

FOOTBALL GOVERNANCE BILL

Summary and initial observations on the Football Governance Bill

published 19 March 2024

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Introduction

1. This week saw the introduction of the Football Governance Bill (the ‘**Bill**’). The Bill is accurately being described as historic. If passed, it will lead to the world’s first independent statutory regulator.
2. The Bill follows Tracey Crouch’s *Fan Lead Review of Football Governance* report (the ‘**FLR**’), and the Government White Paper - *A Sustainable Future Reforming Club Governance* (the ‘**White Paper**’).
3. The FLR was a comprehensive and impressive report. It highlighted the difficulties facing football before making 47 recommendations. The recommendations that the Government create a new independent regulator to oversee financial regulation in English football (‘**IFR**’) have been adopted in the Bill.
4. I confess to initially being unconvinced by the purported benefits that an independent regulator would bring. English football operates in a sophisticated global market. Trying to control it at a national level is, at best, fraught with difficulty. The risk of disrupting or inhibiting the elite level of the game must be recognised and acknowledged. Preventing the establishment of a breakaway league is an admirable goal but it should not inhibit innovation. The Premier League was, lest we forget, a breakaway league that has gone onto great success, giving it the financial resources to support the rest of the English football pyramid.
5. Having had a chance to review the Bill, my previous scepticism has slightly diminished. I am reassured by the limited competency that is being proposed. The IFR will be

restricted to regulating and supervising the operation of football clubs. Proposals that the IFR have wider control over the English football ecosystem have been resisted. Notwithstanding, I am concerned about how prescriptive the Bill is. The Bill repeatedly states that the IFR *must* act in a prescribed manner. I expected the Bill to be a draft enabling Act. I hoped that experts who understand the business of football would be appointed to the IFR, with it then left to develop its own policies and procedures in the way that the Gambling Commission was after the Gambling Act 2005 was enacted. Football is an innovative game and sector. Prescribing what the IFR must do could inhibit development. If the Bill is enacted as drafted, then rather than the IFR being able to amend policies to reflect changes in the game, Parliamentary approval may be required. This requires political time and will. The IFR may become quickly outdated or worse, act to constrain innovation and the growth of the game. Only time will tell if these concerns are borne out.

6. Below are my initial thoughts on the Bill as first published. With the Bill running to 130 pages, it is not an exhaustive review but instead a summary of the most noteworthy points.

Purpose and overview

7. The Bill says that the purpose of any future Act will be to *'protect and promote the sustainability of English football'*.¹ At first glance, this purpose is extremely wide. However, the definition of *English football* makes it clear that we are dealing with the elite level of the game. Fans need to be clear that the IFR will not have oversight for grassroots football, or even those below the National League. Women's football also falls outside the proposed jurisdiction of the IFR.
8. The IFR will have limited competency. Most football fans have welcomed the proposal for an IFR; each projecting onto it powers to deal with what they perceive as the game's ills. Even before its introduction, the IFR faces unrealistic expectations. Whilst the purpose of the IFR is to protect and promote the sustainability of English football, it does not guarantee that clubs will be run properly. Ticket and merchandise prices will continue to rise; executives will forever disappoint fans; and clubs will fail. The IFR system will not eliminate club insolvencies.

¹ Clause 1(1)

9. Clause 1(3) states that English football is sustainable if it (a) continues to serve the interests of fans of regulated clubs, and (b) continues to contribute to the economic or social well-being of the local communities² with which regulated clubs are associated. Both are noble aspirations. However, it is possible to see how these definitions of sustainability could conflict with the purpose of the IFR. Fan and community interests may be best served by clubs investing beyond their means to achieve on field success. A better definition of sustainability would have been to lean on that adopted by the UN Brundtland Commission, such that English football is sustainable if it meets the needs of the present without compromising the ability of future generations to enjoy and benefit from the game.

Owner, Officer, and Senior Manager etc.

10. Clause 3(1) and Schedule 1, Part 1 define the meaning of ‘owner’. A person is an owner of a club if the person is an individual or registered society³ and one or more of the conditions at Schedule 1, Paragraph 2 are met. Paragraph 2 details 5 conditions, with the emphasis being on persons who can directly or indirectly influence or control the activities of a club. ‘Ultimate owner’ is defined by Clause 3(2) as the owner who has the highest degree of influence or control over the activities of the club.
11. Clause 4 defines ‘officer’ and ‘senior manager’. Notably a person is an ‘officer’ of a club if they purport to act as an officer of the club, or is a person with whose directions, instructions, guidance, or advice an officer is accustomed to act. This definition will capture those who seek to direct club operations from the shadows.⁴ As with the current Premier League Rules and EFL Regulations, who is captured by this definition is likely to be a subject of future disputes.⁵

² What is meant by community is not defined in the Bill. Paragraph 81 of the Explanatory Note describes it as persons (e.g. individuals, businesses, public organisations) who live, work or trade in the geographic area associated with the football club, and are therefore impacted by the club’s existence and activities.

