UNIVERSITY OF CAMBRIDGE

ON THE IMPLEMENTATION OF THE FAN-LED REVIEW OF FOOTBALL GOVERNANCE

July 2022

Contributors

Cambridge Pro Bono Project – Executive Directors

Katja Achermann
PhD Candidate, University of Cambridge

Alexandra Allen-Franks
PhD Candidate, University of Cambridge

Darren Peterson
PhD Candidate, University of Cambridge

Matthew Psycharis
PhD Candidate, University of Cambridge

Aradhya Sethia
PhD Candidate, University of Cambridge

Student Coordinators

Daniel P. Campos
MCL Candidate, University of Cambridge

Jeremy Lam
LLM Candidate, University of Cambridge

Quentin B. Schäfer
PhD Candidate, University of Cambridge

Student Researchers

Ana Biderman Furriela
MCL Candidate, University of Cambridge

Leanne Brosnam
LLM Candidate, University of Cambridge

Maxwell Curtis
MCL Candidate, University of Cambridge

Erin Davies
BA Candidate, University of Cambridge

Taige Hu
LLM Candidate, University of Cambridge

Joyce Huyen Do
LLM Candidate, University of Cambridge

Rudraditya Khare
LLM Candidate, University of Cambridge

Nishanth V. Kumar
LLM Candidate, University of Cambridge

Andrew Murphy
LLM Candidate, University of Cambridge

Rajalakshmi Natarajan
MCL Candidate, University of Cambridge

Vinamrata Shrivastava
LLM Candidate, University of Cambridge

Faculty Advisor

Dr Bobby Reddy
Assistant Professor, University of Cambridge
Fellow and Director of Studies, Churchill College

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CAMBRIDGE PRO BONO PROJECT REPORT

The Fan-Led Review ("Review"), published in November 2021, provided an examination of the English football system with the aim of analysing ways of enhancing the governance, ownership structure and financial sustainability of football clubs .[1] In particular, the Fan-Led Review foresees the establishment of an independent regulator for English football ("IREF").

This Report considers how the measures included in the Fan-Led Review should be implemented and their legal viability. We consider the Governance & Financial Regulation aspects in Part I, challenges to the existence of an independent regulator in Part II, and challenges to individual decisions of an independent regulator in Part III. This report does not consider the issues of equity, diversity, and inclusion, the owner & director tests, women's football issues, or player welfare issues that also formed part of the Fan-Led Review. This report also does not consider in detail other initiatives aimed at sustainability, for example UEFA's new financial sustainability regulations.[2] Outside the scope of this report are also the EU's soon to be enacted Foreign Subsidies Regulation.

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[1] Department for Digital, Culture, Media & Sport, 'Fan-Led Review of Football Governance: securing the game's future' (24 November 2021) <https://www.gov.uk/government/publications/fan-led-review-of-football-governance-securing-the-games-future> accessed 10 June 2022.

[2] UEFA, "*Explainer: UEFA's new Financial Sustainability regulations*" (7 April 2022) <https://www.uefa.com/returntoplay/news/0274-14da0ce4535d-fa5b130ae9b6-1000--explainer-uefa-s-new-financial-sustainability-regulations/> accessed 10 June 2022.

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PART I – Governance & Financial Regulation

Executive Summary

- The Statutory Objective of the IREF must be clear in order to enable the IREF to have legal certainty in the carrying out of its general duties. All powers and the purpose behind each power should be clearly defined. In order to ensure all relevant ancillary considerations are permitted, the statutory objective could go into more detail about objectives behind its more powerful enforcement and regulatory functions.
- The IREF can be bestowed with substantial enforcement and supervisory powers enabling it to issue notices seeking information, to conduct necessary investigation, compel persons to provide information, impose fines and penalties and so on.
- Parachute Payments: The IREF can be legally attributed with the role of overseeing parachute payments as long as objective criteria are established for the exercise of such authority.
- Solidarity levy: The establishment of a solidarity levy is legally feasible. However, it should be transparent and fair in its distribution and accompanied by strong enforcement mechanisms.
- Mandatory salary cost adjustment clauses on relegation: The adoption of such a clause is legally feasible as long as the conditions for salary reduction on relegation are specified in the players' employment contracts to which they agree in writing.
- Issues related to disclosure of financial information: The IREF could legally require the disclosure of financial information from clubs that wish to obtain a licence.
- Powers of the Golden Share: the minimum powers of the golden shares should be mandated by the IREF and supplemented by clear guidelines. The IREF may consider following the "Brentford Model".
- Bargaining Power for Supporters/Arbitration: the IREF should establish an arbitration mechanism for disputes arising from the exercise of golden share powers. It should also mandate informal consultations between the club and the supporters for such disputes as well as for the possible expansion of golden share powers.
- IP: Certain IP rights are only acquired by means of registration with the UK IP Office, which would give protection to certain heritage items against exploitation by third parties.

- Type of decision-making powers: The IREF can have both ad-hoc decision-making powers as well as rule making powers. However, rule-making powers need to be well defined in the underlying legislation and cannot be a replacement for a well thought out primary legislation. The powers granted may be transitional or technical matters for which only delegated authority may be apt. The powers granted to the IREF cannot be broad or wide ranging in the need for "flexibility".
- Shadow IREF: The IREF can be set up in shadow form, provided that it does not have any statutory powers or executive functions. Terms of reference for the shadow IREF should be clearly set out and adopted. There are precedents in the UK to support the setting up of a regulator in shadow form. Funding for this shadow body would come from HM Treasury.
- Limits on owner subsidies: There needs to be a defined important objective in the proposed legislation that supports limitation on the size of owner subsidies. The IREF should define how the limitations imposed on owner subsidies are rationally connected to this objective. In assessing the figures which are relevant for the calculation of limits on owner subsidies, the IREF should impair the right in the least restrictive means necessary. In doing this, the IREF could take inspiration from the UEFA Financial Fair Play Regulations.
- Recommendations to the Leagues: The Recommendations to the Leagues could be given statutory power by Parliament and backed by sanctions to ensure enforceability. Alternatively, the Recommendations could be set out as soft law by the IREF but this may not have the same level of compliance.
- IREF Funding: Funding for the IREF would need to be different for the initial phase and different for sustained funding. For the initial phase, the REF should procure its funding from HM Treasury, and should request proportionate funds based on its expenses. Beyond the initial phase, sustained funding may be obtained e.g. by transfer levies, broadcast receipts, licence fees, etc.

1.1. FORMULATION OF STATUTORY OBJECTIVE AND FURTHER DUTIES

The Fan-led Review of Football Governance[3] calls for the establishment of an IREF. Recommendation 1 of Strategic Recommendation A of the Review defines a proposed statutory objective of the IREF as follows:

[3] *Fan Led Review* (n 1).

> "IREF should have a statutory objective of ensuring English football is sustainable and competitive for the benefit of existing and future fans and the local communities football clubs serve. It should have further duties to promote other aspects of the game."[4]

Throughout the Review, several desired powers of IREF are also identified. These include, broadly, utilising a licensing system for men's professional football,[5] operating a system of advocacy,[6] exercising strong investigatory and enforcement powers including sanctions,[7] overseeing financial regulation,[8] operating a proportionality system for owner subsidies, establishing new owners and directors tests,[9] mandating equality, diversity and inclusion plans for clubs,[10] creating standardised rules,[11] providing for dispute resolution,[12] and intervention powers for parachute payments.[13] It is important that the defined set of statutory objectives is sufficiently clear and well defined. This is for two reasons: First, any regulator must be appropriately enabled to carry out the above-named powers with certainty. The law being certain is a core principle of legal policy. Second, there is also a legal reason why statutory objectives and powers should be well-defined. The defined powers must accord well with the statutory objective of IREF. This is so that, should a challenge ever be made to a decision or action by the IREF, the IREF can ensure it is has exercised its powers within its defined statutory objectives. A challenge to the carrying out of a decision or duty by the IREF as not being in accordance with its statutory objective can occur by means of judicial review or the tort of breach of statutory duty.

a. Amenability of the IREF to Judicial Review

Judicial review is defined as a "set of legal standards, enforced through a process of litigation, to enable people to challenge the lawfulness of decisions made by public bodies and

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[4] *Fan Led Review* (n 1) 43.
[5] *Fan Led Review* (n 1) Recommendation 2, 46.
[6] *Fan Led Review* (n 1) Recommendation 3, 48.
[7] *Fan Led Review* (n 1) Recommendation 3, 48; also Recommendation 14, 73.
[8] *Fan Led Review* (n 1) Strategic Recommendation (B), 56.
[9] *Fan Led Review* (n 1) Strategic Recommendation (C), 67.
[10] *Fan Led Review* (n 1) Recommendation 23, 86.
[11] *Fan Led Review* (n 1) Recommendation 30, 102.
[12] *Fan Led Review* (n 1) Recommendation 32, 104.
[13] *Fan Led Review* (n 1) Recommendation 38, 113.

other bodies exercising public functions".[14] Traditionally sports bodies have not been subject to judicial review in England and Wales. The courts have generally held that the relationship between a sports body and its members is generally private and contractual in nature.[15] The key distinction between traditional sports bodies and the proposed IREF is that the IREF will source its powers from legislation. Where a body is established by and sources its powers from legislation, then clearly it will be subject to judicial review.[16] Courts review the actions or decisions of a regulatory body where that body has a public function, or where its decisions produce public law consequences.[17] In addition to being established by legislation, it is arguable that the IREF has a public function given the objectives appear to be pointed towards the community more so than clubs or players and the influence that football has on the English public. This is in contrast to sports clubs which make decisions that purely affect their own members in a contractual manner. As such, it is likely that the IREF will be a body that is amenable to judicial review. As such, it is relevant to examine the principles of judicial review and assess how the statutory objectives need to be defined accordingly.

b. Construction of the Statutory Objective

The courts require bodies to act within the four corners of their powers and duties. They also act as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments.[18] The Courts insist that power is confined by the purpose for which legislation conferred the power.[19] A body will be said to have acted *illegally* if it has no legal authority to make the decision, fails to fulfil a legal duty, misinterprets a function, exercises discretionary power for an extraneous purpose, takes into account irrelevant considerations or improperly delegates decision-making power.[20] A body can also be said to be acting *ultra vires* in exercising powers outside of the jurisdiction

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[14] Harry Woolf, Jeffrey L. Jowell, Catherine M. Donnelly, and Ivan Hare, *De Smith's Judicial Review* (8th edn, Sweet & Maxwell 2007) 1-001.

[15] *R v Football Association ex p Football League Ltd* [1991] 2 All ER 833; *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 (since the appeal board of the Jockey Club was not exercising functions of a governmental nature, its decisions were not amenable to judicial review); *Law v National Greyhound Racing Club* [1983] 1 WLR 1302, para 8; Jack Anderson, 'An Accident of History: Why the Decisions of Sports Governing Bodies Are Not Amenable to Judicial Review' (2006) 35 Comm L World Rev 173.

[16] *R v Panel on Take-overs and Mergers Ex parte Datafin* [1987] QB 815 [66].

[17] ibid [67].

[18] Woolf, Jowell, Donnelly, and Hare (n 14) para 5-002.

[19] Woolf, Jowell, Donnelly, and Hare (n 14) para 5-003.

[20] Woolf, Jowell, Donnelly, and Hare (n 14) para 5-001.

conferred.[21] In addition, the courts will review conduct by administrative bodies that is irregular or unreasonable.[22]

In determining whether a body has acted lawfully, the nature and extent of its power or duty can be found by looking first to relevant statute and the intention of Parliament as expressed or implied within it.[23] The relevant starting point is the "natural and ordinary meaning of a word or term[24] though the courts may also consider parliamentary material leading to the enactment of the provision. Courts afford some leeway to interpretation when the defined objectives are broad, but free rein is not seen as appropriate. Where words such as "shall" are used in relation to something which a body can do, this may raise an inference that it is mandatory that the body do so.[25] In addition, where statute imposes a target or desired strategic outcome, some observe that a court could potentially be asked to assess whether this outcome has been achieved or not.[26]

c. Interaction of the Statutory Objective and the Duties of the IREF

The construction of the statutory objective will inform the determination of what acts of IREF are permissible. The specific powers of the IREF[27] should be laid out clearly in legislation and care should be taken as to deciding which powers are mandatory that the IREF carry out in choosing the language employed. These statutory powers will impliedly authorise everything which can "fairly be regarded as incidental or consequential to the power itself".[28] However, certain proposed duties of the IREF will involve it needing to exercise degree of discretion. These include: decisions regarding the licensing system, financial regulations, investigatory powers etc. The main impact of judicial review on the way these duties can be carried out will be analysed in Part III of this Report. However, this current section will offer brief comment as to how this should impact any decision as to how the relevant duties are laid out in the statute.

In carrying out their duties, the IREF must act in accordance with the proper purposes of the legislation. Even where administrative discretion in granted, the objectives and purposes

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[21] Woolf, Jowell, Donnelly, and Hare (n 14) para 4-013.
[22] See Part III *infra*.
[23] William Wade and Christopher Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014) ch 7.
[24] Woolf, Jowell, Donnelly, and Hare (n 14) para 5-020
[25] Woolf, Jowell, Donnelly, and Hare (n 14) para 5-058.
[26] Woolf, Jowell, Donnelly, and Hare (n 14) para 5-082.
[27] See Part III *infra*.
[28] Wade and Forsyth (n 23) ch 7.

of such discretion provides the criteria of relevance in its exercise.[29] Power granted for one purpose cannot be exercised for a different purpose.[30] For example, where there exists a specific duty to provide a library service, taking actions with the purpose of furthering a trade dispute instead of simply providing a library service amounts to an improper purpose.[31] Similarly, where a purpose or duty is defined to be for "the benefit, improvement and development of the area", a decision that is instead fuelled by the ethical perceptions of hunting amounts to a decision made with improper purpose.[32] Where there is a plurality of purposes, the courts can still invalidate a decision where one of the purposes was improper and it materially influenced the decision.[33]

It should be assessed for what purpose the IREF is being created. If the IREF were to act outside of that purpose, its actions may be challenged. As such, in defining the statutory objectives and outlining the duties of the IREF in legislation, all relevant purposes should be codified. Currently the Review reads: "[E]nsuring English football is sustainable and competitive for the benefit of existing and future fans and the local communities football clubs serve". Taking any actions which are not aimed at sustainability and competitiveness of football could potentially be outside this objective or an improper purpose. In addition, taking any actions which are for the benefit of anyone other than existing and future fans and local communities could potentially be outside this objective or an improper purpose. Given that it is hoped that the IREF will be involved in reducing owner subsidies and financial regulation of the football industry in general, it may be relevant to consider whether there are other purposes involved such as regulation of club finances, promoting fairness, good governance and protecting club heritage. It may be important to note, for example, that the Review proposes that the IREF establish a proportionality mechanism for owner subsidies to clubs.[34] By analogy, the UEFA Financial Fair Play Regulations employ a similar mechanism. However, this system within UEFA is not aimed at ensuring competitive balance between football clubs. Instead, their express purpose is largely to prompt financial stability.[35] Any proposed legislation should endeavour to include all possible objectives of the IREF in order. Financial regulation, the promotion of fairness, governance and club heritage do not necessarily follow from the objectives of sustainability and competitiveness. It is recommended that the objective be

[29] Peter Cane, *Administrative Law* (5th Edition, Oxford University Press 2011) 174.
[30] Woolf, Jowell, Donnelly, and Hare (n 14) 5-090.
[31] *R v Ealing LBC ex p times newspapers* [1987] IRLR 129.
[32] *R v Somerset CC ex p Fewings* [1995] 1 WLR 1037.
[33] *R v ILEA Ex. P Westminster CC* [1986] 1 W.L.R. 28.
[34] See Part II *infra*.
[35] Nick de Marco, *Football and the Law* (Bloomsbury 2018) Ch 16.

reformulated with more detail to include the more detailed objective of the IREF such as maintaining club legacy and establishing a fairer playing field. As it stands, the objectives outlined in the Review do not appear to be sufficiently certain.

d. Objectives of Comparable Independent Regulators

This section will provide some examples of how legislation has laid out the objectives of independent regulators in other industries in the U.K.

