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THE NEW FOOTBALL REGULATOR

Some preliminary observations on the White Paper proposals for an Independent Regulator of Football

by Nick De Marco KC

Introduction

On Thursday 23 February 2023, following much anticipation, the UK Government Department for Culture, Media & Sport ('DCMS') published its White Paper "*A sustainable future - reforming club football governance.*"[1] It has been described as the "*biggest shake up in football for decades*", "*revolutionary*" and "*landmark*". These are not exaggerations. The government proposals represent the first and only independent statutory regulator of football.

Much has already been said about the White Paper, with most commentators broadly welcoming the proposals, the Premier League offering some caution, and the EFL suggesting they do not go far enough. In this article, I discuss a few of the interesting and difficult legal issues that occur to me, in the hope of generating further discussion in the lead up to the important legislation that shall bring in the Regulator.

It is clear from the outset that careful thought has gone into the White Paper, which itself follows the lengthy consultation and impressive work of the Fan Led Review into Football Governance, chaired by Tracy Crouch MP.[2] The proposals in the White Paper strike a careful and pragmatic balance between the perceived need for reform by independent regulation backed with statutory powers, on the one hand, largely motivated by concerns about the financial unsustainability of many football clubs and the threats of breakaway leagues by the elite, and, on the other hand, the importance of allowing what is one of the UK's best performing industries (at Premier League level at least) to continue to attract investment, thrive commercially and generate the highest viewing figures around the world.

The first point to stress is that the new Regulator will not take the place of existing football regulators (such as UEFA, The FA, the Premier League, the EFL or the National League). Those organisations will continue to exist and still be responsible for much (indeed for most) of the regulation of football: such as the rules of the game, the organisation of the competitions, regulation of football transfers and so on. The Regulator's scope will be limited primarily to financial sustainability and good governance (including significantly matters relating to club ownership). Even in these areas, leagues and other bodies may have their own regulations, such as financial fair play ('FFP') rules, and the Regulator will sit above those layers of regulation, intervening only as a last resort. The White Paper frequently uses expressions such as "*advocacy-first approach*" and "*proportionality*" to denote the fact that that it shall try and encourage football clubs to comply with various minimum standards, rather than jump in with punitive sanctions.

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[1] https://www.gov.uk/government/publications/a-sustainable-future-reforming-club-football-governance/a-sustainable-future-reforming-club-football-governance.

[2] See: https://www.gov.uk/government/publications/fan-led-review-of-football-governance-securing-the-games-future/fan-led-review-of-football-governance-securing-the-games-future.

Licensing

And yet, the basis for the Regulator's power shall be a new licensing system where all "*116 clubs in the top 5 tiers of the English football pyramid would require a licence from the Regulator to operate as professional men's football clubs.*"[3] The licences shall require clubs to meet the following 4 Threshold Conditions:[4]

1. Appropriate resources	The club must have adequate financial and non-financial resources and controls in place, to meet committed spending and foreseeable risks.
2. Fit and proper custodians	Persons at a club deemed to exercise significant decision-making influence must be fit and proper custodians.
3. Fan interests	The club must have appropriate provisions for considering the interests of fans on key decisions, and issues of club heritage, on an ongoing basis.
4. Approved competitions	The club must agree to only compete in leagues and competitions that are approved by the Regulator based on predetermined criteria.

A club that fails to meet the licensing criteria can ultimately be prohibited, by law, from playing professional football in the UK. That is of course a last resort, and it is unlikely the Regulator will apply such a sanction other than in the most exceptional circumstances, but its existence is a necessary legal condition of the Regulator's power and not a mere hypothetical.

Perhaps more apposite here are the proposals relating to the fourth Threshold Condition, that clubs can only compete in leagues approved by the Regulator on the basis of predetermined criteria, suggested to be that:[5]

i. The competition must be fair and meritocratic.
ii. The competition must not unduly undermine the sustainability of English football's existing leagues and competitions.
iii. The Regulator must consult fans when approving a competition.
iv. The Regulator must consult the FA when approving a competition.

Paragraph 4.11 of the White Paper makes clear that "*this Threshold Condition would allow the Regulator to create a protective lock against English clubs joining breakaway competitions that did not meet these criteria. This would ensure fans no longer face the prospect of seeing their clubs join competitions, like the European Super League*." That is all well and good, the European Super League being such an unattractive, anti-competitive and unpopular proposition within

[3] Paragraph 4.1 of the White Paper

[4] Table 1 of the White Paper

[5] Paragraph 4.10 of the White Paper

English football. But that may not be the case for all new break-away competitions or innovations.

Consider the Premier League: it was itself a break away from the Football League, set up to protect and increase the income of the top clubs in 1992. It was unsuccessfully resisted by the Football League, who could not pursue a judicial review against The FA (who sanctioned the competition) because The FA is a private body.[6] It has gone on to become the most successful domestic football competition in the world, generating billions of pounds and attracting more viewers worldwide than any other football league, all to the enormous benefit to the clubs that compete in it.

