



5<sup>th</sup> May 2009

**By post and by email**

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Dear Mr Davies

**FREE-TO-AIR EVENTS REVIEW**

Thank you for your letter dated 8 April 2009 to David Pickering, Chairman of the Six Nations Committee, inviting our views on whether the Government should impose any restrictions on the sale of broadcasting rights to the Six Nations Championship to subscription-service broadcasters. We are due to meet with you in person on 14 May 2009 to discuss this issue. In advance of that meeting, and to ensure our time together can be spent most productively, I am pleased to provide the following summary of the Six Nations Committee's comments:

**1. Overview**

- 1.1 The annual Six Nations Championship (the '*Championship*') is organised by the Six Nations Committee, which is made up of representatives of the six national rugby unions that compete in the Championship, i.e., 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).
- 1.2 By agreement of the participating Unions, the broadcasting rights to the Championship are owned and controlled centrally by the Six Nations Committee. The Committee exploits those rights through a private limited company incorporated in Ireland, Six Nations Rugby Limited ('*SNRL*'), which

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has been established specifically for that purpose. The six participating Unions are equal shareholders in SNRL.

- 1.3 The objectives of the Six Nations Committee and SNRL are to promote, foster, develop and extend the sport of rugby union in the Northern Hemisphere, including preserving the core values and traditions of the Championship as the premium Northern Hemisphere rugby competition, and using the goodwill that the Committee and the participating Unions have developed in the Championship to generate commercial revenues for distribution to those Unions. SNRL generates commercial revenues mainly by exploiting the broadcasting rights and title sponsorship rights to the Championship.<sup>1</sup> After paying expenses, SNRL distributes the entirety of the commercial revenues that it generates to its shareholders, the six participating Unions.
- 1.4 The participating Unions are not normal private enterprises, looking to generate profits to pay to their shareholders as a return on investment. Rather, they are the custodians of the sport of rugby union in their respective national 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. Therefore, all commercial revenues the participating Unions receive are applied to cover the costs of their governance and regulation of the game in their respective territories and/or ploughed back into the sport as the financing for their development activities.<sup>2</sup>
- 1.5 Our best estimate is that the revenues generated by SNRL in relation to the Championship account for almost 30% of the total commercial revenues (including broadcasting, marketing, ticketing and hospitality revenues) generated by the premier rugby union competitions in the Northern Hemisphere.<sup>3</sup> As such, Championship revenues (which are mainly broadcast revenues) constitute a significant percentage of the total annual turnover of each participating Union.
- 1.6 What is clear is that the revenues derived by SNRL from exploitation of the broadcasting rights to the Championship form an absolutely essential income stream for each of the participating Unions, without which they would be severely compromised in their ability to discharge their governance and

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<sup>1</sup> Most of the other commercial rights relating to the Championship (e.g., ticketing, hospitality, shirt sponsorship) are exploited locally by the individual Unions, rather than centrally by SNRL.

<sup>2</sup> For detailed information on the developmental activities of each of the home Unions, see the strategic plans and/or other relevant documents posted on their respective websites: [www.rfu.com](http://www.rfu.com), [www.scottishrugby.co.org](http://www.scottishrugby.co.org), [www.irishrugby.ie](http://www.irishrugby.ie), and [www.wru.co.uk](http://www.wru.co.uk).

<sup>3</sup> The other competitions making up the total are the Unions' respective Autumn International matches against touring Southern Hemisphere sides and the key club competitions (the Heineken and Challenge Cups, the Guinness Premiership, the LNR in France, the Magners League, and the Italian Super 10).

developmental responsibilities as custodians of the sport within their respective territories. Without that income, the Unions' efforts to govern and to grow the game, both at an amateur and at an elite level, would be seriously prejudiced. And it is the UK broadcasting market, encompassing each of the four 'home' Unions (of England, Wales, Scotland and part of Ireland), that is the most valuable market for those rights, responsible for more than 50% of total Championship broadcasting revenues. Therefore, any interference with that marketplace has potentially serious ramifications not only for the Championship, but also for the governance and developmental activities of each of the six Unions participating in the Championship.