Independent Regulator	**Legislative Footing**	**Statutory Objective/s**
The Office of Communications ("OFCOM")	Communications Act 2003	*Section 3 (1):* "It shall be the principal duty of OFCOM, in carrying out their functions— (a)to further the interests of citizens in relation to communications matters; and (b)to further the interests of consumers in relevant markets, where appropriate by promoting competition." *Section 3 (2):* "The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, each of the following…"(goes on to list six specific functions of the regulator) *Section 1 (3):* "OFCOM may do anything which appears to them to be incidental or conducive to the carrying out of their functions"
Competition and Markets Authority	Enterprise and Regulatory Reform Act 2013	*Section 25 (3):* "The CMA must seek to promote competition, both within and outside the United Kingdom, for the benefit of consumers." *Section 20 (1)*

		"The CMA may do anything that is calculated to facilitate, or is conducive or incidental to, the performance of its functions."
Financial Conduct Authority	Financial Services and Markets Act 2000 (as amended by the Financial Services Act 2012)	*Section 1B:* The FCA's general duties (1)In discharging its general functions the FCA must, so far as is reasonably possible, act in a way which— (a)is compatible with its strategic objective, and (b)advances one or more of its operational objectives. (2)The FCA's strategic objective is: ensuring that the relevant markets (see section 1F) function well. (3)The FCA's operational objectives are— (a)the consumer protection objective (see section 1C); (b)the integrity objective (see section 1D); (c) the competition objective (see section 1E). (4)The FCA must, so far as is compatible with acting in a way which advances the consumer protection objective or the integrity objective, discharge its general functions in a way which promotes effective competition in the interests of consumers. (5)The FCA must also have regard to various regulatory "principles" in discharging its functions.

1.2. FINANCIAL REGULATION

a. Powers of IREF

The Fan Led Review has rightly underscored the need for strong enforcement mechanisms for a robust financial regulatory framework.[36] The Fan Led Review highlights that the current regime of financial regulation is not forcing clubs to act in a long-term, sustainable way. The Fan Led Review further states that enforcement and deterrence are minimal.

Following this, the Fan Led Review recommends that the IREF should oversee financial regulation in football to ensure financial sustainability of the professional game. [37] The Fan Led Review also recommends that the Government should introduce a financial regulation regime operated by IREF based on prudential regulation. In this regard the Fan Led Review mentions the Financial Conduct Authority ("FCA") as a referral point. We have considered below the powers that the IREF should have to ensure effective regulation and remedial redress in the manner contemplated by the Fan Led Review.

The IREF can be endowed with substantial supervisory and enforcement powers. These would need to be provided by statute. Apart from the FCA, various other independent regulators in the UK such as the Civil Aviation Authority,[38] the Office of Communications,[39] and the Office of Rail and Road[40] have similar powers. Such powers should be exercisable by any officer or agent of the IREF.

Firstly, the IREF should have investigative powers that allow it to undertake any investigation in an efficient and timely manner. The IREF should have the power to: (i) gather information; (ii) enter premises under warrant; (iii) carry on inspection through its officers or appoint external investigators; (iv) require production of a report by independent experts – to be exercised in cases where IREF deems it fit to make further enquiries for fact finding i.e., gathering historic information or evidence for determining whether enforcement action may be appropriate. For this purpose, the IREF can have the power to require production of documents, information or attendance of any person within a stated timeframe; (v) require submission of any documents, books of accounts, registers; electronic files, documents, database; financial records; (vi) summon or require the attendance of owners, directors, employees or any other persons associated with a club to make depositions before the IREF or its representatives or

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[36] *Fan Led Review* (n 1) para 3.10.
[37] ibid 56-57.
[38] Civil Aviation Act 2012.
[39] See the Ofcom Enforcement Guidelines for Regulatory Investigations. Ofcom is the independent regulator, competition authority and designated enforcer of consumer law for the UK communications industries.
[40] Derives enforcement powers from a range of legislations including the Health and Safety at Work Act 1974, Enterprise Act 2002, Railways Act 2005, and the Regulatory Enforcement and Sanctions Act 2008.

agents or to examine them under oath; (vii) give warning to concerned persons to take corrective measures or cease and desist from certain actions or omissions.

Further, like the FCA, to aid the aforementioned investigative processes, the IREF should have the powers to require the production of documents and the provision of any information requested by the IREF. The IREF can also have the powers to hold interviews of persons it deems fit while making an investigation. Like the FCA, the IREF can also have powers to take penal action against persons providing the IREF, with misleading or untrue information. Further, like the FCA, the IREF can also have the power to bring proceedings against a person for "serious forms of non-cooperation"[41] and if a person does not comply with a requirement imposed by the exercise of statutory powers, they may be held to be in contempt of court.[42]

The IREF should have the power to enter premises where documents or information is held with or without police constables or with an IREF investigator to enter the premises and take possession of any documents or information and take such other steps necessary for preserving them or preventing interference with them.

In general, the IREF should have the powers to issue warning notices, alert notices, investigation notices and enforcement notices as and when required.

The IREF should have the power to settle enforcement cases with the concerned parties. Like with the FCA settlement cases,[43] these should not be the same as "out of court" settlements in the commercial context. An IREF settlement, like the FCA settlement, should be a regulatory decision, taken by the IREF, the terms of which shall be accepted by the concerned parties.

For the purposes of real time financial monitoring, a dualistic approach should be implemented. For an *ex ante* financial review, the IREF should have the power to conduct stress-tests[44] as per the mechanisms developed by the IREF prior to granting licences to the clubs. This will help assess the overall financial health of the club before it is granted a licence. Stress test mechanisms could be developed with the help of accounting and finance experts whereby the business models and other financial plans are reviewed by IREF and its experts to assess their viability. For *ex pos*t monitoring, the licenced clubs can be required to make

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[41] FCA, Enforcement Guide, Chapter 4 provides that if a person does not comply with a requirement imposed by the exercise of statutory powers, it constitutes a serious form of non-cooperation and they may be held to be in contempt of court.
[42] FCA, Enforcement Guide, Chapter 4 provides that if a person is required to attend an interview as a result of the use of statutory powers, and such person does not attend the interview, then he can be dealt with by the court as if he were in contempt (where the penalties can be a fine, imprisonment or both).
[43] FCA, Enforcement Guide.
[44] For example, FCA BIPRU s.12.4, FCA Handbook.

periodic disclosures of their respective financial statements. Such financial statements can be independently audited. Such disclosures may be made only annually for each financial year or may be required to be made annually as well as for shorter periodic intervals. Additionally, IREF should have the power to define certain material events that necessarily require disclosure by the licenced club. For example, any direct or indirect change in the owners or directors of the club, periodic disclousure regarding players engaged by the club (provided that some exemptions for smaller clubs and youth teams, for instance, are put in place), material changes in the key financial parameters such as revenue of the club, and so on.

For the purposes of the above, a rulemaking approach will be suitable instead of relying exclusively on an ad-hoc review mechanism. All the powers of the IREF should be set out in the statute constituting the IREF. This is necessary for effective, fair, transparent and timely enforcement by the IREF.

Having highlighted the manner in which enforcement may be carried out by the IREF, we believe that it is also relevant to note two important limitations or challenges in this regard. In case of financial difficulties faced by a club, there are limited remedial measures that IREF will be able to take or assist with. Delicensing and imposing monetary penalties form the central plank of enforcement mechanisms that an independent regulator may deploy to prevent wrongdoings. In a football context, league points deductions may also be considered a credible measure to deter wrongdoing. Although such measures will be most useful for regulating perverse transactions or diversion of funds, imposing monetary penalties may only worsen the financial situation of the concerned club and may not serve the purpose of financial sustainability. Similarly, points deductions could only accelerate relegation creating further worsening of the financial position of the club. This paradox renders enforcement more challenging. Similarly, de-licensing may not serve as an effective deterrent in most cases. As is seen now, clubs are happy to gamble their funds just to leave the club bankrupt and walk away. Equally, regulators cannot easily assume management responsibilities to reorder a club's finances, both because such actions would be taking place against the will of the persons controlling the club's operations, and because the regulator might not have sufficient expertise or resources.

1.3. FINANCES AND DISTRIBUTION

a. Parachute payments

Currently, clubs which are relegated receive a significant amount of money considering that they will suffer from a smaller revenue stream in the form of so-called 'parachute payments'[45]. Such payments are made from broadcasting rights received either by the Premier League or the EFL which are redistributed to the clubs moving to lower leagues. The issue here is that these payments are not made to the other clubs in the respective leagues resulting in a financial disparity between the clubs, making it harder for the latter clubs to ascend.

Currently, the Premier League and the English Football League are the responsible parties for making such redistributions, both of which are private companies. One of the solutions for introducing a fairer redistribution system would be to give the IREF power and authority to oversee parachute payments and to establish relevant standards. For instance, if the mandatory salary cost adjustment clause is introduced, then the relegated clubs will require lower parachute payments as they will not suffer as much from lower revenues.

In addition, parachute payments are currently made during the three years following the relegation, if the club is not promoted, in sums equivalent to, respectively, 55%, 45% and 20% of the Relegated Club's share of broadcasting rights. Another solution would be to either give such financial assistance for a single season or to reduce the percentages of the sums to be paid, this could also reduce the disparity between the clubs in lower leagues. This solution, however, would have to carefully balance the goal to promote fairness in lower leagues and the objective of having competitive upper leagues. This solution, in that sense, would have to be applied alongside a more comprehensive revenue distribution reform in order to be effective.

If the IREF is given the authority to oversee parachute payments, it could do so in an objective manner with a view to promoting a balance between the relegated clubs and those already in that league. In order to guarantee an objective assessment by the IREF, objective criteria should be introduced as part of the agency's statutory provisions considering the relegated club's finances in comparison to the other clubs in the league, and by establishing a cap regarding the redistribution amount.

In conclusion, the Leagues should first get the chance to negotiate redistribution payments' issues by themselves, and, if an agreement is not reached, the IREF would work as an arbitrator and reach a decision based on the aforementioned objective criteria. It is fundamental that such a decision is reached with objectivity to avoid any kind of legal questioning of its authority and rectitude.

[45] The Football Association Premier League, *Premier League Rules 2021-2022*, rule D.25.

b. Solidarity levy

Recommendation 40 of the Fan Led Review suggests introducing a solidarity transfer levy for all Premier League clubs. The solidarity levy would apply on player transfers both within the Premier League and international transfers, with a rate set at around 5-10%. The levy would be paid by the buying Premier League clubs, overseen by the IREF, and will be used to "support the football pyramid".

While termed by the Review as its "most promising and progressive intervention" for distribution, we believe that caution must be exercised. Without further clarification and modification, this proposal may face significant opposition from the Premier League clubs and may not achieve its desired result.

Firstly, while the distribution itself will not meet major legal obstacles and there have been similar practices by the FA, the distribution method should be transparent and carefully planned out to alleviate concerns from Premier League clubs, especially on the lack of connection between the levy and the players concerned in the transfer. Under the FIFA solidarity distribution scheme, the 5% payment will be fairly distributed among all clubs involved in the player's training between his 12th and 23rd birthday.[46] The calculation reflects the number of years the player was with a club and the stage he was in at that time in life. As for the 4% PL levy, it would directly go to the Professional Footballers' Pension scheme.[47] In both cases, the pay-out is directly related to the player concerned in the transfer and the method of distribution is clearly set out. On the other hand, the proposed new solidarity levy currently provides insufficient details relating to its distribution method, and it seems that the new levy will be more about the other clubs further down the pyramid than the player's formal clubs. This lack of connection between the new levy and the player will potentially be a main challenge for the reform to justify. To begin with, we would recommend that the solidarity levy should partly go to the local football associations of the parties concerned. This could be done by referencing the similar levy in Poland: According to the Polish FA regulations, a releasing club (under the territorial authority of the regulator) in an international transfer is required to pay 2% of the transfer fee to the local football association, as well as 1.5% to the Polish national FA.[48] This mandatory contribution to their own local associations will provide more

[46] FIFA, *Regulations on the Status and Transfer of Players* (August 2021), Annex 5.
[47] Premier League (n 45) rule V.41.
[48] Polish Football Association, *Resolution No. VIII/124 of the Management Board of the Polish FA on Status and Transfer of Players* (14 July 2015) para 37.

justification for the levy imposed on clubs. Next, the FA should make clear the distribution plan for such solidarity levies: for example, what percentage will go to building pitches for grassroots players, what percentage will go to different levels of clubs down the pyramid, what percentage will go to children & youth support, etc. Finally, the FA should ensure that all such allocations are made via extensive consultation with different stakeholders, and that the final plan should be released in advance and be transparent in its content. This arrangement could be more easily implemented in transfers when the realising club is under the authority of the IREF (i.e. a English club). However, the IREF may not be have sufficient authority to enforce a solidarity levy when a player is transferred from an international club to an English club, which would further limit its potential and create distortions in the international transfer market.

Secondly, the new solidarity levy should be accompanied by strong enforcement measures. The FIFA solidarity contribution has faced significant enforcement issues: According to relevant provisions in the FIFA regulations, it is the responsibility of the new club to calculate the amount of the solidarity contribution and to distribute it.[49] FIFA has little power in the distribution process and limited oversight. This, combined with the incomplete data provided in some of the player passports, resulted in the weak and selective enforcement of the FIFA solidarity distribution: Without assistance from senior sports lawyers, many smaller clubs did not realise that they are entitled to solidarity distributions until months or even years after the transfer took place, and the buying club sometimes would conveniently forget about the relevant distribution.[50] We believe that the IREF should provide strong enforcement measures for the new solidarity levy: First, it could require all transfers that fall within the scope of the new solidarity levy to go through a unified payment and clearing process in order to identify and timely collect the payment. Second, it should be empowered to issue penalties for clubs who fail to contribute the amount required and in time. Penalties can be in the ways of fines, deduction of points, or suspension of licence, etc.

Finally, we would like to indicate two general concerns relating to the practicality of the solidarity levy. The first concern lies with the potential financial burden it could impose on certain Premier League clubs. Currently, PL clubs are already subject to two mandatory payments on player transfers: Under FIFA regulations, 5% of any international player transfer compensation should be distributed by the player's new club as a solidarity contribution to the

[49] FIFA (n 46) Annex 5, Art 2.