Some have speculated before about the need for some type of '*Premier League 2*' or super Championship, where the clubs at the second tier of English football (joined perhaps by Celtic and Rangers FC) might be able to generate more broadcast and commercial revenues if independent from the rest of the Football League (the 'EFL'). And, of course, the suggestions of some type of new European competition, free from UEFA, continues to be made.

Such innovations are not necessarily bad things. All successful sporting competitions have to adapt, or reform through new structures, in order to survive and prosper. The decline in the annual subscription based football broadcasting model, taken with the rise of new media where younger fans and consumers prefer a greater freedom of choice about what and when they watch sporting events will inevitably impact the business of football if it is to continue to grow.

There are thus obvious problems with the idea of preventing innovation by legislation. The suggested (and sensible) criteria for an "*Approved competition*" go some way to meet this, allowing the Regulator to accept new competitions (perhaps like the Premier League when it formed) so long as it remains part of the pyramid system of football and ticks the other boxes. It may also generate substantial disputes, however, about the legality of decisions said to be based on the sustainability of other leagues, or consultation with fans.

Then there are the legal problems. Consider the recent Advocate-General's ('AG') Opinion in the European Super League case finding that FIFA and UEFA's sanctions on clubs participating in the Super League did not infringe competition law.[7] One of the reasons the AG opined that there was not a restriction of competition by "*object*" within the meaning of Article 101(1) TFEU[8] was because neither FIFA nor UEFA were public bodies such that an undertaking planning to organise a new competition would not "*absolutely have to obtain the approval*" of those bodies to do so.[9] In short, they could still set up their own league: they just could not compete in UEFA at the same time. That would not be the case where a Regulator withdrew a club's license to play any professional football in England because it joined a non-

[6] *R v Football Association Ltd, ex p Football League* [1993] 2 All ER 833

[7] Case C-333/21, *European Superleague Company SL v UEFA*, Opinion of Advocate General Rantos delivered on 15 December 2022 (https://curia.europa.eu/juris/document/document.jsf;jsessionid=562F03D233629AE7D7DBE3297F56EE85?text=&docid=268624&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3265101).

[8] The Treaty on the Functioning of the European Union.

[9] At [75] – [78].

approved competition. Such a rule may well restrict competition, although the careful drafting and application of the criteria for an "*Approved competition*" opens the door to demonstrate that any such infringements may generate objective economic benefits that outweigh the negative effects of the restriction of competition (the Art 101(3) TFEU exemption).

Then there is the potential difficulty with FIFA, which has often suspended national football associations because of state interreference.[10] Article 19(1) of the FIFA Statues[11] provides that "*Each member association shall manage its affairs independently and without undue influence from third parties*", and third parties has been read to include governmental interference. The FA's objects include to "*govern the game of association football*" in England.[12] Does the creation of a state Regulator with powers to prevent a football club playing professional football in England constitute undue influence in The FA's affairs? While it may be arguable, FIFA has been careful in determining when and against whom to invoke its powers to suspend a member association for breach of Art. 19, the usual focus being on influence on the administration of the association itself, rather than on the matters it regulates.[13] Absent something exceptional like the Regulator ordering that The FA must replace its Chairperson with another appointee it is most doubtful that the proposals as drafted would lead to any sanction being applied by FIFA, and it is significant that thus far FIFA itself has not raised any concern about the proposals. A different issue might arise with respect to FIFA's prohibition on recourse to ordinary courts of law found in Article 58(2) of the Statutes; this is considered in the section below on procedures.

Financial Regulation

A key function of the Regulator will be financial regulation, to reflect the need for better financial substantiality of professional football clubs. The approach is not to devise some new set of spending or FFP rules however, but rather to encourage and ultimately ensure (through the Licensing conditions) better financial planning and reporting by clubs, so that they are able to demonstrate they have appropriate financial resources. The financial reporting and monitoring requirements suggested in section 5 of the White Paper represent a sensible approach to the management of large companies such as football clubs, but many professional clubs lower down in the pyramid may find the new obligations a strain on their resources. We can expect many clubs will need to recruit more finance professionals if they are going to comply with new rules.

There is a welcome "*light touch*" approach to spending, in contrast to some of the approaches to FFP and salary caps by the leagues:

[10] See, e.g. the suspension of the Zimbabwe and Kenya FA due to government interference in February 2022: https://www.bbc.co.uk/sport/africa/60523068.

[11] FIFA Statutes, 2022 Ed.: https://digitalhub.fifa.com/m/3815fa68bd9f4ad8/original/FIFA_Statutes_2022-EN.pdf.