1.7 With that background in mind, we turn to the three specific questions you have posed in your consultation paper.

2. **There is no proper basis, in law or in policy, for the expropriation (without compensation) of the proprietary right of the Six Nations Committee to sell the broadcasting rights to the Championship to the purchasers of its choice.**

2.1 The only 'right' at issue here is the Six Nations Committee's property right in the broadcasting of the Championship. That right should not be interfered with unless there is clear and compelling justification, which is wholly absent here. It should certainly not be interfered with unless proper compensation is provided, particularly when that interference prejudices a vital income stream without which the Unions are unable to discharge their governance and developmental responsibilities as custodians of the sport in their respective territories. The public interest in access to premium sporting events is adequately protected by the competition rules, 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. Listing events constrains that competition artificially, and so limits the price paid for the rights, without any suggestion of proper compensation to fill the ensuing funding gap. 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 also supplants the judgment of the Unions, through the Six Nations Committee, 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. The Six Nations Committee therefore disagrees with the very concept of listing of events as a matter of principle.

*A. The Six Nations Committee's proprietary rights should not be interfered with absent clear and compelling justification.*

2.2 The Championship may be competed for by the national representative rugby teams of the six participating Unions, but it is not a public asset, owned by 'the nation.' Rather, it is a privately organised competition, the commercial

rights to which are owned and controlled by the six participating Unions, acting together as the Six Nations Committee.

- 2.3 The Six Nations Committee acknowledges the substantial public interest in the Championship, and further acknowledges the responsibility of its member Unions, as custodians of the game in their respective territories, to promote the Championship and Northern Hemisphere rugby generally. However, the Six Nations Committee does not accept that there is, or that there should be, a legally enforceable ‘right’ for members of the public to watch the Championship on ‘free-to-air’ (‘FTA’) television.<sup>4</sup> To the contrary, the only cognisable right at issue here is the Six Nations Committee’s own proprietary right to sell the broadcasting rights to the Championship 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. ...’*
- 2.4 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 event organiser 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 Six Nations Committee 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 Six Nations Committee’s rights is warranted. And even were such justification to be established (which is disputed), then the interference with the Six Nations Committee’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.
- 2.5 The Six Nations Committee submits that these requirements are not and cannot be met in respect of the Championship and therefore the Championship should not be listed. The Committee does not dispute that the Championship attracts large television audiences, relative to other events. (Indeed, the Committee relies upon and is very grateful for the enthusiasm and dedication of supporters of the Championship). But that is not the same as saying that there is a clear and compelling public interest in the Championship being

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<sup>4</sup> 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). And even then, under the OFCOM Code (para 1.1.4), if a qualifying FTA broadcaster who is offered fair and reasonable terms for the acquisition of the rights does not accept those terms, that event will not be seen on FTA television.

shown live on television. Preservation of the status quo for its own sake, and for the sake of political expediency, are not sufficient justification for interfering with the Six Nations Committee's proprietary rights. Nor is there any other sufficient justification.

*B. The 'public interest' arguments in favour of listing of events are outmoded.*

2.6 Those in favour of the listed events system commonly assert that televised sport is a *'force for cohesion'* in society. The Six Nations Committee does not dispute the unifying effect which sport 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).

2.7 Further, even were some listed events to transfer to subscription services, the Six Nations Committee does not regard 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:

2.7.1 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,<sup>5</sup> internet highlights or reports and the print media<sup>6</sup> all serve to keep sports enthusiasts and the wider public fully informed of major sports events.

2.7.2 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. In this regard, the Six Nations Committee notes with interest arrangements put in place by Sky Sports and the English Cricket Board to provide discounted subscriptions to local cricket clubs as an example of flexible solutions that are available to permit increased access to sporting events that are broadcast live exclusively on subscription services.

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

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

<sup>6</sup> At each Championship match, requests for media accreditation are received from more than 100 different organisations.

As a result, the Committee believes that arguments that subscription services dramatically hinder the ‘cohesive effect’ of sporting events are grossly overstated.

- 2.8 Other assumptions underlying the concept of listed events are also no longer sound. For example, following the publication of the Advisory Group’s 1998 Report, Lord Strathblane stated: *‘[i]f sports are shown on terrestrial television they will secure more sponsorship and bigger advertising deals, which are equally important in raising revenue.’*<sup>7</sup> This simplistic, broad-brush approach glosses over the many nuances inherent in the successful commercialisation of a modern sports property. In fact, the exclusive screening of an event on subscription services does not necessarily reduce the attractiveness of the event to potential advertisers or sponsors. To the contrary, a number of factors are assessed by potential advertisers and sponsors, including the audience demographic of particular media outlets, and exposure gained through news, print and online coverage, particularly where there is an opportunity to be associated with success.<sup>8</sup> And that success is more likely where greater broadcasting revenue, whether derived from subscription services or FTA services, can be reinvested in training and facilities. Furthermore, there is obviously no advertising around the BBC’s coverage of events, while sponsors will know that the BBC Charter restricts their ability 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.
- 2.9 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 Six Nations Committee has been keen to embrace new means of content delivery to rugby union fans: for example, since 2005 the Championship has been screened simultaneously on BBC television and on the BBC Sport website. 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,

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<sup>7</sup> House of Lords debate 20 April 1998, Vol 588 cc 1011.