³ Registered society is as defined by Clause 1 of the Co-operative and community Benefit Societies Act 2014

⁴ Clause 4(3) excludes persons giving professional advice (for example, an accountant giving an officer of a club advice in a professional capacity) from this definition.

⁵ E.g. EFL -v- Birmingham -

<https://www.efl.com/contentassets/2360941774f04705bf2c384b511bca04/20230411---agreed-decision---efl-v-richardson--ors.pdf>

Establishment and objectives of the IFR

12. Clause 5 establishes the IFR. Schedule 2 details how members of the IFR Board will be appointed.
13. Clause 6 sets out the IFR's objectives. These are:
 - a. To protect and promote the financial soundness of regulated clubs;
 - b. To protect and promote the financial resilience of English football; and
 - c. To safeguard the heritage of English football.
14. The IFR can only act to further these objectives.⁶ Consequently, the role of the IFR should be limited and focussed. Reporting around the IFR has implied a that the IFR will perform a role akin to a Commissioner in US sports. This will not be the case.
15. Paragraph 124 of the explanatory Note to the Bill makes it clear that the IFR is not obliged to prevent, at any cost, any club from entering administration or being liquidated. The IFR regime will not guarantee zero failures.

IFR general duties

16. Clause 7(2)(a) states that the IFR must not seek to exercise its functions in a way that effects sporting competitiveness of English football. This draws a clear delineation between football governance and the IFR. The IFR will have no power to determine what happens on the field of play. Delineation between football governance and the IFR is essential to avoiding contravention of Article 15c of the FIFA Statutes.
17. Clause 7(2)(c) provides that the IFR must have regard to avoiding any adverse effects on financial investment in English football. This general duty appears to be an area ripe for challenge by clubs and investors. I can foresee situations where clubs and potential investors argue that restrictive policies and procedures adversely impact the attractiveness of English football to foreign or institutional investors. Challenges to IFR published guidance on the grounds that they offend this general duty is almost inevitable.

Specificity of football

18. Clause 8(d) states that the IFR should act in a way that recognises the specific context of football. If enacted, this will give a statutory basis to the specificity of football, a principle

⁶ Clause 7(1)

well-known to lawyers operating in the sector. This should end any lingering debate over the specificity of football (and specificity of sport generally).

State of the game report

19. The IFR must prepare and publish a state of the game report at least every three years.⁷ This report will look at the main issues affecting English football and provide an assessment of any feature or features that risk jeopardising English football.
20. An in-depth state of the game report is to be welcomed. Club executives and fans alike need to understand the risks existent in the game. The difficulty will be ensuring that the IFR has sufficient resources available to produce a report that fully identifies the risks. To do this properly will be an expensive exercise. This will be money well spent if it helps clubs avoid financial ruin.
21. Not included in the Bill but which I would welcome is an initial stress test of each club. If such a test was performed, then the IFR would have a better overview of the game's finances and governance. Bespoke support for clubs could be provided. Fans would also better understand the predicament that their club is in, allowing them to manage their expectations. Clubs would likely be resistant to opening their books to the world, but I believe this would be in the long-term interests of the game.
22. The first state of the game report must be published within three years of Clause 10 coming into force.⁸ The IFR will invite suggestions about issues or other matters to be included in the report.⁹ It will be interesting to see what format the first report arrives in, and how it develops over time. Of course, a state of the game report that has dire projections risks undermining the financial stability that the IFR is intended to establish.

Guidance

23. Pursuant to Clause 12, the IFR will prepare guidance about the exercise of its functions. These will direct how the IFR operates in the way that the Gambling Commission has since it was established. As noted above, I am of the view that empowering the

⁷ Clause 10

⁸ Clause 10(3)

⁹ Clause 10(5)

independent regulator to shape how it develops is essential if it is to succeed. The issues facing football will develop over time. The IFR will need to adapt, without requiring Parliamentary approval each time. The Bill shackles the IFR, but hopefully there is enough leeway for it to develop into an effective regulator.