[12] Art. 88.1.2 of The FA Articles of Association.

[13] See for a recent discussion of FIFA's approach, "*Why FIFA Banned The All India Football Federation & What It Means*" by Aravind Viswanath (LawInSport, February, 2023): https://www.lawinsport.com/topics/item/why-fifa-banned-the-all-india-football-federation-what-it-means.

> *"Owner funding can allow clubs to chase ambition, and has been a key factor in growing English football into the exciting, and valuable, product it is. Where requirements like salary caps would limit this dynamic competition, it is the government's view that the Regulator should not unduly limit or deter sustainable owner investment. Clubs should be allowed to enjoy the benefits of investment and spending, but enjoy them while being disciplined."*[14]

Though the paragraph following notes the risk of owner subsidisation leading to over spending on player wages and contemplates "*extreme circumstances*" when the Regulator might have a role in considering whether owner might be destabilising.

The White Paper envisages that the Regulator would have specific powers to pre-approve stadium sales,[15] and "*place controls on excessive debt*"[16] through the Licensing system.

The interrelationship between the more "*light touch*", report-focussed financial regulation suggested by the White Paper and the harder edged FFP-type spending controls of UEFA, the Premier League and the EFL is an interesting and potentially difficult one. The White Paper makes clear its financial regulation will interreact with, rather than replace, existing league rules,[17] but in the section dealing with '*The Regulatory Model*' it suggests:[18]

> *"…domestic leagues could still apply financial rules aimed at delivering fair competition, but the Regulator might take a view if certain rules risked cutting across its own financial resilience regulation. If cooperation does not work, the Regulator would need powers to enforce the boundaries of respective rules and responsibilities."*

Yet far from delivering "*fair competition*" league FFP rules tend to re-enforce the economic advantages of richer clubs over others. The stated aims of the various FFP rules are not about competitive balance at all, but about financial sustainability, precisely what the Regulator shall be concerned with.[19] Might this lead to the Regulator erecting and enforcing barriers that dilute the leagues' powers to introduce further cost restraining financial rules? Salary caps provide a good example: the White Paper is (correctly in my view) sceptical about player salary caps.[20] The EFL introduced hard salary caps in the 2019/20 football season in League

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[14] Paragraph 5.20 of the White Paper.

[15] Paragraph 5.24 of the White Paper

[16] Paragraph 5.27 of the White Paper

[17] Paragraph 5.31 of the White Paper

[18] Paragraph 10.17

[19] See, e.g. Art 2 of the **UEFA Club Licensing and Financial Sustainability Regulations**, listing as the rules' objectives such things as "*economic and financial sustainability*" (Art. 2.02(a)), "*better cost control*" (Art. 2.02(c)), "*clubs to operate on the basis of their own revenues*" (Art. 2.02(d)), with no mention of competitive balance (https://documents.uefa.com/r/UEFA-Club-Licensing-and-Financial-Sustainability-Regulations-2022-Online); and see Regulation 18 of the **EFL Regulations** providing that the objectives of FFP rules involve "*improving the economic and financial capability of Clubs*" (Reg. 18.1.1), "*introducing more discipline and rationality in Club football finances*" (Reg. 18.1.4), "*encouraging Clubs to operate on the basis of their own revenues*" (Reg. 18.1.5), "*encouraging responsible spending for the long-term benefit of football*" (Reg. 18.1.6), and "*protecting the long-term viability and sustainability of League football*" (Reg. 18.1.7) (https://www.efl.com/-more/governance/efl-rules--regulations/efl-regulations/section-4-clubs/).

[20] "*salary caps tied to revenue would have negative impacts on competition if applied throughout the pyramid, and would not build resilience to shocks into clubs' finances and operations*" (paragraph 2.24); "*Regulations*

One and League Two, only to have them overturned midway through the season following a successful legal challenge brought by the players' union, the PFA, due to the EFL's failure to consult.[21] Any future attempt by leagues to bring in salary caps (or other hard edged spending restrictions) may now be even more difficult given the indication of the Regulator's stance.

Owners' and directors' tests

The White Paper suggests that the Regulator shall have responsibility for a new, enhanced club owners' and directors' test ('OADT'), drawing on fit and proper persons tests applied by other regulators including the Financial Conduct Authority (FCA), HMRC, the Solicitors Regulation Authority and the Bar Standards Board.[22] In addition to the current disqualification conditions applied by the leagues,[23] including extending test criteria to cover a broader range of past bankruptcies, insolvencies and convictions.[24] For example, current tests disqualify persons convicted of offences of dishonesty, whereas the White Paper contemplates extending this to other serious criminal convictions. They might have had in mind one of the controversial previous owners of Blackpool FC who had a conviction for rape.[25]

A politically-exposed person ('PEP'), that is a an individual who is or has been entrusted with a prominent function, would not be automatically disqualified, but their PEP-status "*may be considered as part of an in-the-round assessment*" given the risk of exposure to bribery, corruption or external influence.[26] One can see how this might become relevant to some foreign owners with current or previous associations with political power.