[50] Dan Chapman, 'Player Solidarity Payments: a hidden goldmine?' (*Full Contract*, 2013) <https://fullcontactlaw.co.uk/2013/10/player-solidarity-payments-hidden-goldmine/> accessed 23 April 2022.

club(s) involved in his training and education over the years.[51] Under PL regulations, an additional 4% levy for any player transfer will go to the Professional Footballers' Pension scheme.[52] The new solidarity levy, according to the Review, will not be able to substitute either of the two existing mandatory payments. Therefore, if the new solidarity levy is introduced, PL clubs will potentially need to set aside 14%-19% of their total transfer fees for levies. This could pose a significant challenge for PL clubs and undermine their competitiveness in the international transfer market. While a 5%-10% increase might be manageable by the top clubs, the same could not be said with the other low-middle range clubs in the PL. Even a 5% increase in the transfer fee might become a "make-or-break" point for them. Thus, apart from the clubs down the pyramid, the imposition of a new solidarity levy must also take into account the financial burden it could impose on some of the Premier League clubs themselves. Otherwise, it could only broaden the financial disparity among Premier League clubs, as the wealthier clubs will be better at overcoming the hurdle. The second concern is that a solidarity levy solely based on transfer fees may not be effective in generating enough funding for distribution. Recent research by FIFA shows that transfers with a transfer fee or any other kind of financial compensation due to the releasing club currently constitute only 15% of international transfers.[53] In 2017, change of club registration by players who were out of contract accounted for 65.5% of all international transfers. While the proposed solidarity levy is indeed more extensive than FIFA's (covering, for instance, local transfers), one must be aware that the solidarity levy will not impact "free" transfers.

Therefore, we would also suggest two alternative measures in lieu of a new solidarity levy: First, we believe that a softer approach would be to extend FIFA's solidarity contribution scheme to transfers between a Premier League club and another domestic club, with the caveat that the domestic solidarity contribution will be enforced by the FA through measures outlined in the previous paragraph. In this way, the FA can still receive a significant amount of funding while focusing the levy on the players concerned. While this could potentially disincentivise clubs from domestic transfers and incentivise international transfers, one must also consider that international transfers tend to be more complicated and involve greater administrative , and FIFA international levies would still be applicable to such international transfers. [NOTE: I'VE MADE THE CHANGE SINCE AT THE PREMIER LEAGUE LEVEL, IN TERMS OF TRANSFER FEES, THERE IS USUALLY A BRITISH PLAYER "TAX" – CLUBS TEND

[51] FIFA (n 46), art 21.
[52] Premier League (n 45), rule V.41.
[53] FIFA, *Global Transfer Market Report* (2018), p 3.

TO IMPOSE GREATER TRANSFER FEES ON OTHER BRITISH CLUBS FOR THEIR BRITISH PLAYERS, PARTLY DUE TO CONCERNS ABOUT STRENGTHENING THE COMPETITION, AND PARTLY DUE TO CLUBS KNOWING THAT BRITISH PLAYERS ARE MORE LIKELY TO SATISFY THE "HOME GROWN" QUOTA PREMIER LEAGUE RULE]Second, an even stronger approach than the proposed new solidarity levy would be one where a solidarity fund is created, whose assets come from progressive taxes from not the transfers, but the players' salaries themselves. This would ensure that the levy covers all transfers, not only those that involve a transfer fee.[54] This, however, would involve strong opposition from players and the complicating issue of defining "salary" in association football in order to avoid potential loopholes.

c. Mandatory salary cost adjustment clauses on relegation

One of the issues clubs are faced with on relegation is a significant decrease in revenue leading to financial difficulty to bear with salary costs. Therefore, the suggested solution by the Fan Led Review is the inclusion of a clause in the players' employment contracts providing for mandatory salary adjustment.[55] This clause would also provide for the possibility of increasing the salaries of players whose team gets promoted to a higher division.

A mandatory salary cost adjustment clause would promote, at the same time, the possibility for clubs to remain financially stable on relegation and financial incentives rewarding players for obtaining positive results for their team.

Such a clause is legally feasible if it adheres to the UK's Labour Law's provisions. The labour legislation currently in force does not prohibit the reduction of salaries where there is a specific provision in the employment contract to which the employee has agreed.[56] There needs to be, however, a specific contractual provision to which the employee, in the present case the player, consents to a salary reduction before it is implemented.

The terms and conditions of the salary increase or decrease considering both promotion and relegation cannot be legally determined as a standard non-derogable implied term in a statute, for example, because of the mentioned requirement that the employee (the player) agrees to them in writing. The better way to put into effect a mandatory salary adjustment

[54] Jakob Laskowski, 'Solidarity Compensation Framework in Football Revisited' (2019) 18 The International Sports Law Journal 150-184.
[55] *Fan Led Review* (n 1) Recommendation 39.
[56] Employment Rights Act 1996, ss 13-14.

clause is to condition the licensing of clubs by the IREF on such a clause in every new player contract, potentially also in every existing player contract.

In relation to financially rewarding players, a parallel can be traced with Corporate Governance techniques to deal with the misalignment between the shareholders' interests and how management is conducted by the companies' senior executives, leading to the incurrence of 'agency costs'. By way of analogy, a misalignment can sometimes emerge between the interests of the players and the interests of the football club (broadly defined).

Throughout the years Corporate Governance policies have found a way to get around the agency cost problem by introducing incentivised executive pay, and the IREF could introduce a similar policy as well. According to the UK Corporate Governance Code ("UKCG Code"), remuneration policies and practices should be designed to support strategy and promote long-term sustainable success.[57] In addition, pursuant to the UKCG Code, remuneration awards or reductions should be defined in a clear, simple, predictable and proportional manner.[58]

The IREF could also consider following the recommendations made by the UKCG Code as they relate to the aforementioned labour legislation provision and give guidance towards the careful drafting of the desired clause to be introduced since players, as employees, have the legal right to know exactly what to expect in terms of salary reduction or increase.

d. Issues related to disclosure of financial information

One of the current difficulties British football clubs face is assessing the financial flows and distributions comprising the sport. There is not a central body that gathers the financial information from all the clubs and compiles it in a single report that is easy to read and comprehend. The introduction of mandatory disclosure of financial information is legally feasible and is a measure that could solve such problems by leading to easy and accessible information regarding the financial health of the clubs.

The Financial Fair Play regulation ("FFP regulation") imposed by UEFA has been a pioneer in the field, and although it has had a positive impact in the finances of clubs playing in the English Premier League ("EPL"), it is considered to be outdated and new amendments

[57] Financial Reporting Council, *The UK Corporate Governance Code* (July 2018), Principle P.
[58] ibid s40.

to it are soon to be proposed.[59] Nevertheless, some of its provisions could still be followed and incorporated by a future regulation of British football, that is: Article 47 – drafting and publication of annual financial statements and Annex VI.[60]

Considering that smaller clubs do not have the resources to hire complex account auditing services, but on the other hand do not have as many sources of revenue in comparison to bigger clubs, their financial statements to be disclosed could be subject to a less complex set of requirements.

A complementary solution would be for the IREF to impose the introduction of an Audit Committee composed of specialised non-executive directors as a condition for the clubs' licensing. As a result, there would be both an external and an internal audit of the clubs' accounts. A high threshold could be established in such case that would only require richer and bigger clubs to introduce such committees, otherwise this measure could financially hurt smaller clubs.

Such an Audit Committee would be responsible for the drafting of a yearly report containing information on financial flows and distribution. An important characteristic of this report would need to be the use of clear and easy to understand language, so that it can be understood by those who do not have a background in accounting. In addition, for the sake of transparency, the report should be published and made available to the public on the clubs' websites. An example of responsibilities to be attributed to the audit committee can be found in the UKCG Code and in the Financial Conduct Authority Handbook[61].

Therefore, the audit committee could be attributed with the responsibility to identify any financial issues faced by the club and make a recommendation on how to address them, as well as concluding on the current state of the financial health of the club, in its report.

1.4. GOLDEN SHARE/IP

a. Powers of the Golden Share

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[59] Aurelien François and others, 'The effectiveness of UEFA Financial FairPlay: Evidence from England and France, 2008-2018' [2021] Sport, Business and Management: An International Journal; see also Mobolaji Alabi, Adrian R Bell and Andrew Urquhart, 'Ten years of financial fair play: has it been good for European football?' (*The Conversation*, 25 November 2021) <https://theconversation.com/ten-years-of-financial-fair-play-has-it-been-good-for-european-football-171021#:~:text=The%20cornerstone%20of%20financial%20fair,5%20million%20over%20three%20years> accessed 13 May 2022.

[60] UEFA, *Club Licensing and Financial Fair Play Regulations* (2018).

[61] UK Corporate Governance Code 2018, Provision 25; FCA Handbook 2022, Disclosure Guidance and Transparency Rules sourcebook, DTRs 7.1.1-7.1.7.

Recommendations 28-31 of the Review suggests that a "Golden Share" system should be established. All licensed clubs should include within their articles of association a system that requires democratic consent to proposed actions relating to identified heritage items. The Golden Share would be held by club's supporters in the form of a Community Benefit Society ("CBS") and may reject the relevant proposals by the clubs within a given time period.

We believe that the Golden Share scheme is an effective and innovative way to let the fans have a say in the disposition of club heritage. To begin with, the scheme avoids further complications by utilising the existing bodies of CBSs under the Cooperative and Community Benefit Societies Act 2014. This sets out clear definitions and powers of each CBS and ensures that they would operate within a sound legal framework. For example, a CBS is legally required to conduct business for the benefit of its community, must operate on a democratic basis, and is an asset locked organisation. Furthermore, it will be subject to regulation by the Financial Conduct Authority, including the latter's power to appoint an accountant to inspect the society's books, appoint inspectors, or to call a special meeting of the society.[62]

Second, the Golden Share scheme is already being practised by Brentford FC (BFC) and records show that the scheme is functioning as expected. According to Steward Purvis, the current representative from Brentford's fan club on the main BFC Board, the golden share structure strikes a good balance between the need to draw external investment and the need to protect club heritages.[63] Compared to the model of full or majority fan ownership, the golden share provides more freedom for the club management while not sacrificing the fan's say on crucial matters.

Under the Brentford model, a special share of 1p will be held by the owner of the golden share. The golden share itself carries no voting power at general meetings of shareholders. However, Brentford FC's articles of association specifies that in the case of a sale of the home stadium, the company must serve a written notice ("sale notice") to the fan club, specifying the details of the deal. The fan club will then have 45 days to decide, via democratic process, whether to serve a veto notice which will prevent the company from entering into an agreement to effect such a sale. We believe that the minimum powers allocated to the owners of the golden

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[62] Community Benefit Societies Act 2014, ss105-106.

[63] Steward Purvis, 'Why the 'Brentford Model' of Fan Director and Golden Share Should be Copied', (Bees United, 23 April 2021) <https://www.beesunited.org.uk/in-focus/why-the-brentford-model-of-a-fan-director-and-a-golden-share-could-work-at-your-club/> accessed 23 April 2022; see also Stuart Hatcher, 'The Implications of a "Golden Share" in Football', (Forsters, 11 October 2021) <https://www.forsters.co.uk/news/blog/implications-of-golden-share-football> accessed 23 April 2022.

share following the Brentford model are sufficiently well defined. *First*, the AOA sets out the essential items that must be specified in the company's sale notice to the fan club, and the definition for the scope of the applicability of the sale notice is clear in the legal sense. *Second*, in the Brentford model, the structure of the veto power provides the fan club (or a future CBS, as envisioned in the Report) enough power to block an agreement deemed dangerous to the club's heritage, but also will not overly interfere with the company's normal decision-making process. The 45-day response period should normally be enough for the discussion and voting among members of the fan club. *Third*, the AOA lays down extensive sections to protect the veto decision in light of potential disputes. For example, in relation to moving to a new stadium, Article 4I provides a list of factors that the fan club, in the Brentford model, and also the potential arbitrators, should take into account when deciding whether to serve the veto notice for a proposed new stadium, including the number of seats, location, quality of facilities, length of ownership, need of a third intermediary stadium, and whether the move has the effect of defeating the purpose of the golden share (as specified in I(C)(1)). This is a highly practical guideline that can avoid most future disputes.

However, there are three remaining issues that the gold share scheme should further consider. To begin with, the IREF should clearly set out the method for which the golden share scheme is to be implemented and provide a "minimum list" containing the heritage items that must be incorporated into the scheme. Following the Brentford Model, each club should be required to provide in its articles of association that one special share of a nominal value shall be held by the club's corresponding Community Benefit Society. The holder of the special share will be entitled to the notice and veto process similar to the Brentford Model as exemplified in the previous paragraph. As for the scope of the heritage items, we believe the minimum list mandated by the IREF should at least include the following items:

- sale of the club stadium
- relocation of the club outside of the local area
- modification to the design of the club badge
- change of first team home colours; and
- change of club playing name
- naming rights
- redevelopment of an existing stadium

As explained below, the parties may consult with each other to expand the scope protected by the golden share scheme. Items such as club mascot or club anthem are among the potential candidates.

Secondly, the golden share scheme should provide adequate definition for each of the heritage items. For stadiums, Brentford FC has provided a good example showing that definitional problems can be overcome. However, noting that different clubs will face drastically different local environment and cultural issues, it is not possible for the IREF to set a one-size-fits-all standard term for all football clubs. Therefore, the IREF should consider drafting a model article for club relocation or list the essential factors that must be included in the considerations for relocation. Alternatively, it could also require that the part on club relocation must be submitted to the IREF for review/approval. Another issue is the definition for other heritage items of the club, such as club badge, first team home colours, and club playing name. For these crucial items, the definition problem will become more prominent, as the scope of the change might vary considerably based on the circumstances. To prevent prolonging the decision-making process for some trivial matters, the golden share article must carve out enough exceptions so that only matters that are truly crucial will be subject to the veto notice by the CBS. Again, this will vary from club to club, and the best thing the IREF can do is to lay down some general guidelines for the clubs to follow and require the CBS to carry out negotiation with the club concerned for a solution that best suits local conditions. The exceptions should be submitted to the IREF for review/approval. For example, it could explicitly exclude the adding of stars to the club badge following a championship win from the veto process. Similarly, minimal colour changes to first team home colours within a certain RGB range should also be exempted.

Finally, we would like to address some other issues with the golden share scheme. First, we believe that having the golden share itself is only the first step. As a licensing condition, the IREF should also require that at least one main board director of the club should be chosen by the relevant CBS, so that the fans' voice can be directly represented at board meetings. Steward Purvis believes that this kind of arrangement can strengthen the bonds between the club and its fan base.[64] Second, for the voting inside the CBS, we believe that the IREF should require different voting eligibility requirements for different matters. The Review identified the difficulty in choosing the "correct" voting constituency,[65] but failed to realise the need to separate different scenarios. For matters that mostly concern the local community, such as the sale of old stadiums and relocation, the voting constituency should be limited to local members of the CBS, season ticket holders, and supporters who have attended at least one home match

[64] ibid.
[65] *Fan Led Review* (n 1) para 8.20.

in the previous season. For general matters such as first team home colours and club name, other supporters, including international supporters, who are members of the CBS should also be allowed to vote.

b. Bargaining Power for Supporters/Arbitration

Recommendation 32 of the Fan Led Review suggests the establishment of an arbitration mechanism for the exercise of golden share powers. The club may appeal any veto decision by the holder of the golden share to the mechanism, which would be arbitrated either by the IREF or a party appointed by the IREF. The arbitration should be at the club's expense.