24. Clause 13(1) also empowers the Secretary of State to prepare guidance about the exercise of the IFR's functions. This is more controversial. It opens the possibility for political interference, if the IFR's actions do not accord with the politics of the day. What is good politics does not always make good policy. The Secretary of State should exercise significant restraint before exercising this power. This risk is mitigated by revisions be restricted to every three years, except if the revision is as a result of amendment to the Bill, or the revision is pre-agreed between the Secretary of State and the IFR.¹⁰

Operating licences

25. The introduction of operating licences is a central tenet of the Bill. A club may not operate a relevant team unless it holds an operating licence.¹¹ Practically, this means that all clubs operating at National League level or higher must obtain a licence.
26. The IFR has the power to issue provisional and full operating licences.¹² When a club first applies, it will be for a provisional licence. A provisional licence will be for three years¹³, during which the IFR will assess whether the club should be granted a full operating licence.
27. Applicants for a licence must submit an application accompanied by a personal statement, strategic business plan, and such other information as specified by the IFR.¹⁴ The IFR must grant a provisional licence if is satisfied that the club will operate a relevant team in compliance with mandatory licence conditions set out at Schedule 5 and in accordance with the duties imposed on clubs by Clauses 45 to 52 of the Bill.¹⁵ A full licence will be granted if the club meets the threshold requirements set out in Schedule 4.¹⁶
28. The mandatory licence conditions that the IFR must attach to each operating licence are:
 - a. A financial plans condition,

¹⁰ Clause 13(3)

¹¹ Clause 15(1)

¹² Clause 15(2) to (4)

¹³ This period can be extended – Clause 17(2) to (5)

¹⁴ Clause 16

¹⁵ Clause 17(2)

¹⁶ Clause 18(3)

- b. A corporate governance statement condition,
 - c. A fan consultation condition, and
 - d. An annual declaration condition.¹⁷
29. The financial plan condition requires a club to submit and update at least annually, a financial plan specifying how a club is, or is going to be, funded.¹⁸ Details of the source of funding and about expected revenues and expenses are also to be included.¹⁹ The club must also provide a financial risk assessment and plans for managing that risk.²⁰
30. The IFR can also impose discretionary licence conditions.²¹ These are to be bespoke to each club. Discretionary licence conditions are to be applied if the IFR is satisfied that compliance with the condition would ensure the club will meet, or contribute towards the club meeting, the threshold requirements set out in Schedule 4 of the Bill. They can also be used to ensure that a club will meet or, will continue to meet, the threshold requirements.
31. Schedule 4 details the threshold requirements for a full operating licence. The Bill requires the IFR to look at a club's financial resources; non-financial resources; and fan engagement.²² Non-financial resources include the qualifications and training of the club's owners and officers, as well as compliance with the corporate governance code of practice.²³ The obligation for fan engagement is met if a club has adequate means by which to consult its fans and takes the views of its fans into account when making decisions.²⁴ Fans will welcome being consulted on strategic direction, business priorities, and operational issues. These requirements reflect the central importance of fans to English football.
32. Schedule 5, Paragraph 7 requires the IFR to prepare and publish a code of practice about the corporate governance of regulated clubs. Clubs must comply with the code and submit a corporate governance statement as required by the IFA.
33. The requirement for clubs to review funding and plan for adverse events is to be welcomed. This, combined with a governance code of practice should, in the medium term, improve English football. All club boards will know what good governance looks

¹⁷ Schedule 5, Paragraph 1

¹⁸ Schedule 5, Paragraph 2

¹⁹ Schedule 5, Paragraph 3

²⁰ Schedule 5, Paragraph 3(a)(iii)

²¹ Clause 21

²² Schedule 4, Paragraph 1

²³ Schedule 4, Paragraph 3

²⁴ Schedule 4, Paragraph 4

like. They will have achievable targets to meet. The corporate governance code of practice will be an important document. A code that reflects the UK Sport Code of Sports Governance, with an emphasis on structure; people; communication; conduct; and policies and processes, will benefit the football ecosystem. The Bill does not make specific reference to equality, diversity, and inclusion. I hope and expect that this will be dealt with in the corporate governance code of practice. If it is not, then this will be a missed opportunity for football to improve its inclusivity.

Owners & Officers

34. Part 4 of the Bill relates to owners and officers of regulated clubs.
35. A person who has a reasonable prospect of becoming an owner or officer of a club must notify the IFR.²⁵ Likewise, a club must notify the IFR if it considers there is a reasonable prospect of a person becoming an owner or officer.²⁶

Owners

36. Clause 28 prohibits a person from becoming an owner of a club until the IFR determines they are suitable. Potential owners must apply, providing details of the proposed operations of the club; the estimated costs of those operations; how those costs are to be funded; and the source of such funding.²⁷ This is similar to the existing regulatory rules.²⁸
37. Where an application is submitted by an individual that meets the individual ownership fitness criteria, they have sufficient financial resources, and there are no grounds to suspect that the applicant has any source of wealth which is connected to serious criminal conduct, then the IFR must make an affirmative determination.²⁹ An individual meets the individual ownership fitness criteria if they have the requisite honesty and integrity and are financially sound.³⁰ The description of *any source of wealth* being connected to serious criminal conduct is extremely wide. New owners can expect to undergo a comprehensive review of their business interests and sources of wealth.