The Regulator may have additional powers to enforce an OADT test identifying a perspective owner's source of wealth and identifying links with criminality and corruption because it can more easily exchange information with other existing regulators and agencies – something contemplated by the White Paper.[27]

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which cap spending on wages (often relative to turnover, called 'soft salary caps') can reduce overspending, but are prone to circumnavigation. They can also entrench the dominance of the richest clubs - there is a strong correlation between wage spend and league position, and soft salary caps permit richer clubs to spend more, thereby increasing their chance of on-pitch success." (paragraph 5.4); "*requirements like salary caps would limit this dynamic competition, it is the government's view that the Regulator should not unduly limit or deter sustainable owner investment*" (paragraph 5.20).

[21] See: https://www.blackstonechambers.com/news/the-pfa-v-the-efl-football-league-1-and-2-salary-cap-arbitration/. Nick De Marco KC and Ravi Mehta of Blackstone Chambers led the successful challenge.

[22] Paragraph 7.16 of the White Paper.

[23] See, e.g. Appendix 3 to the EFL Regulations, the Owners' and Directors' Test (https://www.efl.com/-more/governance/efl-rules--regulations/efl-regulations/appendix-3-owners-and-directors-test/).

[24] Paragraph 7.17 of the White Paper.

[25] https://www.theguardian.com/football/blog/2017/nov/07/blackpool-fit-and-proper-persons-test-football-league.

[26] Paragraph 7.22 of the White Paper.

[27] Paragraph 7.25 of the White Paper.

According to the White Paper the government is considering whether the Regulator should "*set tougher restrictions around leveraged buyouts, whereby the purchase of a club is (in part or wholly) financed through loans secured against the club itself.*"[28] This reflects the concern many (including the Premier League and The FA)[29] have expressed about funding the purchase of clubs with loans from the club itself. However, from a financial sustainability point of view there is little evidence to suggest that those cases that have been reported in the press to have involved leveraged buyouts in relation to club purchases (e.g. Manchester United, Burnley and Chelsea) have led to any concerns about the sustainability of those clubs: quite the contrary. In the circumstances, whilst this might be an area the Regulator wishes to look at, it should be careful before imposing any tougher restrictions that prevent investment in football unless there is clear evidence that a buy-out will make the club unsustainable: in which case the current powers that the White Paper suggests the Regulator would have ought to be sufficient for it to intervene, without the need for restrictions on leveraged buyouts.

Another important development is the proposal that the Regulator would require prospective owners to declare how much money they intend to invest in the club in the short and long-term as part of a "*personal guarantee*".[30] Exactly what form such guarantee would take is as yet uncertain, but many in football have argued that the necessary corollary of encouraging owner investment is some type of up front financial commitment by the investor to cover the club's costs for a given period. The Licensing regime could be a way to do this, and hopefully avoid the problem of an owner committing a club to spending on player wages depending on that owner's funding, only to then "*turn off the tap*" leaving the club in the situation that Bury FC found itself in.

One welcome proposal is that the Regulator's OADT would be subject to a statutory deadline. The OADT tests currently operated by the leagues are not only opaque, to say the least, but are not subject to any timetable. The Premier League took nearly 18 months before it approved the takeover of Newcastle United in 2021,[31] and many other OADT tests drag on behind closed doors for months with no certainty as to how long they might last. This can prove fatal for clubs where buyers (usually locked into some form of exclusivity so the club cannot seek alternative investment) lose patience. Greater certainty and transparency in this area is a good thing, but it will be very important that the Regulator engages sufficiently qualified people to deal with these tests efficiently. Takeover deals are often very time critical, and whatever the problems with some of the leagues' operation of the OADT, the experience of those working for the leagues means that OADT tests can often be dealt with very efficiently. There is a risk that a new Regulator might lack the necessary experience and apply statutory deadlines as a norm rather than an outer time limit, leading to the possible collapse of time sensitive take-overs.

Consultation with fans

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[28] Paragraph 7.29 of the White Paper.

[29] See, e.g.: "*FA working with leagues to tackle leveraged takeovers of clubs*" (Guardian, 11 May 2022), https://www.theguardian.com/football/2022/may/11/fa-working-with-leagues-to-tackle-leveraged-takeovers-of-clubs. ; "*Premier League weighs ban on debt-fuelled club takeovers*" (Sky News, 14 May 2022) https://news.sky.com/story/premier-league-weighs-ban-on-debt-fuelled-club-takeovers-12612619;

[30] Paragraph 7.30 of the White Paper

[31] See: https://en.wikipedia.org/wiki/2021_takeover_of_Newcastle_United_F.C.