<sup>8</sup> For example, Vodafone, the largest sponsor of English cricket, increased its annual payments on renewal of its sponsorship of the ECB in 2006, notwithstanding the fact that live coverage would be provided by Sky Sports rather than by Channel 4. (See Vodafone press release, 11 July 2005).

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.

C. *The competition rules already protect the public interest in free and fair competition in the market for the acquisition of broadcasting rights to sports events, striking a proper balance between the need to encourage investment and innovation and the need to ensure all broadcasters have a fair opportunity to acquire the rights. 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 that subscription platforms are willing to make.*

2.10 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.<sup>9</sup> 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.<sup>10</sup>

2.11 The Six Nations Committee 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

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<sup>9</sup> See *passim* Chapter B2 (EC and UK Competition Rules and Sport), paras B2.249 et seq., in *Sport: Law & Practice*, Lewis & Taylor, eds. (2<sup>nd</sup> Edn., Tolley's, 2008).

<sup>10</sup> 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).

all sports broadcasters, including FTA broadcasters, for the benefit of all stakeholders, including in particular the viewing public.<sup>11</sup>

- 2.12 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 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.

*D. The adverse impact that listing has on competition on the market for the acquisition of the UK broadcasting rights to the Championship is another strong argument against listing.*

- 2.13 In addition to the concerns expressed above about the adverse effects of restricting free competition on the market for UK sports broadcasting rights, there is also the fundamental concern that artificially constraining that competition will depress the value of those rights and so imperil a vital source of commercial income for affected sports bodies.
- 2.14 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.
- 2.15 Currently, all Championship matches involving a home Union (i.e., all of the 15 Championship matches staged per year, except only the France/Italy match) are included in List B, meaning that the live rights can only be granted exclusively to a non-FTA broadcaster if the delayed/highlights rights are sold to a qualifying FTA-broadcaster.
- 2.16 There is no doubt that even this qualified listing has had a depressing effect on the market value of the UK broadcasting rights to the Championship. 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

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<sup>11</sup> 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.')

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.

- 2.17 Of course, moving the Championship to List A would be even more prejudicial. With the Championship on List B, at least the FTA broadcasters know that Sky could be a bidder for the exclusive live rights, and react accordingly. If the Championship was on List A, so that Sky and Setanta (and other subscription broadcasters) were not permitted to bid for the exclusive live rights, then two of the most important potential bidders would be removed from the marketplace in one fell swoop. The detrimental effect on price paid would be substantial.
- 2.18 On the other hand, de-listing the Championship, and so permitting free and fair competition on a level playing-field, can only have a positive impact on rights fees, ensuring that the true value of the participating Unions' investment in the event can be realised. While this might mean the BBC would have to devote slightly more of its licence fee income to acquisition of the live rights to the Championship, that is a burden that it can bear much more easily than can the Six Nations Committee.
- 2.19 And the public can hardly complain at this use of public funds, given the premise that the Championship is a vital part of the national fabric to which everyone should have free access. In short, if the public wants FTA access to the Championship, then the public should absorb the cost, not the private organisation that stages and owns the commercial rights to the Championship.

*E. No proper compensation is provided for this expropriation of rights*

- 2.20 By the same token, if the UK Government is not willing to require the BBC to pay the market rate for the broadcasting rights to the Championship, but instead wishes to expropriate the Six Nations Committee's proprietary rights in the name of the public good, then the Six Nations Committee (and through it the participating Unions) should be held harmless from the resulting prejudice, i.e., it should be fully compensated for the resulting loss in value of the rights.
- 2.21 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 Six Nations Committee would submit that interference with its proprietary broadcasting rights is only justified if the Government ensures that adequate compensation is received by the Six Nations Committee.
- 2.22 The current legislation does not provide any such mechanism. Indeed, where it 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.