²⁵ Clause 27(1)

²⁶ Clause 27(3)

²⁷ Clause 28(2)

²⁸ E.g. Premier League Rule F.28

²⁹ Clause 28(4)

³⁰ Clause 26(7)

38. When making a determination under Clause 28, the IFR must have regard to the government's '*foreign and trade policy objectives*'.³¹ The Bill is silent on how the IFR will be made aware of these objectives. The possibility for foreign and trade policy objectives to conflict with the Bill's purpose of protecting and promoting the sustainability of English football are self-evident, as is the potential for this to be used as a means of applying political pressure to a regulator that is intended to be independent. The effect of the Premier League's success may have been to further the UK's foreign and trade objectives, but this was not the object of the league. Clause 37(2) gives rise to the possibility that control over ownership of English football could be used to reward or exclude those states that the UK has a positive/negative relationship with.
39. Clause 37(3) details what the IFR will consider when determining whether an individual has the requisite honesty and integrity. These include whether the individual has been a party to proceedings in any court or tribunal; and whether any regulatory or disciplinary action has been taken against them. Court and tribunal proceedings includes those in the civil or family jurisdictions.
40. The IFR will also need to consider any convictions or criminal proceedings anywhere in the world.³² This, again, is not dissimilar to the current regulatory regimes.³³
41. Similarly, the IRF must have regard to whether, on the balance of probabilities, the individual has engaged in conduct outside of England and Wales which would, if done in England and Wales, amount to the commission of a serious offence.³⁴ This is similar to Premier League Rule F1.10 and gives rise to the potential that someone charged but acquitted before the English courts³⁵ could be in a better position than someone similarly not charged in a different jurisdiction. One can foresee disputes over whether there is sufficient evidence to establish guilt on the balance of probabilities.
42. When considering whether an individual is financially sound, the IRF must have regard to the individual's financial arrangements, including whether the person has been subject to a procedure similar to bankruptcy anywhere in the world.³⁶ Again, this reflects the

³¹ Clause 37(2)

³² Clause 37(3)

³³ E.g. Premier League Rule F1.8

³⁴ Clause 37(3)(a) – A serious offence means an offence specified or galling within Part 1, Schedule 1 to the Serious Crime Act 2007 (see Clause 37(8))

³⁵ Where the burden would be beyond reasonable doubt.

³⁶ Clause 37(4)

existing regulatory framework and will continue to lead to disputes as to what is a similar procedure to bankruptcy.

Officers

43. Clause 29 makes similar provisions in relation to new officers. A new officer must make an application in accordance with rules made by the IFR.³⁷ The IFR must make an affirmative determination if it considers the applicant meets the officer fitness criteria.³⁸ Clause 26(8) states that an individual meets the officer fitness criteria if they have the requisite honesty and integrity, the requisite competence, and are financially sound. The mandatory requirement for an affirmative determination is subject to Clause 29(4)(b), which states that the IFR must not approve the individual if there is an order under Clause 38(2) disqualifying them from being an officer.

Time limits

44. Clause 32 enables the Secretary of State to impose time limits on the determination process. It is essential that these time limits are kept to a minimum and complied with. The purchase of a club is, invariably, time sensitive. Delay by the IFR could jeopardise deals; thereby, conflicting with the IFR's general duty to avoid any adverse effects on financial investment in English football.³⁹ The IFR should be compelled to deal with determinations as expeditiously as possible, rather than viewing the time limit as a date to work towards.

Change of circumstances

45. Clause 33 requires owners and clubs to notify the IFR if there has been, or may have been, a material change in circumstances relating to an owner or officer. The obligation is to do so as soon as is reasonably practicable.⁴⁰ This is an area that is likely to give rise to future disputes; with parties arguing over what amounts to a material change and when the duty arose.

Incumbent owners

³⁷ Clause 29(2)

³⁸ Clause 29(3)

³⁹ Clause 7(2)(c)

⁴⁰ Clause 33(4)

46. Clause 34 deals with incumbent owners. Incumbent owners are those who own a regulated club at the time any future Act comes into force, or who is an owner when the club becomes a regulated club.⁴¹ In those circumstances, the IFR may determine whether the individual meets the individual fitness criteria⁴² and whether they have a source of wealth connected to serious criminal conduct.⁴³ Similar provisions apply in relation to incumbent officers.⁴⁴ If the IFR is minded to make a negative finding against an incumbent owner or incumbent officer, then they will be afforded the opportunity to make representations.⁴⁵ If the IFR determines that the owner (including incumbent owner) or officer (including incumbent officer) is not suitable, then it can make an order disqualifying them.⁴⁶