An important feature of the proposals is the recognition of the status of football fans. Clubs shall be required "*to have appropriate and proportionate provisions for considering the interests of fans on key decisions and issues of club heritage*".[32] In this respect, the Regulator shall work closely with The FA, which is itself updating its rules to protect club heritage assets, such as the club badge, name and home colours. Rather than introducing the proposal to give fans a "*Golden Share*", it is proposed that the Regulator will require clubs to collect proof that a majority of fans are in favour of a change, "*giving fans an effective veto over changes to these intrinsic representations of their club's history and heritage*."[33]

Such matters can be of significant importance to football fans. I recall the controversy at the club I support, QPR, when the then owner, Flavio Briatore, decided, without consultation, to change the club badge to a design that might have befitted one of his branded luxury slippers and got rid of the popular long time club mascot "*Jude the Ca*"' (who has since returned back along with a fan chosen badge). The requirement to consult, and show a majority of fans support such changes, should curtail such whims in the future.

Stadium sales and relocations shall also require pre-approval of the Regulator, who shall consider the historical connection to a specific location, views of supporters and the local community, and the impact on other clubs in a new location before giving approval.[34]

While some may argue these various provisions limit the ability of owners to take measures to increase the financial viability of their clubs, they reflect one of the important underlying themes of the Fan-Led review and the White Paper – that football is not to be treated as the same as other interchangeable commercial businesses, it plays an important social role in the community.[35] The White Paper represents a political decision to protect the social status of football.

At the same time, it is likely the Regulator will apply the various conditions relating to heritage assets and stadia in a flexible and proportionate way, in accordance with its objectives to encourage the financial sustainability. To put it simply, if a club can make the case that it can only financially survive by moving stadium, for example, it would be self-defeating for the Regulator to prevent such move because the majority of the club's fans did not support it.

Financial distribution

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[32] Paragraph 8.5 of the White Paper.

[33] Paragraph 8.18 of the White Paper.

[34] Paragraph 8.21 – 8.22 of the White Paper.

[35] Football "*is an important part of the lives of a large proportion of the population and its clubs play a pivotal role in many communities. The loss of a football club can result in substantial economic and social costs felt by a range of affected parties*" (paragraph 2.10); "*Unlike typical consumers of typical products, fans have deep emotional and social connections to their club. In economic terms, this means when their club ceases to exist, they will not substitute to an alternative 'supplier' - their demand will simply remain unfulfilled. In football terms, an Everton fan is not going to cross Stanley Park to switch allegiance to Liverpool if the worst happens to their club.*" (paragraph 2.11); "*Unlike typical businesses, football clubs are community assets with cultural heritage value. In addition to the direct and indirect economic benefits they deliver to local areas, they benefit wider society. Clubs often engage in community initiatives, and contribute to civic identity and pride in place.*" (paragraph 2.13).

One of the most controversial areas considered in the White Paper is the vexed question of the distribution of football revenue, that is the distribution of monies primarily earned by the Premier League from broadcasting rights, to leagues and clubs lower down in the pyramid. Quite sensibly, the White Paper does not suggest what the distribution should be, or even that the Regulator should decide that question (other than as a *"last resort"*). The "*advocacy-first*" approach is again adopted: clubs and leagues shall be encouraged to come to an agreement between themselves. But if they do not certain measures are proposed.

The divergencies in distribution are highlighted in the White Paper at paragraph 9.3:

> "• *The majority (c.83%) of revenue earned by clubs in the top 4 divisions now sits within the Premier League, while League Two clubs account for just 1.5%. By comparison, in 1993 the Premier League's share of revenue was 57%.*
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> • *The gap between the collective revenues of Premier League clubs and of Championship clubs exceeded £4 billion in 2020/21. The average revenue of a Premier League club (£243 million) was approximately 8 times that of a Championship club (£25 million). There was also a wide gap between Championship (£25 million) and League One (£7.2 million) clubs."*

The Regulator's "*targeted power of last resort*" to intervene on financial distributions is clearly envisaged as a "*stick*" that shall hopefully never have to be used, because the leagues will understand the benefit of reaching a satisfactory agreement between themselves. But if no agreement is reached a two-stage intervention is contemplated.

The first step would be for "*mediation*" (incorrectly described as "*arbitration*" in some of the reporting of the White Paper),[36] that is a process by which the parties are encouraged to reach an agreement, usually with the assistance of an independent mediator who shall encourage agreement but not make any decisions. This is a sensible proposal. In particular, if a mediator, respected by both parties, with good knowledge of the legal and commercial issues related to financial distribution in football is appointed, the parties may be persuaded to voluntarily agree to a reasonable financial settlement.