We agree with the Review that the IREF itself is "arguably best placed to be the arbitrator" with its expertise and independence in football regulation. Due to the need to balance between protection and efficiency, it is not advisable to refer the matter to arbitration mechanisms outside of the IREF framework. The arbitration panel should be composed of three arbitrators, with one appointed by the football club, one by the CBS, and one appointed by the IREF itself. Alternatively, the third arbitrator could also be appointed by the FA. This corresponds with Brentford's practice IA 4(C)(4)) and will ensure the neutrality of the panel.[66] The IREF should keep a list of accredited arbitrators in the field of sports law and update it from time to time.

We believe that the IREF should require every club to state clearly in their articles of association the scope of power and role of the arbitration panel in the case of an appeal against a veto notice. In Brentford's AOA, for example, the panel's role is to decide the following matters:

- Whether the proposed sale is for the purpose of a bona fide move to a new stadium (as defined in the AOA); and
- Whether the proposed sale meets all reasonable requirements of the club, including whether conditions (as defined in the AOA) have been met in full.

The clause should specify that if the arbitration panel answers both questions in the affirmative, then it must declare that the veto by the CBS is null and void.

Beyond the arbitration mechanism, we believe that the IREF should also mandate an informal consultation mechanism. This is to prevent that in the case of a hostile relationship

[66] Brentford FC Limited, *Articles of Association (As amended by a resolution dated 24 July 2018)*.

between the club and the CBS, the veto process could be too formal to settle the disputes. In the event of a potential veto decision, either the club or the CBS should have the power to demand both parties enter into the informal consultation process for another period of 45 days, during which the board of the football club should directly engage with the CBS and the fan base to further explain and negotiate the plan. The IREF may appoint a coordinator to facilitate the consultation process. The main goal of this mechanism is enhanced disclosure and communication. Clubs entering into the informal consultation process should be required to release more documents on the proposed decision and provide sufficient justification, and the consultation process itself should be transparent to all members of the CBS. After the end of the informal consultation process, the club may then deliver a modified notice to the CBS, which would then have 45 days to decide whether or not to veto the revised decision. This kind of informal consultation already exists in several clubs,[67] and we believe it is important that it is recognised and facilitated by the IREF for the exercise of golden share powers. Finally, it is fundamental that this consultation period does not compromise the relevant club's ability to engage in beneficial sales, and the consultation's length and procedure should be carefully evaluated alongside stakeholders.

Similarly, informal consultation should be encouraged by the IREF for negotiating for additional golden share powers between the CBS and the club. As discussed in the previous section, it is not recommended to have a one-size-fits-all solution for all football clubs on the scope of the golden share powers. If the CBS wants to include extra heritage items into the golden share scheme that are not within the minimum list mandated by the IREF, then the IREF should facilitate an informal consultation procedure between the CBS and the football club. If the consultation does not yield positive result, then the CBS may still raise the issue to the IREF and recommend it to include the item in the minimum list.

The veto rights set out in the articles of association should be entrenched[68] by providing that such rights may only be amended with the consent of the holder of the golden share.

c. IP

One of the goals of the Golden Share is, besides giving supporters the possibility of influencing decisions regarding the governance of the club, to protect the relevant club's

[67] 'Club and Trust to hold informal consultation regarding new exciting plans for Fan Park', (Tranmere Rovers FC, 14 May 2021) <https://www.tranmererovers.co.uk/news/2021/may/club-and-trust-to-hold-informal-consultation-regarding-new-exciting-plans-for-fan-park/> Accessed 23 April 2022.
[68] For the relevant process, see Companies Act 2006, s22.

heritage items such as the stadium, badge, name and first team home shirt colours. The Golden Share would give rights to the CBS to decide over the sale of the club stadium, changes to the badges' colours etc., but it will not protect certain items from the commercial exploitation by third parties.

Therefore, a possibility would be to make the CBS of each club the entitled party to the intellectual property rights (the proprietor) over the aforementioned items as part of the rights under the Golden Share. Such IP rights could then be licenced to the clubs so that they could make profit by selling products using the club's name, shirts, and others.

This way the relevant club's heritage could be protected and overseen by the supporters who are the true community around them. Although clubs still need to make money from merchandising, the exploitation of products with the relevant club's brand could be done by means of registering the club's trademark by the CBS instead of the club itself being the owner of the trademark[69] and then both parties could enter into a trademark licensing agreement.[70]

In case of clubs who already own a trademark, they could assign[71] the ownership rights to the respective CBS who would then have to licence it back to the club, for an insignificant amount such as 1 pound sterling provided for in the licensing agreement. Both the licensing and/or transfer of a trademark should be registered with the UK Intellectual Property Office.[72]

The question then arises whether the CBS could be contractually obligated to licence the trademark, which would be important for the club to help in its revenues and financial sustainability. A rigid statutory provision would not be the best way around it, so this should not be a condition for licensing of the clubs under the IREF.

The clubs' badge could as well be protected under a trademark; for instance Manchester City Football Club Limited has registered the club's badge with the UK's Intellectual Property Office under the trademark number UK00912140471. However, the colours of the team home shirt cannot be owned by anyone, so they would not be able to be protected under IP rights.

An alternative would be to establish under the conditions of licensing of a club with the IREF to register its badge and name (logotype) with the UK IP Office. Then, under the Golden Share provision in the relevant club's Articles of Association, the CBS could have a veto right over any changes over the aforementioned heritage items. This would potentially enable heritage protection while maintaining an important revenue source for the club.

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[69] Trade Marks Act 1994, s 1.
[70] ibid s 28.
[71] ibid s 24.
[72] ibid s 25.

While these alterntives could be legally feasible, there are concerns that giving the IP rights to the CBS could negatively affect the club's ordinary management (i.e. the CBS could use IP rights as levearage to force the club to take other unrelated actions, and could also decrease the market value of the club. The IP proposals, therefore, may have a chilling effect on investment in football clubs and may create moral hazard issues that would far outweigh their potential benefits.

1.5. AD-HOC DECISION-MAKING VS RULEMAKING: WHETHER THE POWERS OF THE REGULATOR SHOULD BE FORMULATED TO MAINLY CONCERN AD-HOC DECISION-MAKING (IN LICENSING ENFORCEMENT) OR INCLUDE SUBSTANTIAL RULEMAKING AUTHORITY.

This issue has not been dealt with in detail in the Review.[73] The Review also does not spell out whether it is preferred that the IREF has rule making powers in addition to Ad-hoc decision-making powers. We have therefore analysed whether it is permissible for the IREF to have both these powers from a UK administrative law perspective.

At the outset, the IREF can have both ad-hoc decision-making powers as well as rule making powers, provided that the contours of these powers are spelt out in the underlying legislation. In particular, if rule making powers is accorded to the IREF, then the underlying legislation would need to tightly define its scope and applicability. There is also a need to justify the need for delegated rule making powers when a legislation is presented before the Houses of Parliament. Guidance on delegated rule making powers from the UK House of Commons suggests that in general, delegated rule making powers is justified when:

- the matter in question may need adjusting more often than Parliament can be expected to legislate for by primary legislation;
- there may be rules which will be better designed after some experience of administering the new Act, or because they rely on information which is not available at the time that the Bill is passed and which it is not essential to have as soon as it begins to operate;
- the use of delegated powers in a particular area may have strong precedent and be uncontroversial; or
- there may be transitional and technical matters which it would be appropriate to deal with by delegated powers.[74]

Therefore, if any delegated rule making powers are granted to the IREF, the above principles would need to be generally kept in mind. For instance, rule-making powers in respect of licensing conditions (for instance imposing an additional condition or relaxing an existing one) can lay with the IREF. This may be justifiable on grounds that comments and experience from the industry may need to be factored in while imposing licensing conditions. This may be

[73] *Fan Led Review* (n 1).
[74] Rt. Hon. David Lidington MP, ‘Written Evidence’ (January 2017) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/legislative-process/written/45428.html> accessed 25 April 2022.

beneficial in ensuring better sustainability of the game, as adaptations may need to be made based on any new misconduct that comes to light.

In any event, the rule making powers should be tight and clearly defined in the legislation. Open ended rule making powers are not likely to be approved by Parliament and may be subject to judicial review.[75] In general, rule-making powers associated with enforcement, penalties, governance of the IREF itself, financial regulation and levy of fees may be hard to justify from a UK administrative law standpoint.

In general, legislation with broad delegated powers has been criticised by Parliamentary and constitutional committees. For instance, the Immigration Bill 2015-16 was criticised on the basis that key terms in the legislation remained undefined and it was within the powers of the Secretary of State to decide on the meaning and scope of those terms and implement the provisions of the Act on a case-by-case basis.[76] The Data Protection Bill was criticised because it provided for wide ranging delegated powers. The justification given for this was the need for "flexibility". However, the Delegated Powers and Regulatory Reforms Committee commented that the need for flexibility cannot trump the need for primary legislation to be robust.[77] The Constitution Committee, while scrutinising the Space Industry Bill stated as follows:

> "[*a*] Bill which contains a large number of delegated powers in lieu of policy detail can be challenging for Parliament to scrutinise meaningfully, as it is more difficult to form an accurate impression of what the legislative package as a whole will look like. In such circumstances, scrutiny can be aided by the publication alongside the Bill of illustrative regulations giving a sense of how the Government envisages using the delegated powers contained in the Bill."[78]

Further, if powers of amendment or repeal are granted to delegated authorities, then a clear specific purpose for this should be outlined in the legislation and supporting materials. The legislation should also specify how this power would be used. The need for speed or flexibility cannot determine the need for any rule making/amendment/repeal authorities.[79] Therefore, while providing the IREF with rule making powers, the above principles should be

[75] Judicial review is discussed further in Section 3.5 of this Report.
[76] Constitution Committee, '*Immigration Bill*' (7th Report, Session 2015–16, HL Paper 75).
[77] Delegated Powers and Regulatory Reform Committee, '*Data Protection Bill*' (6th Report, Session 2017–19, HL Paper 29).
[78] Constitution Committee, 'Space Industry Bill' (2nd Report, Session 2017–19, HL Paper 18).
[79] Select Committee on the Constitution by the House of Lords, 'The Legislative Process: The Delegation of Powers' (20 November 2019) 19.

borne in mind and the rule making powers should not be wide ranging, should be strictly defined in the underlying legislation, and should not be a complete replacement for a robust underlying primary legislation.

1.6. SETTING UP IREF IN SHADOW FORM

The Review discusses that while the IREF is likely to bring major changes in the way football as a game is governed, in order to ensure that the IREF is fully operational as soon as the underlying legislation for it is passed by both Houses of tParliament and receives assent from Her Majesty ("Royal Assent"), a non-statutory form of the IREF should be set up in shadow form as soon as possible. The Review acknowledges that while setting up of the IREF in its shadow form may require funding from the UK Government's Economic and Finance Ministry ("HM Treasury") , this initial step can go a long way in ensuring that the IREF starts working with and completing the initial base work with clubs, leagues, fans, other regulators and bodies like UEFA to build capability and expertise.[80] The Review also suggests that the IREF could also go ahead and start the process of recruiting experienced regulators (to work within the IREF), particularly on the prudential regulation, who would work with the industry stakeholders before the legislation receives Royal Assent.[81] Setting up of the shadow form of IREF would also be a transitional vehicle to shift between status quo and the proposed governance model.

There are no enabling or prohibiting provisions under UK law that prohibits a governing body/regulator to be set up in shadow form before the underlying legislation to set up the governing body receives its Royal Assent. However, the shadow regulator cannot have any regulatory or statutory powers before the Royal Assent for the underlying legislation is granted. The IREF in its shadow form will have a very limited role to play and can only be permitted to undertake preparatory steps for its final implementation as the IREF after Royal Assent. Clear terms of incorporation should be specified for the setting up of the shadow IREF. These should also specify what would happen to the shadow IREF in case Royal Assent is not received for the underlying legislation.

The approach of setting up a shadow regulatory body before receiving the Royal Assent has been done in the UK in the past as well. The Building Safety Regulator ("BSA"), and the

[80] *Fan Led Review* (n 1) 50.
[81] *Fan Led Review* (n 1) 52.

Digital Markets Unit (“DMU”) (a part of the Competition and Markets Authority (“CMA”)) were first set up in shadow form. The scope, the funding, and the period of existence for both these units are given below:

Topic	BSA[82]	DMU
Scope	To monitor high rise building safety. In shadow form, the regulator’s roles is: • To focus on assisting the government to develop the needed reforms in building safety and in preparing itself and the sector for the new regulatory regime. • To liaise with residents, the industry and developers to enable it to form the regulation and safety standards.	To monitor competition similar to the CMA but with an exclusive focus on businesses with activities in digital markets. In shadow form, the regulator’s role is[83]: • To carry out preparatory work ahead of implementing the statutory regime. • To support and advise the UK Government on establishing the regime and assessing how the code of conduct will operate in practice. • To gather evidence on digital markets using the CMA's existing powers; and • To engage with stakeholders and building relationships across industry, academia, government and other regulators.

[82] Ministry of Housing, Communities & Local Government, Government of UK ‘Building Safety Regulator: Factsheet’ (updated 5 April 2022) <https://www.gov.uk/government/publications/building-safety-bill-factsheets/building-safety-regulator-factsheet)> accessed 25 April 2022.

[83] Department for Business, Energy & Industrial Energy, Government of UK, ‘Digital Markets Unit (non-statutory)-Terms of Reference’ (updated 7 April 2022) <https://www.gov.uk/government/publications/non-statutory-digital-markets-unit-terms-of-reference/digital-markets-unit-non-statutory-terms-of-reference> accessed 25 April 2022.

Funding	From the HM Treasury as a part of funds allotted to the department of health and safety. Eventual funding for the regulator would come from a mix of treasury funding and levies imposed on developers applying for approval from the building and safety regulator.	DMU functions within the CMA and therefore is funded through the CMA's budget. CMA is funded through the exchequer's funding as well as funding that it receives in the form of fees/penalties etc[84].
Period of time in existence	The shadow form was set up when the bill was introduced, (in approximately July 2021) and is proposed to continue for 6-12 months after the bill receives the Royal Assent, till the actual regulator is up and running and equipped to monitor building safety[85].	From April 7, 2021 and will continue to apply till a final regulator is established and running[86].

Using the above examples, when setting up the IREF in shadow form, the government needs to ensure that, the shadow IREF:

- is set up as a non-statutory regulator (i.e. no executive functions);
- has clear terms of reference adopted, specifying what the shadow regulator can do;
- receives funding for performing its functions as a shadow regulator from the HM Treasury; and

[84] Department for Digital, Culture, Media & Sport, Competition and Markets Authority, Government of UK, 'A new pro-competition regime for digital markets' (July 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf> accessed 25 April 2022.