Disqualification

47. An individual who is to be disqualified will be notified⁴⁷ and afforded the opportunity to make representations. The period afforded must be at least 14 days.⁴⁸
48. If an individual is disqualified from being an owner, then the IFR will give the person a direction.⁴⁹ This will require them to take all reasonable steps to cease being an owner of a club.⁵⁰ Similar provisions apply in relation to officers, with a direction being given to the officer and the club requiring them to be removed as an officer.⁵¹ The IFR also has the power to order the removal of owners in limited circumstances, e.g. where there has been a failure to comply with a direction.⁵² The issuing of such directions and ownership removal orders is likely to be very contentious and give rise to challenges. The prescriptive nature of the Bill means that the IFR will be tightly constrained in how it exercises these powers. Any failure to strictly adhere to the wording of the Act (when enacted) will give rise to grounds to challenge the decision. Conversely, there is little

⁴¹ Clause 34(3)

⁴² Clause 34(1)

⁴³ Clause 34(2)

⁴⁴ Clause 35

⁴⁵ Clause 36

⁴⁶ Clause 38(1) & (2)

⁴⁷ Clause 38(3)

⁴⁸ Clause 38(4)

⁴⁹ Clause 39(1)

⁵⁰ Clause 39(2)

⁵¹ Clause 40(2)

⁵² Clause 43

discretion afforded to the IFR, meaning that attempts to overturn a determination will be extremely difficult if there has been compliance with the statutory wording.

Duties on Clubs and Competition Organisers

49. Clause 45 is directed towards avoiding a breakaway league akin to that proposed by the European Super League ('ESL'). It prohibits a club that is a regulated club (or has been one in the previous 10 years) from operating a team in a prohibited competition. Clause 45(3) states that no account is taken of any time before the coming into force of Clause 45 when calculating the 10-year period. This creates the (unlikely) possibility that Premier League clubs could *breakaway* before the Bill is passed.⁵³ This would mean that they would not be a regulated club and, therefore, not prevented from competing in a prohibited competition.
50. A prohibited competition is a competition specified by the IFR⁵⁴ having considered those matters stated at Clause 45(5). The issues to be considered include whether the competition is merit-based, whether it would jeopardise existing competitions, or whether it would harm the heritage of English football.
51. Before specifying a competition as a prohibited competition, the IFR must give notice to the competition organiser⁵⁵ and take reasonable steps to determine the views of fans in England and Wales of regulated clubs.⁵⁶ The views of the FA and other interested stakeholders must also be sought.⁵⁷
52. The IFR can specify a competition as a prohibited competition whether or not any of the matches are played in the UK, or when the teams entered into it are not exclusively or predominantly English teams.⁵⁸ This is clearly directed at the ESL, or other breakaway European or World competition.
53. Clause 45 will, in effect, provide a statutory bar to a breakaway league. Placing this on a statutory footing will avoid competition law challenges to the prohibition.⁵⁹ However, Clause 45 should not be read as protecting the status quo. The IFR will have the power to

⁵³ This scenario is unlikely due to fan pressure and contractual obligations to the league that Premier League clubs are subject to.

⁵⁴ Clause 45(3)

⁵⁵ Clause 45(6)

⁵⁶ Clause 45(8)

⁵⁷ Clause 45(10)

⁵⁸ Clause 45(10)

⁵⁹ Though there may be other challenges based on international treaties etc.

authorise other competitions, provided they are based on merit and do not jeopardise English football. A pan-European or Global club league is still a possibility, though less likely to involve English clubs than was previously the case.

Club Heritage

54. Clauses 46, 48, and 49 deal with club heritage issues.

Home grounds

55. Clubs must notify the IFR if they propose to dispose of any freehold or leasehold interest in their home ground;⁶⁰ use any interest in their home ground as security in respect of a loan;⁶¹ or relocate.⁶²

Crest and home shirt colours

56. Clubs are prohibited from changing their crest or home shirt colours unless they have taken reasonable steps to establish that the changes are supported by a majority of the club's fans in England and Wales.⁶³ A club is also prohibited from changing its name without approval from the FA.⁶⁴

57. These proposals recognise the centrality of football to many communities and seek to protect this. They do not go as far as requiring fans to have a *Golden Share*, as recommended in the FLR. That proposal was not adopted by the Government in the White Paper, therefore, its omission from the Bill is not unexpected. Given that protecting clubs for fans and communities is the central motivation behind the introduction of the Bill, it is surprising that the opportunity to enshrine this by requiring Golden Shares was not taken. I can see how doing so might have made English football less attractive to investors (that being part of the IFR's general duties) but this does feel like a missed opportunity to do more. It will be interesting to see if this is revisited as the Bill makes its passage through Parliament.

⁶⁰ Clause 46(1)(a)

⁶¹ Clause 46(1)(b)

⁶² Clause 48(1)

⁶³ Clause 49(1)

⁶⁴ Clause 49(2)

Administrators

58. Clause 47 prohibits the appointment of an administrator without the approval of the IFR. This does not take football clubs outside of the ordinary insolvency regime, nor does it prevent clubs from entering administration. The purpose behind it appears to forewarn the IFR of an impending administration and allow it to take steps to try and avoid it. A club entering administration effects the whole English football ecosystem. When an administration is unexpected, as was the case with Wigan in July 2020, then the reverberations can be even more damaging as clubs will not have factored the same into their financial planning.