- 2.23 It is not justifiable for the Government to use legislation to strip away the most valuable commercial rights the sport may have simply to satisfy a populist demand, particularly when the Government offers no compensation whatsoever to fill the substantial funding gap that may result.

*F. The participating Unions are the custodians of the sport and are in the best position, when it comes to selling broadcasting rights, to balance the various competing interests in order to determine what is in the best long-term interests of the sport as a whole. There is no proper justification for the Government to supplant the Unions in that role.*

- 2.24 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.'*<sup>12</sup> 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 'home Unions' of England, Scotland, Wales and Ireland.<sup>13</sup>

- 2.25 Thus, the Government relies upon the home Unions to organise, manage and regulate the entire conduct of rugby union in the UK, 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 national governing bodies to determine what is in the best long-term interests of the sport as a whole.

- 2.26 The home Unions require substantial funds to carry out their roles as custodians 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. The Government provides some limited (mainly Lottery) funding of grass-roots rugby union, but

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

<sup>13</sup> The Irish Rugby Football Union governs the sport not only in Northern Ireland but also in the Republic of Ireland, where of course the UK Government has no jurisdiction.

otherwise leaves it to the home Unions to generate the funds they need in whichever way they can.<sup>14</sup>

- 2.27 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,<sup>15</sup> to date the Government has not responded to requests to assist sports bodies in their efforts to improve that position.<sup>16</sup> 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.
- 2.28 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 (see para 1.6), the revenues that the SNRL has been able to generate from the sale of the broadcasting rights to the Championship form an essential income stream for the four home Unions. Indeed, without that income stream it is unlikely that all of those Unions will be able to maintain the current level of investment in their national teams, which would therefore become less competitive, which would in turn diminish the current strength of the Championship as a vibrant and attractive sporting product.
- 2.29 As noted above (see para 2.14), in large part, the value of the broadcasting rights to sports events like the Six Nations Championship is due to the emergence of strong competition among British broadcasters for the rights to sports events. Without competition from subscription channels like Sky and Setanta, the rights fees paid by public-service and other free-to-air broadcasters like the BBC, ITV and Channel Four would surely be much smaller than they are.
- 2.30 The Six Nations Committee understands very well the tension between the need to promote the sport through its broad exposure on FTA television, and the need to generate maximum commercial revenues to fund the governance

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<sup>14</sup> And of course the UK Government provides no funding at all to the Irish union, or to the French or Italian unions, notwithstanding that its listing of their matches against home Unions in the Championship adversely affects the market value of those rights in the UK.

<sup>15</sup> 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. (2<sup>nd</sup> 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).

<sup>16</sup> 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.

costs and development programmes of the participating Unions. Finding the correct compromise between the various competing imperatives is by no means a simple analysis; on the contrary, it is a nuanced and finely balanced one.<sup>17</sup> And it is the firm and unequivocal opinion of the Six Nations Committee that it is the Committee, as the representative of the Unions, and not the Government, that is best-placed to strike the right balance.

- 2.31 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. (See para 2.24, above). 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 rights-owners and their commercial partners are ready, willing and able to adapt to those developments in a way that an ad hoc Free-To-Air Review Panel is simply unable to do.
- 2.32 There need be no concern that leaving this decision to the Six Nations Committee would mean that higher revenue is always prized above providing broad access to the public to the Championship. To the contrary, the Six Nations Committee has always recognised its responsibility to satisfy the substantial public demand for access to the Championship. As a result, it has always granted the live rights in the UK, Ireland, France and Italy to the main public service broadcaster in each territory (respectively, the BBC, RTE, France Télévisions, and La7).<sup>18</sup>

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<sup>17</sup> 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.

<sup>18</sup> In 1996, the RFU did a unilateral deal with Sky, granting it exclusive live rights to England's home matches in the Championship for the period 1997-2001. This led to a dispute between the RFU and the other Unions participating in the Championship, which was eventually resolved by the entry into the current Six Nations Constitution, confirming that no Union has the right to sell the broadcasting rights to Championship matches unilaterally, and that instead the Six Nations Committee owns and controls those broadcasting rights centrally. And the RFU is now a signatory to the Voluntary Code of Conduct for Rights Owners issued under the auspices of the CCPR, committing to ensure that major events under its control are generally available on FTA television in the UK, in live or recorded form.