[85] Ministry of Housing, Communities & Local Government, Government of UK, 'Outline Transition Plan for the Building Safety Bill' (updated 5 July 2021) <https://www.gov.uk/government/publications/building-safety-bill-transition-plan/outline-transition-plan-for-the-building-safety-bill> accessed 25 April 2022.

[86] Department for Digital, Culture, Media & Sport, Competition and Markets Authority, Government of UK, 'New watchdog to boost online competition launches' (7 April 2022) <https://www.gov.uk/government/news/new-watchdog-to-boost-online-competition-launches--3> accessed 25 April 2022.

- has functions that are limited only to the transition to final form, recruiting talent, and establishing the infrastructure for starting executive operations as soon as the relevant Bill receives Royal Assent.

1.7. THE SUSTAINABILITY INDEX

In general, the Fan-Led Review seeks to ensure that "English football is sustainable and competitive for the benefit of existing and future fans and the local communities football clubs serve". Considering this objective, the Fan-Led Review has recommended that "IREF should oversee financial regulation in football (…) to ensure financial sustainability of the professional game, IREF should oversee financial regulation in football". The Fan-Led Review does not expressly currently consider the creation of a compulsory index measuring clubs' sustainability as part of this strategy. In any event, the Government has indicated that further details on how reforms will be implemented will follow in the forthcoming White Paper, which will be published in the summer of 2022.

Moreover, UEFA has recently introduced new regulations with respect to club financial stability which aim to develop real-time monitoring of clubs' financial stability and expenditures. Fair Game has also put forth a proposal of a Sustainability Index maintained by the IREF, which would score clubs on four criteria: (i) equality standards; (ii) fan engagement; (iii) financial sustainability; and (iv) good governance.

While this Report will not consider these regulations and proposals on their own merits, it will analyse the possibility of introducing similar indexes as part of IREF's objectives.

As detailed in Item 1.1 above, the statutory purposes of the IREF should be considered when creating a sustainability index. Creating a sustainability index which would include parameters and purposes outside the scope of IREF's objectives is likely to result in challenges. As also indicated in 1.1, monitoring fans and local communities' engagement through a sustainability index could be outside IREF's purposes if not appropriately indicated in statute. Any proposed index should be in line with the objectives of the IREF. As concluded above, the objectives outlined in the Fan-Led Review do not appear to be sufficiently certain and a sustainability index with criteria such as "fan engagement" and "equality standards" could be challenged under this basis. Additionally, the IREF must act in accordance with the proper purposes of the legislation, with objective criteria and clear standards of performance where administrative discretion in granted. A sustainability index should be established under these premises to avoid potential challenges. In order to access the relevant data and to maintain a

sustainability index, clubs should be required to make regular disclosures regarding relevant criteria, as defined by the IREF and in line with its statutory objectives.

In case of poor performance in the sustainability index, IREF must have clear enforcement mechanisms that an independent regulator may deploy to prevent non-compliance. As indicated in Item 1.2 above, there are concerns with respect to the effectiveness of financial and de-licensing sanctions to non-compliance. The sustainability index enforcement mechanisms should also consider monitoring directors and club administrators as part of its approach towards sustainable football. Out of an abundance of caution, it may instead be safer for compliance to be incentivised through extensive public disclosure of the sustainability index.

Finally, as seen in the recent UEFA real-time monitoring regulations, a period of gradual implementation would further mitigate potential risks of challenges to a compulsory sustainability index.

1.8. PROPORTIONALITY MECHANISM: LIMITATIONS ON OWNER SUBSIDIES AND POTENTIAL REGULATORY DECISIONS THEREON

The Review considers that IREF should have a proportionality mechanism when assessing owner injections. Recommendation 8 of the Review states: “IREF should have a proportionality mechanism managing the level of owner subsidies based on the size of a club’s existing finances or if owner injections at one or a few clubs is destabilising the long-term sustainability of the wider league.”

Wealthy owners inject money into their clubs. This what is called an owner subsidy. Owner subsidies can be good for clubs and competition and allow for clubs to be transformed into champions which can sometimes be for the benefit of fans.[87] However, the Review identifies that overspending in order to compete can trigger wage inflation and destabilise the financial situation of football clubs overall.[88] In this way, a distinction exists between ‘true investors’ who are looking for a competitive financial return and ‘pure success-seekers’ who are willing to pay for success of the club.[89] The proportionality test is supposed to determine what level of owner injections are appropriate and inappropriate. The Review proposes a limit

[87] *Fan Led Review* (n 1) 59-60.
[88] ibid 60.
[89] Ulrik Wagner, Rasmus K. Storm, and Klaus Nielsen, *When Sport Meets Business: Capabilities, Challenges, Critiques* (SAGE Publications 2016).

being set on the level of owner subsidy based on the size of a club's existing finances.[90] This section will evaluate the legality of such a proposal, in particular by drawing parallels with the UEFA Financial Fair Play Regulations.[91]

a. Proportionality of Subsidy Limitations

It should be recalled that powers of an administrative body, should be exercised in conformity with the European Convention on Human Rights, as implemented by the Human Rights Act 1998.[92] Article 1 of the First Protocol protects the right to property.[93] An owner of a football club using their own money to affect outcomes with the club is arguably an enjoyment of their possessions within the definition of the right to property.

A 'structured proportionality test' has emerged in regard to interference with convention rights.[94] The court will ask itself if "(i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".[95] The right to property is further qualified in that the convention states that it does not "impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest".[96] It is observed that the courts will afford the primary decision-maker a degree of deference in exercising their discretionary judgment.[97] An example of a decision of a regulator being challenged on proportionality grounds for interference with a property right occurred in the case of *R (Clays Lane Housing Cooperative) v The Housing Corporation.*[98] In this case, the court held that the test of proportionality required a balancing exercise justified on the basis of a compelling case in the public interest that is reasonably necessary and

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[90] *Fan Led Review* (n 1) 60.
[91] Financial Fair Play Regulations (n 60).
[92]Section 6 of the Human Rights Act 1998; "The judge over your shoulder — A guide to good decision making" (Government Legal Department 2016), 10 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf>.
[93] "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." Article 1, European Convention on Human Rights.
[94] *Wade and Forsyth* (n 23) Ch 6.
[95] *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80.
[96] Article 1, European Convention on Human Rights.
[97] *Wade and Forsyth* (n 23) Ch 11.
[98] *R (Clays Lane Housing Cooperative) v The Housing Corporation* [2004] EWCA Civ 1183.

concluded that the regulator had not carried out such test. However, the regulator's decision was nevertheless held to be a valid one which would have been arrived at regardless had a proportionality analysis been carried out.[99]

Any decision as to the make-up of potential owner subsidy rules to be administered by the IREF should be proportionate to potentially limiting a fundamental right of the owners of football clubs. The Review proposes that a limit should be set "on the level of owner subsidy based on the size of a club's existing finances (which would grow over time if the investment was successful and the club grew)".[100] The IREF should first, for the reasons outlined in Section 1(1) of this Report, but also for proportionality purposes, ensure there is a legislative objective that supports limitation on the size of owner subsidies. The IREF should ensure and define how the limitations imposed on owner subsidies are rationally connected to the relevant legislative objective e.g. the sustainability of English football. In assessing the figures which are relevant for the calculation of limits on owner subsidies, the IREF should impair the right in the least restrictive means necessary. This would be a standard aligned with a proportionality test. However, if the mechanism used is not the least restrictive means possible, this does not mean it necessarily will fall foul of a proportionality challenge. In the context of public administration, the Court of Appeal has noted that to hold otherwise would mean that "decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory".[101] As such, due to this demonstrable trend of deference to the decision-maker, it is unlikely that there would be a successful challenge on this ground if the regulator shows a decision is reasonably necessary in the public interest.

b. Analogy with UEFA Financial Fair Play Regulations

In assessing the potential means by which the IREF could exercise a proportionality mechanism for limiting the levels of owner subsidies, it may be helpful to consider the Financial Fair Play regulations established by UEFA for European football leagues. UEFA have adopted financial criteria for grant of a UEFA license which is necessary to partake in their leagues. These include the club having finalised and audited accounts,[102] no overdue

[99] ibid [28].
[100] *Fan Led Review* (n 1) 60.
[101] *R (Clays Lane Housing Cooperative) v The Housing Corporation* (n 61) [25].
[102] Financial Fair Play Regulations (n 60) Art 47.

payables,[103] and future information if there are concerns about the club as a going concern.[104] UEFA also has a break-even requirement. Clubs can only incur expenditure of up to €5m more than they earn over a three-year period.[105] The relevant income for this determination excludes contributions from third parties or equity participants unless it meets the acceptable deviation criterion, which allows the limit to be exceeded by up to €30m if covered by contributions from shareholders.[106] UEFA Disciplinary Regulations provide for a whole host of possible sanctions including a reprimand, a fine, disqualification from competitions in progress and/or exclusion from future competitions or withdrawal of a licence.[107] This system has been subject to legal challenge but mostly on the issue of its impact on Competition law.[108] There have also been claims made on issues of fair procedures regarding the implementation of these rules.[109] As such, following fair procedures in the administration of these financial regulations will be a necessary consideration.[110] A potential reason for the lack of challenge on other grounds could be derived from the fact that the law applicable to any dispute under the UEFA regulations is the regulations themselves as a system of contracts.[111] This is opposed to being subject to the public laws of a national jurisdiction. The proposed regulations as issued by the IREF would, conversely, be subject to the laws of England and Wales. Thus, the IREF could be subject to more challenges; namely through the system of judicial review as outlined above.

1.9. ENFORCEABILITY OF RECOMMENDATIONS TO THE LEAGUES (E.G. PLAYER SALARY RELEGATION ADJUSTMENT CLAUSES)

There are a series of recommendations directed towards the football leagues, as opposed to clubs, in recommendations of the Review. These are general recommendations to the FA, the League, the Premier League, EFL and the PFA. They are as follows:

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[103] ibid Art 49.
[104] ibid Art 52.
[105] ibid Art 61.
[106] ibid; Adam Lewis and Jonathan Taylor *Sport law and practice* (4th edn 2021), Ch. B.
[107] Daniel Geey "The UEFA Financial Fair Play Rules: a difficult balancing act" (2016) Entertainment and Sports Law Journal 9(1), 5.
[108] See infra, Part 2.1.
[109] *Manchester City FC v. UEFA* (28 July 2020, CAS 2020/A/6785).
[110] Decisions of sports federations are subject to the requirements of natural justice as per Rosmarijn van. Kleef, *Liability of Football Clubs for Supporters' Misconduct: A Study into the Interaction between Disciplinary Regulations of Sports Organisations and Civil Law* (Eleven International Publishing 2013).
[111] de Marco (n 35) ch. 16.

> "37. The FA should scrap its current formula for distributing revenue it generates. The FA should have more flexibility to redistribute revenues as it sees fit, based on its assessment of where funding is most needed in the game.
> 38. Football should seek to resolve distribution issues itself. If no agreement can be reached by the end of 2021, the Premier League and EFL should commission research to find a solution, with backstop powers for IREF if a solution is still not found.
> 39. The Leagues, FA, and PFA should work together to include a new compulsory clause in the standard player contracts that provides for an automatic adjustment to player salaries at a standard rate upwards on promotion and downwards on relegation…
> 44. The EFL should review its rules on artificial pitches, and at the very least relax its current rules on artificial pitches to offer flexibility to newly promoted clubs, giving them a 3-year grace period to convert to grass pitches."[112]

There do not appear to be any barriers to introducing legislation that codifies these recommendations. Equally, the IREF could impose such clauses directly themselves. What would be necessary is that the leagues are made answerable to the IREF. A legal duty to abide by the IREF regulations could likely only arise if the legislation specially laid out that the IREF has jurisdictional control over the leagues. An Act can lay down any proposition of law, in accordance with the doctrine of parliamentary sovereignty.[113] In this manner, the legislature could make any relevant recommendations binding on all professional men's football leagues. They could introduce sanctions or authorise the IREF to impose sanctions. A softer potential mechanism would be requiring the football leagues to "apply or explain" the IREF recommendations. By analogy, the U.K. Corporate Governance Code has its foundation in the Listing Rules of the Financial Conduct Authority established by the Financial Services and Markets Act 2000. These are enforceable on a comply or explain basis. The recommendations to the leagues could therefore adopt a similar structure to form a softer form of enforceable regulation.

1.10. FUNDING OF THE IREF

[112] Fan Led Review (n 1) 140.
[113] Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, 2020) 31.

The Review sets out that the IREF can look at raising funds through a solidarity transfer levy ("Transfer Levy") and funding through the Premier League's broadcast receipts ("Broadcast Receipts"). A Transfer Levy is a portion of a player's transfer price from one club to another, that a club would need to pay to the IREF. As stated in the Report, the Transfer Levy, would, apart from funding the IREF for its operations also play a pivotal role in developing the game.[114] The Review also discusses how the IREF can be paid a portion of the broadcast receipts that the English Premier League receives from its broadcast partners around the world.[115]

While the means of funding discussed in the Review may be implemented, the suggestions in the Review would be better suited for sustained funding after the initial phase of implementation of the IREF. The IREF would therefore, need to procure its initial funding from other sources.

Funding methodology for regulatory bodies may be set out in the underlying legislation. As long as the funding methodology is in the legislation and has been approved by the Houses of Parliament and received the Royal Assent, the IREF can receive funding in accordance with the underlying legislation.

a. Initial Funding

The IREF would need to procure its initial funding from budgeted amounts from HM Treasury. The budget proposed would need to be proportional to the expenses and the needs of the IREF and cannot be exorbitant. Considering that the IREF would be a first of its kind sports regulatory body, there are no similar precedents for sports regulatory bodies that exist in the UK. Failing any sports related precedent, we have looked at how other regulatory bodies in the UK are typically funded. The CMA,[116] (the competition regulator in the United Kingdom), the BSA (the regulator overseeing the safety and performance of buildings in the UK),[117] and the Prudential Regulatory Authority: the regulator focusing on the stability of the UK financial

[114] *Fan Led Review* (n 1) 114.
[115] ibid, 50.
[116] CMA, Government of UK, 'Main Estimates 2020-21: Estimates memorandum for the Competition and Markets Authority (CMA)' (27 April 2021) <https://committees.parliament.uk/publications/1400/documents/12814/default/> accessed on April 25, 2020.
[117] Department of Levelling Up, Housing & Communities 'Building Safety Regulator: Factsheet, (updated 5 April 2022) <https://www.gov.uk/government/publications/building-safety-bill-factsheets/building-safety-regulator-factsheet#how-will-the-building-safety-regulator-be-funded> accessed 11 May 2022.

system (a subset of the Bank of England, which is publicly funded),[118] have all been funded by HM Treasury.

Given the above examples, there is a case to be made for the IREF to request for funding from HM Treasury for its initial implementation phase before becoming a self-financed regulatory body like the Financial Conduct Authority. The Financial Conduct Authority is completely self-funded now based on the fees and penalties it received from the entities it regulates.

In order to ensure complete transparency, the IREF should, however, publish an annual report detailing how the funds received by it through any of the sources mentioned above have been utilised. This is currently being done by the CMA.[119]

b. Sustained Funding

Other than the methods of sustained funding mentioned in the Review and highlighted above, the IREF can also explore the option of charging license fees from clubs when they approach the IREF for licensing of their club, and an annual fee that is to be paid by the Premier League clubs to the IREF along with an annual filing for governance. This will be similar to the funding of the Financial Conduct Authority, which runs on licence fees that it charges the firms it regulates.