Levy

59. Clauses 52 and 53 empower the IFR to require clubs to pay to the IFR a levy for any period where they are a licenced club. This levy will be used to fund the establishment and operation of the IFR.
60. The introduction of a levy will impose an additional burden on many clubs that are already in financial difficulty. The levy will need to be tailored to the size and resources of each club. The cost of the levy must be kept to a minimum, lest the IFA risk contributing to the financial instability that it has been introduced to combat. On the other hand, the IFR must have sufficient resources available to allow it to carry out investigations and take steps to protect the game. All clubs will be watching with great interest when the IFR publishes its levy rules.

Distribution

61. Part 6 of the Bill deals with distribution of revenue. This issue has attracted the most interest pre-publication, with the Premier League and EFL currently unable to agree a deal,⁶⁵ and reports of the Bill having been delayed in the hope that a deal would be done.

⁶⁵ The Guardian – [Premier League faces backlash after failing to agree with the EFL](#) – retrieved 21 March 2024

62. Revenue for the purposes of Part 6 is primarily revenue received from broadcasting rights.⁶⁶ Other revenue can be specified in regulations made by the Secretary of State.⁶⁷ The potential to amend the definition of revenue is necessary to future-proof the regime, as how we consume (and pay for) sport is changing.
63. A specified competition organiser can apply for the resolution process to be triggered.⁶⁸ Currently, this will be the Premier League or the EFL, though that may change in future.
64. The IFR will only trigger the resolution process if one of 4 conditions is met, namely:
- a. Where no distribution order or agreement is in place for a season;⁶⁹
 - b. If there has been, or will be, a material reduction in the relevant revenue received by one specified competition organiser;⁷⁰
 - c. There has been a material change in circumstances since the last distribution agreement or order had effect;⁷¹ or
 - d. A distribution agreement has been in place for a specified period, with that period either having been agreed by the specified competition organisers or, in any other case, 5 years,⁷² and

it has reasonable grounds to suspect that its ability to advance one of its objectives would be jeopardised if the resolution process were not triggered.⁷³

65. The procedural hurdles to be overcome before the resolution process will be triggered are high. This is consistent with the Government's statements that the IFR will adopt an advocacy first approach.⁷⁴ The IFR will encourage the Premier League and EFL to agree a distribution deal, rather than proceed to the resolution process. It will be interesting to see when, if ever, the IFR determines that its objectives will be jeopardised if the resolution process is not triggered.

⁶⁶ Clause 55(2)

⁶⁷ Clause 55(2)(a)(ii)

⁶⁸ Clause 56(1)

⁶⁹ Clause 56(3)

⁷⁰ Clause 56(4)

⁷¹ Clause 56(5)

⁷² Clause 58(2)(a)

⁷³ Clause 58(2)(b)

⁷⁴ <https://www.gov.uk/government/news/historic-football-governance-bill-introduced-in-parliament>

Mediation

66. The first stage of the resolution process is mediation. A 70-day period is allowed for this process to complete.⁷⁵
67. The requirement to mediate is consistent with the current trend in civil disputes (and increasingly so in sporting governance disputes) but whether it will achieve its purpose, is questionable. The Premier League and the EFL are sophisticated, co-dependant entities. If it has proven necessary to trigger the resolution process, then it is likely that their positions are unreconcilable. Given the current positions of the Premier League and the EFL, we may get to see whether this system works sooner rather than later.

Final proposals and distribution orders

68. If the specified competitions organisers cannot reach a mediated agreement, then they must present their final proposals and any supporting evidence.⁷⁶ Which of these final proposals is to be adopted will be determined by an Expert Panel⁷⁷ consisting of at least three members.⁷⁸ Contrary to pre-publication reports, this is not intended to be an arbitration scheme.⁷⁹
69. Clause 65(1) states that the Expert Panel must make an order requiring the relevant revenue to be distributed in accordance with whichever proposal the committee considers to be more consistent with the IFR's objectives, without placing an undue burden on the commercial interests of either specified competition organiser.⁸⁰
70. The decision to make the Expert Panel choose between the two final proposals encourages the competition organisers to put forward their best offers, rather than starting high in the expectation of a decision somewhere in the middle. This approach also reduces the possibility for challenge. The Expert Panel will be exercising limited discretion. Any accusation that the decision is unreasonable is unlikely to succeed. However, this approach deprives the Expert Panel of the power to impose a distribution order outside of those proposed by the competition organisers. An eminent panel may reason that there is

⁷⁵ Clause 59(2), (4), and (6)(b)

⁷⁶ Clause 60(4)

⁷⁷ The Expert Panel will comprise those with skills, knowledge and experience in relation to the operation, organisation or governance of clubs or competitions, and financial or other regulation. Schedule 2, Paragraph 8(2)

⁷⁸ Clause 60(2) and Schedule 2, Paragraph 19

⁷⁹ Per Paragraph 70 of the Explanatory Note where it is said that this is not deemed to constitute an arbitration scheme for the purposes of the Arbitration Act 1996

⁸⁰ Clause 61(1) & (2)

an alternative that better serves the IFR's objectives and limits the burden on either party. Would it not be better if the panel could direct this solution? Again, I will be interested to see if this is scrutinised as the Bill passes through Parliament.