- 2.33 So, for example, taking the last two television cycles, and the next one (2010-2013), the exclusive television broadcasting rights to the Championship have been granted as follows:

<u>Territory</u>	<u>2002-05</u>	<u>2006-09</u>	<u>2010-13</u>
UK	BBC	BBC	BBC
Ireland	RTE	RTE	RTE
France	FT	FT	FT
Italy	La7	La7	Sky Italia

- 2.34 At the same time, the Six Nations Committee has insisted that each of its broadcast partners exploits its rights on every available medium, including the Internet, and that they grant ‘news access’ to Championship highlights to their competitors. Similarly, the Committee has always granted live radio broadcasting rights to the Championship to the BBC. This demonstrates that the Committee will always insist that its broadcast partners (whoever they may be) provide maximum exposure and access to the Championship to the public.
- 2.35 Of course, it follows from the above remarks that we believe SNRL should remain free to decide in the future whether an exclusive live deal with a FTA broadcaster remains the best option in each relevant territory. Certainly the steadily-increasing number of subscribers to platforms such as Sky is a trend that has to be taken into account.<sup>19</sup> Against that, however, the Six Nations Committee’s track record demonstrates that we place significant value in the longstanding relationships that we have with the public service broadcasters in our key markets, and that will be an important factor to be weighed in the future. The crucial point, however, is that the judgment of what is most appropriate is one that is properly made by the rights-owner in light of its experience and expertise, not by Government.

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<sup>19</sup> Indeed, as noted in the table above, SNRL has recently granted the live broadcasting rights in Italy to the 2010-13 Championships to Sky Italia. This was because Sky Italia’s bid was substantially greater than La7’s bid, notwithstanding that SNRL retained the right to grant delayed broadcasting rights to a FTA broadcaster in that territory.

**3. If events are to be listed, what criteria should be used to select them for listing?**

- 3.1 For the reasons set out above, the Six Nations Committee believes that there is no justification for the Government to supplant the Six Nations Committee'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 Six Nations Committee considers that as a matter of principle the Championship should not be listed.
- 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 measurable than at present.
- 3.3 At present, the key 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. 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.'*<sup>20</sup>
- 3.4 In that analysis, clearly 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, 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 Six Nations Committee agrees with the inclusion of this factor, but believes it should be given 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.

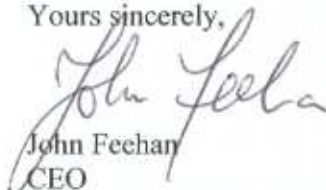
<sup>20</sup>

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

- 3.5 Contrary to the approach taken in the current listing scheme, the Six Nations Committee does not think that an event's history of live FTA broadcasts and/or large television audiences should militate in favour of listing. That history does not give rise to a legitimate expectation that it will be repeated, let alone a right to insist on such repetition. Effectively that would be to penalise those event organisers who have historically chosen to prioritise increased exposure over increased revenues by stripping them of their right to make a different choice in the future.
- 3.6 In addition, the focus on premium sports events in the listed events system needs to be reconsidered. The public interest might equally be said to be in the support of a wide variety of sports at different levels to encourage participation and to nourish the development of athletes in a variety of disciplines. It also appears to the Six Nations Committee to be grossly unfair that those subscription broadcasters who do invest in screening the lower levels of particular sports throughout the year should be precluded from bidding for or securing the premium events in those sports.
4. **If events are to be listed, how should the Six Nations Championship be treated?**
- 4.1 If the concept of listing is to be maintained, there is absolutely no justification for putting the Championship on List A, particularly given the clear adverse impact that such a move would have on the value of the rights to the Championship, and therefore on the commercial income that the participating Unions can expect to receive, and on which they rely so much.
- 4.2 However, the Six Nations Committee would also say that there is no sufficient justification to keep any Championship matches on List B. As noted above, that listing has a detrimental impact on the value of the rights, without any compensation being payable to the Committee. (See para 2.22, above). In terms of the current criteria, while the Championship attracts a strong loyalty within the tribal rugby community, it cannot be said to be an "*event which serves to unite the nation*". Furthermore, the Six Nations Committee is best-placed to determine how to balance the need to promote the game to the widest possible audience with the need to raise commercial income, and its track record demonstrates that it is committed to ensuring, through its arrangements with its broadcasters, that access to the Championship is maximised. (See para 2.32, above).

We look forward to discussing these issues with you at our meeting on 14 May 2009.

Yours sincerely,



John Feehan  
CEO

Six Nations Rugby Limited