If this does not work, a form of "*binding final offer arbitration*" could be imposed whereby "*the Regulator would set out the terms of the process, including the issues that any financing would need to address. In response, the Premier League and EFL would each set out their proposal, with accompanying analysis and justifications. The Regulator would then choose which of the 2 proposals is more appropriate, based on the evidence presented and in consultation with all relevant parties*."[37] Such an approach ought to encourage each side to present its most reasonable case, in the knowledge that arguing for "*too much*" is likely to undermine its position. An advantage of final and binding arbitration is that there will only be very limited grounds upon which the parties can challenge the final result, such as serious procedural irregularity or a point of law (as provided for by the Arbitration Act 1996): the merits of the decision itself could not be challenged.

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[36] Perhaps because the second step is arbitration, or because the White Paper suggests at paragraph 9.9 that it would undertake a mediation role, similar to the Advisory, Conciliation and Arbitration Service (ACAS).

[37] Paragraph 9.12 of the White Paper.

Yet, stepping back, these are potentially highly interventionist powers. It would be difficult to imagine any government, especially a Conservative government, requiring the top supermarkets agree with all of the other smaller supermarkets and high street mini-markets on how they will distribute their profits to those who make less, with the threat that if they fail to reach a redistribution agreement, a statutory Regulator would impose a financial settlement on them. That no doubt reflects the fact, discussed above, that the White Paper sees the football industry as separate and different from other commercial businesses, a view that has some support in the opinions made in the European Courts with respect to recent competition law challenges in sport.[38] But the draconian nature of this last resort power is why it is most unlikely that anyone will want it to ever actually be used: it is there to encourage agreement between the parties; the threat of its use is more likely to have effect than its actual use.

Regulation in practice

"*Advocacy-first*" and "*proportionality*" are again the watchwords applied to the Regulator's approach to the practical exercise of its powers, and the White Paper suggests a four-stage escalating enforcement model, starting with monitoring and supervision, then "*advocacy*" (engaging with a club to resolve issues), followed by enforcement (compelling clubs to take specific actions) and finally disqualification, where, significantly, the examples given in the White Paper focus on the disqualification of "*those in charge*" of a club, rather than the club itself.[39]

In terms of the Regulator's power to sanction, the White Paper makes clear that "*sporting sanctions*" such as points deductions, shall not be included within the suite of powers the Regulator shall have (but shall remain with the leagues and The FA).[40] Rather, the Regulator's sanctioning powers will be: reputational sanctions (i.e. naming and shaming) on both clubs and controlling individuals, financial penalties on both clubs and controlling individuals, suspension or disqualification of controlling individuals from involvement in football and suspension of clubs via withdrawal of licences.[41]

The application of such sanctions should be proportionate to the offence. A good example is given: "*financial penalties may not be an appropriate sanction to apply to a club already in financial*

[38] See e.g, Case C-333/21, European Superleague Company SL v UEFA, Opinion of Advocate General Rantos (footnote 7 above):

> *"[41] The particular features of sporting activities set them apart from other economic sectors. Sport is characterised by a high degree of interdependence, since clubs are dependent on one another in order to be able to organise themselves and to develop in the context of sporting competitions. It follows that a degree of equality and a certain competitive balance are necessary, characteristics which distinguish sport from other sectors, where competition between economic operators ultimately leads to inefficient companies being driven out of the market.*
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> *[42] Therefore, whilst the specific characteristics of sport cannot be relied on to exclude sporting activities from the scope of the EU and FEU Treaties, the references to that specific nature and to the social and educational function of sport, which appear in Article 165 TFEU, may be relevant for the purposes, inter alia, of analysing, in the field of sport, any objective justification for restrictions on competition or on the fundamental freedoms."*

[39] Figure 5 of the White Paper.

[40] Paragraph 10.8 of the White Paper

[41] Paragraph 10.6 of the White Paper

distress, or may be a weak deterrent to wealthy clubs or individuals."[42] In the past leagues have been criticised for fining clubs in financial distress (thus making things worse), or fining rich clubs in ways that would have no deterrent effect. The Regulator shall seek instead to target the decision-makers at clubs with minimal undue impact on fans, club staff, and players.

The focus on sanctioning individual owners and decision makers is an interesting one, and a departure from the current regime operated by the leagues which tends to punish clubs for misconduct and only bring charges against individuals in exceptional circumstances.[43]

So far there is no indication in the White Paper of how such sanctions against individuals will be imposed,[44] but given that sanctions against individuals may impact on their reputation, income, right to work or right to own properly, as a matter of natural justice there should be a full and fair hearing of the matters in issue before any sanction is applied. It will not be sufficient, in my view, for the judicial review-type supervision of a sanctioning decision to be the only route to challenge the Regulator's decision in this regard (whereas it most likely shall be sufficient in many other respects), and some system of disciplinary tribunals or merits appeals, similar to those operated by The FA or the leagues, should be put in place to determine individual disqualifications.