71. The IFR may revoke a distribution order if it considers there are exceptional circumstances to do so.⁸¹ The IFR cannot, however, revoke or interfere with a distribution agreement. This is consistent with the principle of freedom of contract; the State being slow to interfere with an agreement freely entered. It is understood that the EFL wanted the IFR to have the power to revoke or revisit a distribution agreement if it was not in the best interests of the game. As the IFR has the power to revoke a distribution order in exceptional circumstances, I can see the logic of this approach. If the distribution model is not working for the game, then why should the fact that it was agreed rather than ordered make a meaningful difference. The IFR's role is to ensure that English football is sustainable. If there are exceptional circumstances that place the sustainability of English football at risk, then the IFR would be justified in requiring the specified competitions organisers to revisit the distribution model.
72. The IFR is required to keep the distribution orders under review to ensure that they are being complied with.⁸² The IFR can take enforcement action if a specified competition organiser does not comply.⁸³ Again, this power does not extend to a distribution agreement. If, for example, the Premier League does not comply with its obligations under a distribution agreement, then the EFL's remedy will be to enforce the contract. The IFR could not take enforcement action against the Premier League in such circumstances.

Investigatory powers

73. Part 7 of the Bill details the IFR's proposed investigatory powers. These largely mirror other regulators and appear uncontroversial.
74. Of most interest to clubs and legal practitioners is the IFR's power to appoint an expert reporter and the requirement to preserve information.
75. An expert reporter can report on any matter that the IFR considers necessary for the purpose of exercising its functions under the Act.⁸⁴ Clause 65(4) empowers an expert

⁸¹ Clause 62(3)

⁸² Clause 63(1)

⁸³ Clause 63(1)(b)

⁸⁴ Clause 65(1)

reporter to require a person to give information that they consider necessary for preparing their report. This is an extremely wide power that will allow the IFR to gather information from those outside the jurisdiction of football's governing bodies. There is no requirement that the person required to deliver information be a *participant* or similar. A person who fails to comply could be sanctioned in accordance with Part 8 of the Bill.

76. Schedule 8 provides further details as to the IFR's investigatory powers. These include the power to enter premises under a warrant.⁸⁵ This power is far beyond anything currently available to football regulators.
77. Clause 71(1) requires a person who knows or suspects that an investigation is being, or is likely to be, conducted, to preserve relevant information. Relevant information means any information that the person knows or suspects is or would be relevant to the investigation.⁸⁶ Losing emails or deleting WhatsApp messages could result in financial penalties being imposed.⁸⁷ If the destruction of information is found to be intentional, reckless, or done to conceal relevant information, then the person may be guilty of a criminal offence punishable by up to 2-years imprisonment and/or an unlimited fine.⁸⁸ The potential consequences for destroying, falsifying, or providing misleading information will be much more severe under the IFR regime than under the current football regulatory system.
78. Further, it will be an offence to give false or misleading information to the IFR or an expert reporter,⁸⁹ and if a person intentionally obstructs the IFR in the exercise of a warrant. Again, these offences are punishable by up to 2-years imprisonment and/or an unlimited fine.⁹⁰

Reviews and Appeals

79. Part 9 creates a system of reviews and appeals.
80. A person has the right to a review of a reviewable decision.⁹¹ A decision is reviewable if it is listed in the first column of the Table in Schedule 10. These include the refusal to

⁸⁵ Schedule 8, Paragraph 2

⁸⁶ Clause 71(2)

⁸⁷ Clause 74(1) and Schedule 9

⁸⁸ Clause 77(6)

⁸⁹ Clause 77(3) & (4)

⁹⁰ Clause 77(6)

⁹¹ Clause 80(1)(a)

grant an operating licence; the issuing of a disqualification order; and the decision to make a distribution order. The Table also details who the review will be carried out by; either the IFR Board or a committee of the Expert Panel.