[118] Bank of England 'Governance and Funding' <https://www.bankofengland.co.uk/about/governance-and-funding> accessed 11 May 2022.
[119] CMA, Government of UK, 'Main Estimates 2020-21: Estimates memorandum for the Competition and Markets Authority (CMA)' (27 April 2021).

PART II – Legal Challenges to the Existence of a Regulator

Executive Summary

Competition Law

- The international characteristics of football - foreign ownership of clubs, players transfer and continent-wide competitions, etc. - renders the application of the Treaty on the Functioning of the European Union ("TFEU") a possibility, despite the UK's exit from the EU. Post Brexit, EU competition law may still apply to the IREF given its (indirect) effect on trade between Member States.
- A competition law challenge is more likely to be brought through private enforcement than by the CMA or the EC. Such suits also require the claimant to prove antitrust injury and a sufficient connection between the infringement and the harm to the claimant. This requirement complicates challenges but is highly fact-sensitive.
- There is no potential liability under Article 101 TFEU as long as the implementing legislation and the IREF allocate no decision-making power to the clubs or leagues in the achievement of its objectives.
- Liability at EU law under Article 102 TFEU is conditional on (1) conduct that "affects trade between members states", (2) "by one or more undertaking", (3) "in a dominant position within the internal market or in a substantial part of it", (4) and such conduct constituting an "abuse". An abuse may be (5) objectively justified by the pursuit of legitimate objectives.
- The 'effect on trade' requirement of EU competition law is likely to be made out. The equivalent jurisdictional threshold in UK competition law of 'affecting trade within the UK' will certainly be made out.
- However, whether the IREF constitutes an "undertaking" is more complex due to convoluted jurisprudence and the novelty of this type of sporting regulator. On balance, characterisation as an undertaking is a remote possibility. There is a difference in this regard between the different aspects of the Fan-Led Review. The IREF could conceivably fall inside the characterisation for a) the licensing regime, and b) rules that impose salary adjustments and caps on players. By contrast, the financial regulation of the Review, restrictions on owners and directors, financial redistributions conducted by the IREF, and

corporate governance rules are even less likely to be challengeable because the IREF almost certainly does not act as an undertaking in this context.

- The Article 102 TFEU & Chapter II Competition Act 1998 prohibitions: The IREF is unlikely to have a dominant position within the EU under EU competition law. It is highly likely to have a dominant position within the UK under UK competition law.
- ‘Abuses’ of the dominant position under Article 102 TFEU or the Chapter II Competition Act 1998 prohibition in the instant case would be exclusionary abuses. It is possible to envision both more problematic abuses “by object” and less problematic abuses “by effect” in relation to the IREF’s conduct. Given the fact-sensitive nature of the enquiry and missing case-law, specific guidance is difficult to give. Once again, the licensing regime and salary cap rules are more likely to be challengable than the other recommendations of the Fan-Led Review.
- However, many such claims have low prospects of success given the proportionality of the IREF's functions to its legitimate objectives, particularly with regard to the 'specific nature' of sport recognised under EU law. The IREF should take care to satisfy the ‘inherency’ and ‘proportionality’ standards for such justifications, in particular in relation to licensing and salary caps.
- Challenges on the basis of UK competition law largely avoid the potential barriers to a challenge of ‘effect on trade’ and existence of a ‘dominant position’ in the EU. Such challenges face equivalent requirements as in EU law since the Competition Act is modelled on EU competition law. Given the limited jurisprudence so far developed, it is unlikely that the resolution in regard to the ‘undertaking’ and substantive liability questions would differ substantially from those adopted at EU law. So long as the CMA and the Courts do not take an entirely novel approach contradicting EU jurisprudence regarding the definition of an undertaking, the IREF is unlikely to pose substantive issues under domestic UK competition law. In fact, it is conceivable that the UK courts will take a more restrictive approach to competition challenges, especially to the IREF, after having exited the EU.
- Article 106 TFEU does not apply after Britain’s exit from the European Union. There is no equivalent provision in UK domestic law.

State Aid/Subsidy Regimes

- EU state-aid regulations no longer apply in the UK. In lieu of Article 107 TFEU, the UK-EU Trade and Cooperation Agreement (TCA) subsidy regime applies.

- The IREF's initial financial funding, and contingent costs incurred in the IREF's future operation provided by the government might fall into the scope of Article 363 TCA as a subsidy granted by the State.
- The implication of the TCA's application is that any financial assistance the IREF receives from the UK Government will be made public, and can then be subject to challenge of validity and compliance. This scenario is currently deemed unlikely, but not impossible.
- The government's non-financial support for the IREF is unlikely to be subject to the TCA.

Solidarity Transfer Levy

- The Solidarity Transfer Levy provisions will be disliked by clubs who are likely to want to challenge. Current applicable competition law legislation does not clearly deal with its regulation. There is, at least in the sphere of competition, discretion in the creation of the Solidarity Transfer Levy scheme.

National Security Legislation

- The IREF may assume the duties to monitor acquisitions across clubs and voluntarily notify the government if necessary, under the *National Security and Investment Act 2021* (UK).

2.1 EU & UK COMPETITION LAW:

a. Introduction

This section addresses the potential legal challenges to the establishment of the IREF, with a primary focus on competition law. In determining the most likely forms of legal challenges to the IREF's establishment, one must consider the most likely source of a legal challenge i.e., the parties most aggrieved by the intended powers and regulatory functions of the IREF. Accordingly, this section assesses the prospects of a challenge to the establishment of the IREF on the basis of competition law coming from an overseas football league, a powerful Premier League club, a club competing against English clubs in European competition, or the FA. Given the IREF is set to be established by legislation passed in the UK Parliament, it is difficult to foresee a challenge to its existence coming from the CMA. It is also unlikely that a challenge to IREF's establishment will come from the European Commission ("EC"); one reason being that case law suggests activities connected with the

exercise of the powers of a public authority are not subject to EU competition law.[120] However, a private party may argue that the IREF is nevertheless subject to competition law based on the concentration of financial regulatory functions in the IREF that transcend traditional regulatory functions. In evaluating the prospects of such a challenge, this section analogises EU jurisprudence concerning the application of competition law to sporting rules implemented by governing bodies.

b. Key issues

As highlighted above, a challenge to the IREF may come from a club or league outside of the UK, particularly given the involvement of Premier League clubs in UEFA competitions. Therefore, whether EU competition law is applicable to the establishment of the IREF is a critical consideration for the purposes of this Report.

This section addresses the two main risks under EU competition law which could potentially stand in the way of the IREF's establishment and ongoing regulatory powers i.e. challenges under: (I) Article 102 TFEU; and/or (II) Article 106 TFEU.

The most contentious elements under these provisions for the purposes of the IREF concern:

- whether the IREF's conduct will have an 'effect on trade';
- whether the IREF meets the definition of an 'undertaking' or 'public undertaking'; and
- whether the IREF's functions are proportionate to its legitimate objectives having regard to the special features of sport.

Each of these elements are considered in detail below.

2.1.1 UK Competition Law after Brexit

As of 1 January 2021 - the end of the Brexit transition period - EU competition law is no longer enforced within the UK, meaning Articles 101 and 102 TFEU have ceased to apply with respect to conduct that affects trade only within the UK market. Accordingly, the *Competition Act 1998* and the *Enterprise Act 2002* have become the exclusive sources of

[120] See Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica*, *Médica, Técnica y Dental (FENIN) v Commission* [2003] ECR II-357; C-309/99 *Wouters v Algemene Raad van de Nederslandse Orde van Advocaten* [2002] ECR I-1517.

competition law in the UK. The domestic competition provisions in the UK substantially reflect approximately equivalent provisions under EU competition law. For example, the provision concerning abuse of dominance contained in Chapter II *Competition Act 1998* (UK) mirrors Article 102 TFEU.

The TCA involves the UK and EU mutually committing to maintain and enforce effective competition law to prevent anti-competitive conduct and abuses of dominance, fundamentally 'maintaining the status quo of the existing EU and UK competition law rules'.[121] The key difference being that the EU community dimension aspect (discussed above) is not relevant for a challenge under the UK's domestic regime.

Nevertheless, the EC still has jurisdiction to challenge conduct by a UK undertaking if it affects trade between Member States. The potential for parallel investigation under EU and UK Competition Law still exists. As discussed above, the functions of the IREF have the ability to affect trade in the UK in addition to affecting trade in EU markets, meaning the IREF is still likely to be subject to EU competition law.

If a challenge is brought under UK Competition Law, EU case law will only have a persuasive effect. Section 60 of the Competition Act 1998 (UK) has been revoked, meaning the UK courts are no longer required to interpret domestic competition law consistently with EU Competition Law.[122] Section 60A confers discretion on the CMA and UK Courts to depart from EU law, meaning “there is now greater scope for UK competition law to diverge from EU competition law in the future”.[123] Accordingly, UK competition law may develop a novel approach to addressing restrictive measures by regulatory bodies, again compromising the legal certainty regarding the prospects of future challenges against the IREF. Nonetheless, the principles underlying competition enforcement are effectively a ‘common law’ given the limited guidance of Article 101 and 102. The core principles of competition enforcement in EU and UK are based on a solid economic foundation and a common consensus and are unlikely to diverge substantially, at least in the short term. The Report will highlight where there are differences in the statutory framework and case law between the jurisdictions.

[121] Norton Rose Fulbright, *‘The Impact of Brexit on Antitrust and Competition’* (*Norton Rose Fulbright*, January 2021) <https://www.nortonrosefulbright.com/en/knowledge/publications/e8d5744d/the-impact-of-brexit-on-antitrust-and-competition> accessed 24 April 2022.

[122] Charles Russell Speechlys ‘*Brexit: Implications for Competition*’ (*Charles Russell Speechlys*) <https://www.charlesrussellspeechlys.com/en/news-and-insights/blogs/brexit-implications-for-you-and-your-business/competition/> accessed 24 April 2022.

[123] Julian Ellison, David M Harrison and James Harrison, ‘*Implications of Brexit on UK Competition Law*’ (*Mayer Brown*) <https://www.mayerbrown.com/en/perspectives-events/publications/2021/04/implications-of-brexit-for-uk-competition-law> accessed 24 April 2022.

2.1.2 Jurisdictional Thresholds: Do the IREF's Functions affect trade between Member States?

The territorial scope of EU competition law is limited to conduct that *"*may affect trade between Member States".[124] The IREF has functions affecting the movement of professional footballers in the international transfer market (at least indirectly) through the solidarity transfer levy and the re-distribution of revenues. These functions will impact the ability and/or the willingness of English football clubs to purchase and sell players. Despite the UK no longer being an EU Member State, English clubs continue to compete with European clubs to acquire talent, and in international leagues. Therefore, the functions of the IREF will impact cross-border economic activity and the competitive structure of the European labour market, thereby having an overall impact that affects trade between Member States.[125] Given the broad interpretation of the 'effect on trade' requirement incorporating indirect and potential consequences,[126] this requirement is likely to be satisfied.

The equivalent jurisdictional threshold in UK competition law is whether the conduct at issue 'affects trade within the UK'.[127] The IREF's operation will certainly affect trade within the UK.

2.1.3 Is the IREF an "Undertaking"?

The more contentious issue is whether the IREF will constitute an "undertaking" within the meaning of EU and UK law, which is another necessary element for EU competition law to apply. The TFEU does not provide a definition of the concept of an undertaking; neither does the Competition Act.

Public bodies as "undertakings": The European Courts have applied the term to entities engaged in economic activities regardless of their legal status and the way in which they are financed.[128] When a regulator takes regulatory actions in exercise of its public functions, it does not constitute an undertaking, the same way that a regulatory statute cannot contravene Articles 101 or 102 TFEU. As the European Courts have explained: Activities connected with

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[124] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, articles 101 and 102.
[125] European Commission, Guidelines on the effect of trade concept contained in articles 81[101] and 82[102] of the Treaty (2004/C 101/07) paras 15, 20 and 21.
[126] ibid paras 36-43; Case 172/80 *Züchner v Bayerische Vereinsbank* [1981] ECR 02021 para 18; Case C-41/90 *Hofner and Elser v Macrotron GmbH* [1991] ECR I-01979; C-309/99 *Wouters* (n 120).
[127] Competition Act 1998 (UK) ss2, 18.
[128] Case C-41/90 *Hofner and Elser v Macrotron GmbH* (n 126)

the exercise of the powers of a public authority are not subject to EU competition law.[129] A body is not an undertaking if it carries out an activity that is "of its nature a core function of the State".[130]

Bodies engaging in economic activity as "undertakings": Public bodies, even a regulator controlled and created by the government such as the IREF, if they engage in economic activity, instead of the mere exercise of public functions, will constitute an "undertaking" and be subject to EU competition law. Economic activity involves supplying goods or services with the potential to make profits.[131] In *FENIN*, the Court of Justice upheld the approach taken by the Commission and General Court that since FENIN's behaviour was not economic, the public bodies in question were not acting as undertakings.[132] The behaviour at issue was the procurement of goods and services on the market by Spain's national health service. Mere procurement without offering goods or services was held to not constitute an economic activity sufficient for undertaking status. Sport is capable of being an "economic activity".[133]

Since the IREF will not offer goods and services on the market, it might not come within the ambit of engaging in economic activity. The regulation of the provision of goods or services on the market is not sufficient to act as an undertaking.[134] This leaves to be considered whether the IREF, in the exercise of its public functions will be considered an undertaking. The IREF's functions are likely to displace functions previously exercised by e.g. the FA and Premier League and are therefore arguably within the ambit of 'economic activity'.

The case of *Wouters* demonstrates a functional approach to the definition of economic activity,[135] stipulating that EU competition law "do[es] not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity … or which is connected with the exercise of the powers of a public authority".[136] Although the case acknowledges that "associations carrying out regulatory functions in relation

[129] See Case T-319/99 *FENIN* (n 120); C-309/99 *Wouters* (n 120).
[130] Case C-343/95 *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA* [1997] ECR I-01547.
[131] Case 118/85 *Commission v Italian Republic* [1987] ECR 2599 para 7; Joined Cases C-264/01 etc *AOK Bundesverband* [2003] ECR I-2493.
[132] Case T-319/99 *FENIN v Commission* (n 120)
[133] Case C-415/93 *ASBL v Jean-Marc Bosman* [1995] ECR I-04921.
[134] Case C-30/87 *Corinne Bodson v SA Pompes funebres des regions liberes* [1988] ECR 02479.
[135] Case C-309/99 *Wouters* (n 120)
[136] Case C-309/99 *Wouters v Algemene Raad van de Nederslandse Orde van Advocaten* (n 120) para 57.

to an industry or sector are subject to the requirements of competition law”,[137] it places emphasis on the context and objectives of the regulatory body's functions.

