present, the essential criterion is 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. For example, there was relatively little public outcry over the ECB's grant to Sky of exclusive rights to England's home Test matches until success in the Ashes series against Australia gripped the public's attention in 2005. In other words, 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' do little to distinguish between events that should be listed and those that should 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.'*¹⁸
- 3.4 It follows from what the FAW 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.¹⁹ If it decides not to outbid its competitors in these circumstances, that is the best

¹⁸ Speech by Andy Burnham MP, DCMS Minister, 26 September 2008.

¹⁹ And the public can hardly complain at this use of public funds, if it is accepted that the International Matches 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 International Matches, then the public should absorb the cost, not the national governing body that stages the matches and owns the associated commercial rights.

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 the FAW's belief that the impact of falling broadcasting revenues on the ability of sports governing bodies to run their sports must be given central importance. Under the current legislation, in considering whether to list an event the Secretary of State is to have regard to *'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.'* The FAW agrees with the inclusion of this factor, but believes it should be given the highest priority, and 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 sport.

4. **Question 3: Which events should be listed?**

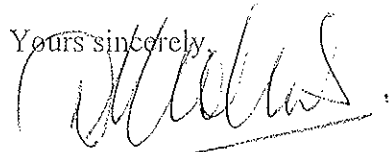
- 4.1 If the concept of listing is to be maintained, the FAW strongly submits that there is absolutely no justification for putting the International Matches on either List A or List B, particularly given the clear adverse impact that such a move would have on the value of the rights to those matches, and therefore on the commercial income that the FAW can expect to receive, and on which it relies so much to ensure the competitiveness of the Welsh national team and future participation in the sport.
- 4.2 In terms of the current criteria, while the International Matches feature national representative teams, they cannot be said to be either an *"event which serves to unite the nation"* or *"a shared point on the national calendar"*. The FAW does not dispute that the International Matches are capable of attracting significant television audiences, relative to other events televised in Wales. (Indeed, the FAW relies upon and is very grateful for the enthusiasm and dedication of supporters of the Welsh national football team). But that is not the same as saying that there is a clear and compelling public interest in the International Matches being shown live on FTA television. In particular, populist appeal is insufficient justification for interfering with the FAW's proprietary rights. Nor is there any other sufficient justification.
- 4.3 The FAW is certainly not aware of any public outcry about the fact that Sky holds the exclusive right to broadcast live coverage of the International Matches in the UK. The public accepts that Sky has an important role to play in the UK sports broadcasting market, and that the FAW have a right and responsibility to exploit the commercial rights to the International Matches as it thinks fit. For those who do not have access to Sky, the ability to watch highlights coverage of the matches free-to-air on S4C, and/or to listen to live coverage of the match on BBC radio, is clearly sufficient.

David Davies OBE

16 June 2009

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We would be happy to expand on the issues addressed above, or any other the Advisory Panel considers appropriate.

Yours sincerely,


David Collins
Secretary General
The Football Association of Wales Limited