81. Clauses 81 and 82 prescribe how an internal review shall be carried out. The reviewer can uphold, vary, or cancel the decision.⁹²
82. The Bill also provides a right of appeal to the Competition Appeal Tribunal (the ‘**Tribunal**’).
83. The right to appeal is granted to a concerned person, or any other person with sufficient interest in the decision.⁹³ This gives rise to the possibility of the FA or the leagues becoming a party to an appeal.
84. Clause 83(1)(a) prescribes certain reviewable decisions where an appeal may proceed directly to the Tribunal i.e., without there first being an internal review.^{94 95} This direct right of appeal confined to:
 - a. The suspension or revocation of an operating licence;⁹⁶
 - b. A deemed determination that a person is not a suitable owner or officer of a club;⁹⁷ and
 - c. The making of a disqualification order in respect of a person.⁹⁸
85. In all other circumstances, a concerned person or interested party must seek an internal review before appealing to the Tribunal.⁹⁹
86. Any appeal must be made in accordance with the rules relating to the procedure of the Tribunal.¹⁰⁰
87. The issuing of an appeal does not automatically suspend the effect of the decision to which the appeal relates.¹⁰¹ The Tribunal has the power to direct the suspension of the

⁹² Clause 82(1)

⁹³ Clause 83(1)

⁹⁴ Clause 83(2)

⁹⁵ Note: An internal review can be requested. If an internal review is requested, then an appeal must await its conclusion – Clause 83(3)

⁹⁶ Under Clauses 19 or Schedule 9, Paragraph 9

⁹⁷ Under Clauses 32(5), 34, or 35

⁹⁸ Under Clause 38

⁹⁹ Clause 83(1)(b)

¹⁰⁰ Clause 83(4) - This includes the requirement to lodge an appeal within the time period specified in Part 5B of the Tribunal Procedure Rules (Clause 83(5)).

¹⁰¹ Clause 83(6)

effect of a decision, save for in limited circumstances.¹⁰² Any appeal is to the Court of Appeal on a point of law only.¹⁰³

88. Clause 84(1) lists those appeals that will be determined on their merits. These are the same decisions listed at Clause 83(2), namely:
- a. revoking a provisional operating licence under Clause 19;
 - b. a deemed determination that a new owner or officer is not suitable to be an owner or an officer of a club as a result of the time period for the IFR to make a determination being exceeded under Clause 32(5);
 - c. a deemed determination that an incumbent owner is not suitable to be an owner of a club under Clause 34;
 - d. a deemed determination that an incumbent officer is not suitable to be an officer of a club under Clause 35;
 - e. making a disqualification order in respect of a person under Clause 38;
 - f. suspending or revoking an operating licence under Schedule 9, Paragraph 9.
89. The Tribunal may confirm or set aside a decision. It may also remit the matter to the IFR or reviewer; take such steps as the IFR or reviewer could have taken; or make any decision which the IFR or applicable reviewer could have taken.¹⁰⁴ The power to remit is likely to be the course most often taken, with the Tribunal being deferential to the IFR's expertise. This gives rise to the possibility of appellate ping-pong that is sometimes seen in other tribunal jurisdictions i.e., when a case goes on appeal and is remitted on multiple occasions.
90. In all other cases, the Tribunal must apply judicial review principles.¹⁰⁵
91. The rationale behind prescribing the Competition Appeal Tribunal as the forum for appeal is unclear to me. The Administrative Court had been suggested as the likely forum, given its expertise in judicial review. There was a logic to this that isn't obvious with the Competition Appeal Tribunal. My preference would have been for the creation of a specialist court, similar to the Technology and Construction Court. Whilst its workload would be limited, I believe that it would English football would have benefited from judges with sector specific expertise. The creation of such a court would have been consistent with the specificity of football recognised at Clause 8(c) of the Bill. Said Court

¹⁰² Clause 83(6) and (7)

¹⁰³ Clause 83(8)

¹⁰⁴ Clause 84(3)

¹⁰⁵ Clause 84(2)

need not only be confined to football but have jurisdiction over sports-related disputes more generally.

92. Recent years have seen football disputes play out in the courts with increasing regulatory. Part 9 of the Bill, if enacted, will likely see this become a more regular occurrence. Football has long preferred to deal with its disputes under the cloak of arbitration. The future may see that cloak being lifted. Whether that acts as a deterrence to breaching the terms of the Act, only time will tell.

Conclusion

93. The proposal to introduce a Football Regulator has been welcomed by all sides of the political divide. The adoption of this Bill, in some form, appears inevitable.
94. I remain sceptical of the intellectual rationale for an IFR. The potential for it to be an additional layer of bureaucracy is there for all to be seen. Its operation will take funds from clubs, which is counterintuitive. What success will look like has not been clarified. This is not to be a zero failure regime. If multiple clubs fail over the next decade, then will the IFR have been a failure? Will this lead to the IFR being abandoned? I suspect not.
95. If the IFR is to succeed, then it will have to act to work collaboratively with the clubs. It also must have adequate resources available to it.
96. Football finance needs reform. I have been involved in several cases arising from the failure of clubs. The devastation that this causes fans and communities is to be avoided, where possible. Whether the IFR is the right option to do this, only time will tell.

Steven Flynn

22 March 2024

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