The application of *Wouters*, specifically the concept of “regulatory ancillary that enabled the courts to overlook the incidentally anticompetitive effects of primarily regulatory measures” has been accepted and applied to the sporting context in the cases of *Meca Medina* and *ISU* discussed below.[138] Accordingly, the IREF could argue that it is not engaged in economic activity by emphasising its connection “with the exercise of the powers of a public authority”.[139] The counterview is that the regulation of football is not an “essential function of the state” and is not typical of a public body.[140] Such activities could conceivably be carried out by a private sector body, such as a sports governing body. For example, in *MOTOE*, the exercise of public powers to grant applications to organise motorcycling events was not considered acting as an undertaking but advertising and sponsorship activities related to those events were.[141]

Sports governing bodies as “undertakings” in EU competition law: The convoluted and fact-driven jurisprudence of EU sports law does not clarify the above tension. A court might consider whether the IREF is comparable to a traditional Sports Governing Body (“SGB”) for the purposes of EU competition law. The Fan-Led Review of Football Governance report, published in November 2021, argues that the IREF “would not operate in areas of traditional sports regulation”[142] i.e. those areas currently occupied by e.g. the self-regulating FA and the Premier League. Nonetheless, the IREF does, for example, intend to regulate players contracts and administer parachute payments, stepping into those areas.

URBSKFA v Jean-Marc Bosman suggests that sport is subject to Community law in so far as it constitutes an economic activity.[143] In *Laurent Piau v European Commission*,[144] the CFI considered national football associations to be members of FIFA and may be considered undertakings as well as associations of undertakings. The free movement part of the case law has ceased to be applicable after the UK’s exit from the EU, but the competition law part remains applicable. Whether the IREF is characterised as an SGB is material because it is a

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[137] Tom Cleaver, ‘*Anticompetitive Behaviour by Professional Regulators – Wouters Naturalised*’ (*Competition Bulletin*, 18 March 2013 <https://competitionbulletin.com/2013/03/18/anticompetitive-behaviour-by-professional-regulators-wouters-naturalised/> accessed 24 April 2022.
[138] ibid; see also Richard Whish and David Bailey, Competition Law (10th edn, OUP 2021) chapter 3.
[139] *Wouters* (n 120) para 57.
[140] Case C-343/95 *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA* (n 130) para 22.
[141] Case C-49/07 *MOTOE v Elliniko Dimosia* [2008] ECR I-4863.
[142] *Fan Led Review* (n 1) 14.
[143] Case C-415/93 *ASBL v Jean-Marc Bosman* (n 133).
[144] Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-00209.

settled position in EU case law that SGBs are subject to free movement and competition law under the TFEU when establishing and enforcing sporting rules.[145] In our opinion, it is unlikely that the European Courts would accept a characterisation of the IREF as an "undertaking" on the basis of the sports governing body analogy because sports governing bodies in the sense of the case law are not regulators and invested with much fewer (if any) public powers. As mentioned above, the IREF is not being established as a regular SGB; rather, it intends to engage in "sophisticated business regulation tailored to the specifics of the football industry".[146] Tracy Crouch MP (chair of the Fan-Led Review) in her letter dated 22 July 2021, stated that "football issues" should be outside the remit of the IREF.[147] Nonetheless, the applicability of jurisprudence relating to SGBs to the IREF is somewhat uncertain given the novelty of the IREF's functions and the exact scope of the remit of the IREF.

Functions of the IREF as "undertakings": Nevertheless, characterisation as an undertaking is a "chameleon" concept based on the EU courts' functional approach. Therefore, the IREF may be classified as an undertaking in exercising some functions but not in its exercise of others.

For example, restrictive measures taken by the IREF regarding rules and eligibility of football leagues in the UK (in contrast to strictly financial regulation) might be analogised to restrictive measures adopted by SGBs.[148] This potential risk is further demonstrated by the recent trend in national competition authorities subjecting SGBs to antitrust scrutiny.[149]

Parts of the Fan-Led Review that are likely to incur legal risk are (a) the licensing regime, and (b) rules that impose salary adjustments and caps on players;. By contrast, (a) the financial regulation of the Review, (b) financial redistributions conducted by the IREF, (c) restrictions on owners and directors, and (d) corporate governance rules, are less likely to be challengeable because the IREF does not act as an undertaking in this context.

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[145] Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-06991; Case C-325/08 *Olympique Lyonnais* [2010] ECR I-02177; Case C-49/07 *MOTOE* (n 141); Case T-93/18 *International Skating Union v Commission* [2020] ECLI:EU:T:2020:610.
[146] *Fan Led Review* (n 1) 14.
[147] *Fan Led Review* (n 1)
[148] Pinsent Masons *'Independent Regulation of Football can be Blueprint for Sports Sector'* (*Pinsent Masons*, 30 November 2021) <https://www.pinsentmasons.com/out-law/news/independent-regulation-football-blueprint-for-sports-sector> accessed 24 April 2022 ("some measures such as the introduction of mandatory promotion and relegation clauses will, however, need to be carefully thought through if they are not to be successfully challenged legally").
[149] Italian Competition Authority (ICA) No. 29718, Case 1838. See also Portuguese Competition Authority (AdC) LPFP decision (Autoridade da Concorrencia, April 2021) <https://www.concorrencia.pt/en/articles/adc-issues-statements-objections-anticompetitive-agreement-labour-market-first-time> accessed 24 April 2022.

In exercising its powers relating to the licensing and penalty regime, the IREF might be construed to be acting as an undertaking. SGBs traditionally carry out the determination of who may play in their leagues and impose penalties for infractions of their rules. The IREF may therefore be considered to be conducting an economic activity and act as an undertaking. Nonetheless, due to the nature of the IREF as a regulatory body invested with public functions, claimants' success remains unlikely.

The Competition Appeal Tribunal ("CAT") has held in *Strident Publishing v Creative Scotland* that the award of grants from public funds, here to support creative activity for the public benefit, did not characterise the body as an undertaking.[150] By analogy, the financial redistribution function of the IREF is unlikely to be characterised as an undertaking. The IREF will also not be characterised as an undertaking in levying taxes (e.g. the Transfer Levy).[151] There is also an exception for redistributive activities carried out according to principles of solidarity which would render them wholly social and therefore outside the undertaking characterisation.[152] The Financial Regulation function is not a function usually performed by the private market but by government regulators and is not an economic activity, making a challenge less likely. But given that UEFA and some leagues are performing such functions, a challenge is conceivable.

We recommend that the functions of the IREF should be carefully separated to minimise the overlap between these areas to increase legal certainty for the latter functions. Additionally, there should be no scope for regulatory standards to be determined by the industry (though consultation is both permissible and desirable); this risks the characterisation of the IREF as a regulator outside the definition of an undertaking. On balance, the best view is that in regard to the exercise of its novel functions, the IREF will not be considered an undertaking under the relevant EU jurisprudence, whereas the risk is higher for those functions that replace or augment functions currently occupied by existing sports governing bodies in this area. Despite the higher risk, it remains likely that such claims will fail at the undertaking stage, as long as the IREF performs only those functions in relation of which it has been granted public powers.

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[150] [2020] CAT 11.

[151] Case C-207/01 *Altair Chimica SpA v ENEL Distribuzione SpA* [2003] ECR I-8875.

[152] Office of Fair Trading, '*Public bodies and competition law: A guide to the application of the Competition Act 1998*' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284407/OFT1389.pdf> accessed 07 June 2022 14-18.

2.1.4 Article 101 TFEU/Chapter I Prohibition Competition Act 1998

Application of Art 101 TFEU is conditional on an anticompetitive agreement between multiple undertakings or "decisions by associations of undertakings". If the IREF is considered an undertaking, it will be considered a single undertaking. Sports governing bodies are traditionally likely to be considered associations of undertakings because its members have decision-making authority within the self-regulating sports governing body. In *Laurent Piau v European Commission*,[153] the CFI considered national football associations to be members of FIFA and may be considered undertakings as well as associations of undertakings. The Fan-Led Review seems to foresee no such decision-making authority for clubs. Therefore, there is neither an association of undertakings nor an agreement between undertakings. Accordingly, as long as the legislation implementing the IREF and the IREF's internal mechanisms allocate no decision-making authority to the clubs, there is no liability under Art 101 TFEU.

The same applies to the Chapter I prohibition in the UK's Competition Act 1998. The Chapter I prohibition is equivalent to the Art 101 TFEU prohibition, and the UK case law does not diverge relevantly.

2.1.5 Liability under Article 102 TFEU/Chapter II Prohibition Competition Act 1998

Article 102 TFEU restricts certain conduct by undertakings which have a dominant position in a given market. Dominant undertakings have a special responsibility not to hinder competition in the market.[154] Art 102 states: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."[155] Accordingly, liability under Article 102 TFEU is conditional on (1) conduct that "affects trade between members states", (2) "by one or more undertaking", (3) "in a dominant position within the internal market or in a substantial part of it", (4) and such conduct constituting an "abuse". An abuse may be (5) objectively justified by the pursuit of legitimate objectives.

[153] Case T-193/02 *Laurent Piau v Commission* (n 144)
[154] Case 322/81 *Nederlandsche Banden Industrie Michelin* v *Commission* ("Michelin I") [1983] ECR 3461 para 57.
[155] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, article 102.

2.1.6. Liability under Art 102 TFEU for public undertakings

Challenges to the IREF are possible under Article 102 TFEU. *Porto di Genova* held there may be Article 102 liability for certain rules laid down by the State as implemented by another in a dominant position.[156] This case concerned a dominant undertaking performing dock work which had been granted exclusive rights by Italy. The ECJ held that the creation of a dominant position in light of these exclusive rights is not automatically incompatible with Article 106 TFEU. However, it will amount to a breach of Article 102 TFEU if the undertaking cannot avoid abusing its dominant position or when such rights are liable to create a situation where the undertaking is induced to commit an abuse.[157]

Despite the issues raised in *Porto di Genova*, the facts of the case and the undertaking concerned do not strictly correlate to potential issues which may arise with the IREF as the disputed activity and behaviour in *Porto di Genova* was dock work carried out by a private undertaking. *Porto di Genova* noted that an abuse of dominance will arise when the exclusive rights granted to the undertaking by the State cannot avoid abusing its dominant position or when such rights are liable to create a situation which may induce the undertaking to commit such an abuse. For the purposes of this report, it is worth bearing in mind that the state trusting an undertaking with the operation of services of general economic interest does not by virtue of the provision absolve it from compliance with Treaty rules.

In *ISU*, the General Court held that eligibility rules had as their object the restriction of competition in the worldwide market for the organisation and commercial exploitation of international speed skating.[158] It may be argued that independent regulator inherently involves non-compete aspects analogous to this case.

Both the EU General Court and the Grand Chamber of the Court of Justice have acknowledged and legitimised the mere holding of a dominant position by sports governing bodies to set rules for the entire sport.[159] However, this gate-keeping function must not be exercised in a way to prioritise the body's own events at the expense of third parties.[160]

a. Market Definition

[156] Case C-179/90 *Porto di Genova* (n 130)
[157] ibid para 17.
[158] Case T-93/18 *ISU v European Commission* (n 145).
[159] Case T-93/18 *ISU v European Commission* (n 145); Case C-49/07 *MOTOE* (n 141).
[160] Case T-93/18 *ISU v European Commission* (n 145).

Identifying a dominant position requires definition of the relevant market.[161] Based on this, a case against the IREF for the holding of a dominant position may be less likely due to the difficulty in ascertaining a relevant market (particularly in geographic terms). Whilst there is overlap between British football leagues and other leagues in Europe (UEFA competitions), it would be difficult to successfully argue that the IREF exercises functions amounting to a dominant position in an international football market. A narrow definition of the relevant market limited to "English football" would be less favourable for the IREF as it would be easier to establish its dominance in this context.

As a result, the IREF would likely be considered to have a dominant position within the UK, instead of the EU or international football market. After Brexit, this is insufficient for EU law to find a "dominant position within the internal market or a substantial part of it" since the UK has left the EU's internal market.[162] But as a result of its narrower geographic focus, UK competition law would assess the IREF to have a dominant position within the UK.

b. The "by object"/ "by effect" distinction

The distinction between anti-competitive conduct by object and anti-competitive conduct by effect is a core element of the Article 102 jurisprudence: A restraint can either be 'by object' or 'by effect'.[163] The former characterisation involves a form-based analysis, deeming certain types of unilateral conduct intrinsically anti-competitive.[164] By contrast, effects-based analysis engages detailed economic analysis to determine the likely outcome of certain conduct, consistent with the 'modernisation' of EU Competition Law.

Given the fact-sensitive nature of the categorisation process, it is difficult to state exactly which actions will be considered restrictive by object or by effect without being apprised of the exact nature of a future challenge. Another issue is that the core of the abuses that would be alleged are ordinarily subject to scrutiny under Article 101 instead of Article 102. Guidance here is difficult to give as a result of most cases relating to SGBs having been brought under Art 101 and because the European Courts have not provided clear guidance on the characterisation process, seemingly preferring to proceed on a case-by-case basis. The guidance that is available largely pertains to characterisation under Art 101, with little in the

[161] Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215.
[162] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, article 102.
[163] Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235.
[164] Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law* (7th edn, OUP 2019) 375.

way of abuses under Art 102, which, due to the structuring of the IREF as a regulator instead of a SGB, have not received much attention. The guidance in the next two sections therefore proceeds to provide examples of which areas of the Fan-Led Review are more easily challengeable.

c. Restraints "by object"

Under Article 101, few restraints are restrictive by object, such as naked price-fixing or market-sharing.[165] Certain of the IREF's objectives could be construed as by object restraints by analogy to these types of restraints. If the IREF implemented salary caps, this might amount to a "by object" restraint, or at least an easily challengeable restraint. La Liga imposes salary caps that, to our knowledge, have not been challenged in court. There are doubts that these salary caps, as imposed by a SGB, are compatible with EU law.[166]

Similarly, it could be argued that because one of the driving forces behind the envisioned establishment of the IREF seemed to have been the attempted creation of a 'Super League',[167] its purpose is to preclude other organisations from running competing events (analogous to the *ISU* case under Article 101).[168] Since the IREF is not a classic sports governing body, it would likely take such actions unilaterally. The case would then have to be brought under Article 102 instead, and might be subject to 'by object' categorisation. If the IREF takes steps to prevent its regulatory subjects from competing in additional competitions, such an action will likely be subject to scrutiny.

The CJEU has stated that for a restraint to be characterised as "by object", the restraint must cause "a sufficient degree of harm to competition".[169] A refusal by the IREF to provide a licence to a club may also amount to a "by object" restraint because it prevents the club from engaging in competition entirely. Challenges to minor penalties, such as point deductions, are less likely to be restrictive 'by object', but could fall under the categorisation. The Court has

[165] Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services* [1998] ECR II-03141 para 136.
[166] See e.g. Dwayne Bach and Sinziana Ianc, 'Are Team Salary Caps in Football Compatible with EU Law?' (*Law in Sport*, 13 August 2021) <https://www.lawinsport.com/topics/item/are-team-salary-caps-in-football-compatible-with-eu-law> accessed 08 July 2022.
[167] Fan-Led Review of Football Governance (n 1) 8. See also George Parker and Samuel Agini, 'English football to have independent regulator by next election, pledges Dorries' *Financial Times* (London, 3 April 2022) <https://www.ft.com/content/13912e50-94c4-4c17-a9e8-a70401802570> accessed 05 June 2022.
[168] Case T-93/18 *ISU v European Commission* (n 145).
[169] Case C-67/13 P *Groupement des Cartes Bancaires v European Commission* ECLI:EU:C:2014:1958 para 69.

also held that the 'context' is relevant in the characterisation process.[170] The context enquiry enmeshes it with the justification and legitimate purpose inquiry (discussed below). It should therefore be noted that the justifications and legitimate purposes inquiry can affect categorisation, but we discuss this step of the analysis separately below.

d. Restraints "by effect"

If a claimant fails to establish the categorisation of a restraint as by object, they will as a matter of course argue that it is restrictive by effect. Claimants are much less likely to succeed in challenging these restraints. Liability for restriction of competition by effect requires proof of anticompetitive effects. Pro-competitive effects are not assessed here but at the objective justification stage.