I have already touched upon the interplay and potential overlap between the Regulator's functions and those of the leagues – perhaps most obviously in respect to financial regulation. The focus is again on co-operation and consultation between the existing regulators (including UEFA, The FA and the leagues) and the Regulator, with respect to changes in rules and in how functions ae exercised.[45]

Consideration is being given to the Regulator having the statutory power to delegate specific regulatory functions, for example to The FA or the leagues, where they already have the capability to perform them.[46] However "*the Regulator would need to be reassured that the industry body would make decisions independently of influence from clubs*". The two key areas of the Regulator's competence (financial sustainability and the operation of the OADT) are probably those areas where (i) the leagues do already have significant experience and capability to perform such functions, but also (ii) there is the most concern about the leagues, who are essentially the representatives of the clubs within them, being able to make decisions independently from the clubs. That is probably why the only example of a contemplated

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[42] Paragraph 10.7 of the White Paper

[43] Consider for example the current much publicised Premier League proceedings alleging over 100 breaches of various financial reporting and other rules brought against Manchester City FC. It is only the Club, and no individuals allegedly responsible, who face the charges. In contrast, in EFL v Sheffield Wednesday (EFL Disciplinary Commission, July 2020), the EFL initially charged both the club and some individual decision makers with the breaches of FFP and associated rules involved, but ultimately dropped the charges against the individuals. (https://www.efl.com/siteassets/image/201920/1920-judgements/efl-v-sheffield-wednesday-fc---decision.pdf)

[44] *"We are giving further consideration to the appropriate process and maximum penalties for the Regulator."* (paragraph 10.10 of the White Paper)

[45] See, eg. paragraph 10.16 and 10.19 of the White Paper.

[46] Paragraph 10.21 of the White Paper.

delegated function made in the White Paper relates to the The FA potentially having some heritage protection functions.

Procedural Safeguards

Given the Regulator will have strong powers, the White Paper suggests various important procedural safeguards that will be of particular interest to football lawyers, governing bodies, clubs and other participants.

First, the government may bring in non-binding guidance providing additional instructions around how the Regulator should operate, and the Regulator is likely to have a duty to have regard to this guidance when exercising its functions.[47]

Second, the Regulator would have a "*duty to consult*" affected stakeholders before taking certain key decisions. The White Paper suggests such stakeholders would be likely to include clubs, supporter groups, industry bodies (e.g. the FA, domestic leagues, FIFA, UEFA) and the government.[48]

Third, there should be set thresholds in place before the Regulator takes any enforcement action. The example given is that before the Regulator imposes a direction on a club, the following three tests should be met: (i) Is the club in breach of a Threshold Condition of its licence? (ii) Has the club failed to rectify a breach following reasonable efforts by the Regulator to steer it towards compliance? (iii) Would a direction advance one of the Regulator's primary duties?[49]

Fourth, there will be certain statutory deadlines put in place for certain of the Regulator's functions – as discussed above with respect to the operation of the OADT.[50]

These basic public law duties are important to guarantee that the Regulator acts independently, proportionately and consistently. If the Regulator breaches these duties, or acts outside of its powers or unfairly in some way, its decisions may be subject to legal challenge, as discussed below.

In terms of accountability, the Regulator will be expected to publish detailed guidance on its regulatory system, and an annual report detailing its performance against key performance indicators, and the Regulator's performance could be scrutinised by Parliament, for example by the Culture, Media and Sport Select Committee.[51]

One important area is how a party can challenge a decision, act, or indeed failure to act by the Regulator. The White Paper makes clear that the "*majority of the decisions of the Regulator would be appealable on judicial review principles … before an independent court or tribunal*". [52] As public

[47] Paragraphs 11.3-11.4 of the White Paper.

[48] Paragraph 11.5 of the White Paper.

[49] Paragraph 11.8 of the White Paper.

[50] Paragraph 11.9 of the White Paper.

[51] Paragraph 11.14 of the White Paper.

[52] Paragraph 11.18 of the White Paper.

lawyers well know, and as the White Paper goes on to explain, such review will focus on whether the Regulator acted within its powers, applied proper reasoning having taken into account necessary considerations, and followed due process - rather than the merits of the case.

Whereas the default position will be judicial review, the White Paper accepts that in some circumstances the Regulator's decisions may be subject to a full merits review, in particular "*in appeals against more punitive regulatory sanctions*". This accords with my earlier point about decisions banning persons from owning or being involved in football, or of course withdrawing a club's licence. Such punitive decisions ought only to be taken after a full and fair hearing of all the merits.

At present we are told that the government is giving consideration to these matters and, in particular which decisions might be subject to a full merits review, and which court or tribunal is best placed to hear the claims.[53] As to the latter point, the obvious court to conduct judicial review of the Regulator's decisions in the Administrative Court, given its expertise in applying the public law standard of review. But given some appeals shall also have to be full merits appeals, there may be a case for a (small) separate division of the Court, made up of specialist judges with a knowledge and appreciation of the football industry, to determine challenges to the Regulator's decision making, in the same way for example that there are specialist tax, technology and competition law divisions of the courts. It would be an unfortunate step backwards from the current position (where various specialist sports lawyers sit on tribunals) for decisions of a particular football industry nature to be made by judges with little or no appreciation of the nature of the specific issues in the industry.

But wherever the court or tribunal is based, one particular significant development is that the "*Open Justice principle*" shall now apply as the default position: hearings will have to be held in public. Many of us have argued that the particular nature of many disputes in sport, which may involve matters of wider public interest than the interests of the parties directly involved, ought to mean that such hearings should be held in public. Whether the obvious case involving allegations of widespread racism in English cricket, where whistle-blower Azeem Rafiq's application that the cricket disciplinary hearings ought to be held in public for the first time was successful,[54] or the recent controversial but confidential disciplinary case involving alleged rule breaches brought by the Premier League against Manchester City FC, or Newcastle United FC's arbitral claim that the Premier League acted contrary to its own rules – the outcome of certain regulatory decisions have a wider impact on other participants in sport and, given the importance of integrity, a wider public interest. Given also that the decisions in these types of cases are now increasingly published,[55] save for where there are exceptional circumstances (such as the need to protect confidential information or the identity of vulnerable witnesses) there are few remaining sustainable arguments that such hearings

[53] Paragraph 11.22 of the White Paper.

[54] See, "*ECB Racism Disciplinary Proceedings To Be Held In Public: Open Justice In Sports Disputes*" by Nick De Marco KC, (LawInSport, November 2022), https://www.lawinsport.com/blogs/blackstone-chambers/item/ecb-racism-disciplinary-proceedings-to-be-held-in-public-open-justice-in-sports-disputes?category_id=229.

[55] Routinely by FIFA, UEFA, The FA, and the EFL, and in many other sports; more inconsistently by the Premier League.

should be held in private. The move towards more public hearings of disputes of this kind will be accelerated by the fact that the Regulator of the nation's biggest sport will have its decisions subject to review in open court.

The effect of this may be significant. Consider this example: Club A appears to have acted in breach of various financial rules and is operating unsustainably such that the Regulator ought to impose conditions upon it and, perhaps, the league ought to impose sporting sanctions on it, but the Regulator and the league fail to act. Other clubs operating in the same league and respecting the financial rules may be put at a disadvantage to Club A. In the past those other clubs might have to pursue private and confidential arbitrations, perhaps against the league or against the offending club, but in the future there is the strong possibility that they may seek to review the Regulator's alleged failure to act, and that any such challenge, and the evidence and disclosure relevant to the same, will be determined in public.

The public spotlight on decision making is a good thing: it encourages greater consistency, transparency and fairness, and in turn public confidence in the system. Hopefully a consequence of the Regulator will be better and more consistent decision-making being done, and being seen to be done, in this regard.

The current rules in football, like many sports, require nearly all disputes to be conducted in private and confidential disciplinary or arbitral forums laid out in the various rules. FIFA itself prohibits "*recourse to ordinary courts of law*" unless otherwise allowed by it (i.e. with some employment disputes) and requires each national association (such as The FA) to insert a clause in its rules providing for mandatory arbitration of all football disputes.[56] Do such provisions clash with the proposals that the decisions of the Regulator be subject to challenge in open court? In my view, they do not. FIFA, FA, league and other disciplinary and arbitral provisions will continue to apply; court proceedings shall only apply when a party challenges a decision of the Regulator itself, i.e. a body that is not under the jurisdiction of FIFA, The FA or any domestic football authority, but rather an independent public body sitting above those private bodies.

Conclusion

The White Paper is an impressive piece of work. I have not attempted to summarise all of its many recommendations, but rather focussed on those which I anticipate may have the greatest legal and commercial implications for football. While some remain sceptical about the whole notion of an independent regulator, it now seems inevitable that we shall soon see one coming in, given the widespread political support for the concept. The time for debate about the merits of a Regulator has passed; focus should now be on its scope and powers. To that extent, the proposals in the White Paper, which essentially reflect a "*light touch*" approach to regulation that seeks to work with the football industry are to be largely welcomed, although as always the devil will be in the legislative detail. The challenge thereafter shall be to make sure the Regulator is properly funded and equipped with experts able to deal with our often complex, quite particular, rarely out of the public spotlight, highly successful yet dangerously precarious, but always dynamic, football industry.

[56] Art 58 FIFA Statutes (https://digitalhub.fifa.com/m/3815fa68bd9f4ad8/original/FIFA_Statutes_2022-EN.pdf).