The Premier League has already indicated that it might be opposed to certain regulatory developments, noting that "it is important to everyone that any reforms do not damage our game, its competitive balance or the levels of current investment".[171] For example, a top Premier League club may argue that the redistribution of television rights income or the award of parachute payments is restrictive by effect. It could further be argued that the IREF's functions, by effect, restrict the ability of clubs to engage in outside competitions (e.g., Super League).[172] An additional way in which the IREF could be challenged by way of its dominant position restricting competition is that it is distorting wages and reducing the potential earnings of players. Analysis of restraints by effect is highly fact-sensitive and it is beyond the scope of this report to consider whether certain individual restraints or decisions of the IREF would be considered restrictive "by effect".

e. Objective justification & legitimate objectives

Article 102 allows for the justification of an anticompetitive practice through the process of "objective justification". European Commission guidance notes that an objective

[170] Case C-67/13 P *Cartes Bancaires v Commission* (n 169).
[171] 'League welcomes publication of Tracey Crouch MP's Fan Led Review of Football Governance' (*Premier League*, 25 November 2021) <https://www.premierleague.com/news/2368306> accessed 13 June 2022.
[172] Dwayne Bach, 'The Super League and Its Related Issues under EU Competition Law' (*Kluwer Competition Law Blog*, 22 April 2021) <http://competitionlawblog.kluwercompetitionlaw.com/2021/04/22/the-super-league-and-its-related-issues-under-eu-competition-law/> accessed 24 April 2022.

justification has to be an external factor such as the need to guarantee health or safety;[173] alternatively,[174] an efficiency defence similar to Article 101(3) is available.[175]

EU law explicitly acknowledges the special features of sport and its unique legitimate objectives,[176] as codified in Article 165 TFEU:

> “Article 165 (ex Article 149 TEC)
> 1. (...) The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.
> 2. Union action shall be aimed at ‘(...) 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen”

This provision provides a “formal rolling political agenda on the subject of sports law and policy”.[177] It clearly grants the Commission a legislative competence.[178] However, the extent to which Article 165 influences the enforcement of competition law is the subject of debate.[179] The preferred view is that this provision will aid the interpretation of the substantive competition law provisions, creating more favourable conditions for the autonomy of bodies such as the IREF with regard to competition law.

f. Objective justification

In particular, the Court of Justice has noted in *Meca-Medina* that sporting rules might be excluded from the application of EU competition law if (i) the restrictions served legitimate objectives; and (ii) the restraint of competition was inherent and proportionate to the pursuit of

[173] Commission Guidance on Article 102 Enforcement Priorities (2009/C 45/02) para 29.
[174] ibid para 28
[175] ibid para 30
[176] Case C-415/93 *Bosman* (n 133).
[177] Richard Parrish, 'EU Sports Policy' <https://www.edgehill.ac.uk/law/files/2019/10/EU-Sports-Policy.pdf> accessed 26 May 2022.
[178] Stephen Weatherill 'Has the Treaty of Lisbon Provided 'Principles' of EU Sports Law?' (University of Oxford, 3 November 2010) <https://www.law.ox.ac.uk/events/has-treaty-lisbon-provided-principles-eu-sports-law> accessed 25 June 2022.
[179] Parrish (n 177).

those legitimate objectives.[180] There is some doubt whether Meca-Medina forms part of the Art 101(3) justification, but since fulfilling the requirements in Meca-Medina is sufficient to avoid liability, this question is of no consequence. In *Meca-Medina*, at issue were the IOC's anti-doping rules, which were found to be justified under the two-pronged test.

Accordingly, the application of competition law to sports is constrained under EU law by "conditional sporting autonomy".[181] The jurisprudence acknowledges that the dual role of SGBs can create conflicts of interests between establishing rules to protect the sporting league and restricting competition, i.e., conferring an advantage to its own sporting competition to the detriment of other competitions.

While few defendants have been won under the objective necessity standard (and none under the efficiencies justification),[182] the argument is significantly aided by the increased deference to sport laid out in the Art 165 TFEU and "conditional sporting autonomy", as discussed above, and in the ensuing case law, particularly *Meca-Medina*.

The compatibility of sporting rules with EU competition law is determined on a case-by-case basis,[183] which compromises prospective legal certainty in this area. Measures regulating competition and restricting participation adopted by sporting bodies must be inherently in pursuit of legitimate sporting objectives and proportionate to those objectives.[184] The functions of the IREF must therefore be "limited to what is necessary to ensure the proper conduct of competitive sport" to avoid a successful competition law challenge.[185] The IREF must remain vigilant to ensure it does not take excessively restrictive or punitive measures. The mere labelling of the IREF as "independent" will not prevent possible scrutiny in the exercise of its regulatory function as the circumstances of each decision may be assessed closely. Therefore, to avoid contravening competition law under the TFEU, any measures taken by the IREF must not go further than its legitimate, identified aims. Each of the proposed IREF functions should be scrutinised to determine whether there are less restrictive ways of achieving the identified goals. Relevant factors include the directness of the link between the measures to the legitimate objectives as well as the severity of any penalties imposed.[186] This is, in any event, good governance, and should be implemented regardless of legal challenges.

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[180] Case C-519/04 P *Meca-Medina* (n 145) para 42.

[181] Professor Stephen Weatherill, '*Saving Football from Itself: Why and How to Re-make EU Sports Law*' (Centre for European Legal Studies, Mackenzie Stuart Lecture, Cambridge, 3 March 2022).

[182] Richard Whish and David Bailey, *Competition Law* (n ?) 221.

[183] Case C-519/04 P *Meca-Medina* (n 145).

[184] Case C-309/99 *Wouters* (n 120); Case C-519/04 P *Meca-Medina* (n 145).

[185] Case C-519/04 P *Meca-Medina* (n 145) para 47.

[186] Case T-93/18 *ISU* (n 145) paras 84-104.

The IREF's licensing functions are likely to be the most problematic functions from a competition law perspective. This is because "powers of authorisation are subject to more significant obligations".[187] The proposed licencing system to be administered by IREF creates a mechanism for IREF to enforce its requirements on clubs in the top division of the National League and above. Whilst EU jurisprudence largely focuses on restriction of individual competitors and players, the same principles likely apply to the licencing of clubs.[188] The "Super League" litigation,[189] which effectively challenges non-compete obligations on clubs, may provide useful guidance on this point in the future. This litigation involves a consortium of European clubs challenging "UEFA's position as the governing body and regulator of European football as well as the organiser of the Champions League, claiming it is a monopoly and anti-competitive, unfairly preventing clubs from forming their own competitions."[190]

For the time being, the landmark *ISU* case is likely to provide points of analogy to the IREF.[191] The case concerned the only international regulatory body for figure and speed skating recognised by the IOC, which assumed the dule role of regulator and sports event organiser. *ISU* was considered to be a sports association but also an undertaking. This decision noted that a sports governing body cannot abuse its regulatory and disciplinary powers in an anti-competitive manner. Thus, the General Court held *ISU* was subject to obligations of competition law and must not distort competition. However, this can be distinguished as it is unlikely that the IREF would be considered an "event organiser". The General Court placed emphasis on the ability of third parties to organise events for the competitors.[192] It is not intended that the IREF will have the power to authorise events held by third parties. Nor is it envisaged that the IREF will be establishing any new competitions. Furthermore, the clubs that will be subject to the IREF already compete in other competitions (e.g. UEFA). It is therefore unlikely that the IREF will be deemed to be carrying out an analogous dual role.

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[187] ibid para 70 ("The exercise of that regulatory function should therefore be made subject to restrictions, obligations, and review, so that the legal person entrusted with giving that consent may not distort competition by favouring events which it organises or those in whose organisation it participates"); see also Case C-49/07 *MOTOE* (n 141) paras 51-52.

[188] Alfonso Lamadrid and Pablo Ibanez Colomo, 'The ISU case and the Superleague: on Ancillarity, Object and Burden of Proof in the General Court's Judgement' (*Chillin'Competition*, May 2021) <https://chillingcompetition.com/2021/05/17/the-isu-case-and-the-superleague-on-ancillarity-object-and-burden-of-proof-in-the-general-courts-judgment-case-t%E2%80%9193-18/> accessed 24 April 2022.

[189] Case C-333/21 (Request for a preliminary ruling from the Juzgado de lo Mercantil n.° 17 de Madrid (Spain) lodged on 27 May 2021) *European Super League Company, S.L. v Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA).*

[190] David Conn, 'UEFA Warns of ESL's Threat to Football but Drops Disciplinary Action Against Clubs' *The Guardian* (London, 28 July 2021) <https://www.theguardian.com/football/2021/sep/27/super-league-still-poses-existential-threat-to-footballs-future-uefa-warns> accessed 24 April 2022.

[191] Case T-93/18 *ISU v European Commission* (n 145).

[192] ibid e.g. paras 74-75.

Almost all exercises of the powers of the IREF are likely to have 'legitimate objectives', the first limb of the *Meca-Medina* test. A Commission Working Document enumerates financial stability and fair competitions as legitimate objectives.[193] The inherency and proportionality standards are more problematic. Is the measure inherent to sporting objectives ("intimately linked to the proper conduct of sporting competition"),[194] and is it proportional to the goal that is to be achieved (or is there a less restrictive alternative)? In particular, it should be ensured that any measure taken by the IREF in relation to its licensing functions or functions preventing clubs or players from competing complies with these demands. This also applies to the salary cap proposal.

g. Efficiencies defence

Regulators are capable of having pro-competitive effects - 'an effective regulator can helpfully complement the role of the competition agency and thereby ensure a consistent and coherent competition policy for the sector.'[195] The pro-competitive effects need to be established with specific regard to the exclusionary abuse alleged. It would have to be argued that the exclusionary nature of the IREF's functions are necessary to give effect to its regulatory concerns.

As pointed out above, no defendants have been successful under the efficiencies justification of Article 102 TFEU. As a result, it would be a mistake to rely on the success of such a defence in practice. It is to be doubted whether the effect of *Meca-Medina* and the more permissive standard for objective necessity extends so far as to improve the chances of success of an efficiencies defence in the sports context. Additionally, it is likely that the profit sharing requirement of Article 101(3) and of the efficiencies defence in Article 102 cannot be fulfilled on the facts.

2.1.7 Potential Substantive Challenge: Article 106 TFEU

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[193] European Commission, 'Commission Staff Working Document – The EU and Sport: Background and Context – Accompanying document to the White Paper on Sport' (11 July 2007) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007SC0935&from=EN> accessed 09 July 2022.
[194] Case C-519/04 P *Meca-Medina* (n 145) para 10.
[195] Jose Manuel Panero Rivas, 'Article 106(1) TFEU Ready for Duty Again; the CJEU's Judgement in the DEI Case' (*KSLR EU Law Blog*, 13 October 2014) <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=753> accessed 24 April 2022.

In accordance with Article 106(1) TFEU, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109. Article 106(1) prohibits Member States from adopting, with regards to public undertakings or undertakings bearing special or exclusive rights, any measure that would lead to an infringement of another Treaty provision, including Articles 101 and 102 TFEU and free movement provisions.[196] Article 106(2) sets out exceptions from the application of the prohibition in Article 106(1). The undertaking has to provide Services of General Economic Interest to the extent that this is necessary for the achievement of the public service missions they are entrusted with. Article 106(3) authorises the Commission to adopt directives and decisions in order to implement the rules set out in the preceding paragraphs.

To achieve its duties listed in the Fan-Led Review, the IREF will operate a licensing system under which each club operating in professional men's football — i.e. Step 5 level (National League) or above — would be required to hold a licence to operate and be subject to various licence conditions. The licensing conditions should focus on measures to ensure financial sustainability via financial regulation and improving decision making at clubs through items such as a new corporate governance code for professional football clubs, improved diversity, and better supporter engagement.[197]

Clubs will need to apply for a licence and confirm annually that they are compliant with their obligations. Non-compliance with these licence conditions could lead to a range of sanctions.[198] The IREF also has a range of powers to enforce its licensing system, including but not limited to: adjusting licence conditions; investigation and interim actions against suspected licence breaches; and sanctions in case of breaches, such as the ability to impose points deduction, fines, bans, and to order compensation. A challenge that might be raised is that the IREF's licensing and disciplinary actions, in connection with the licence system, could constitute an abuse of dominant power under Article 106, in combination with Article 102 TFEU.

Prior to Brexit, Article 106 of the TFEU may have been relevant to this substantive challenge on the basis of an abuse of a dominant position in the UK. This is because Article 106 provides that Article 102 applies to "public undertakings" as well as undertakings granted

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[196] ibid.
[197] Simon Evans, 'UK government report recommends independent regulator' (*Reuters*, November 24, 2021) <https://www.reuters.com/world/uk/uk-government-report-recommends-independent-regulator-2021-11-24/> accessed 20 March 2022.
[198] Fan-Led Review (n 1) chapter 2, option 4.

"special or exclusive rights" by a Member State. The unilateral discretion of the IREF to grant or revoke licences may be deemed a 'special or exclusive right'. It is possible that an exclusive or special right could be granted by a public authority through a private law contract which had a regulatory effect. However, the IREF's functions are being granted by UK statute, meaning the establishment of the IREF is not "imputable to a Member State" and therefore Article 106 does not apply even if the IREF is characterised as a "public undertaking".

2.1.8 Short-form opinions

DCMS, Fair Game, or another body may petition the CMA to issue an opinion to provide guidance on the application of UK competition law in the context of the IREF to clarify its priorities, approach to enforcement, and the law. The previous process for so called 'short-form opinions' has been discontinued but this does not prevent the CMA from giving appropriate non-binding guidance.[199] A similar system exists under EU competition law.[200]

2.2 SUBSIDIES/FINANCIAL TRANSFERS AS STATE AID

2.2.1 Article 107 TFEU & the UK-EU TCA

It is a matter for the government to determine the costs of introducing the IREF. Among others, the government must determine the costs of operations, and staff job descriptions and compensation. After its establishment, it is expected to be funded "sustainably" i.e. from fees levied on clubs and transfers, and fines. The Fan-Led Review suggested that the IREF's main funding should be derived from licence fees based on a sliding scale of the value of revenue received by a club from broadcasting. Furthermore, the IREF's operating cost is to be partly covered by fines and revenues from the enforcement of the regime.[201] However, some initial funding may be needed from the government in order for the IREF system to be operational as early as possible. The IREF will be relying on the government to provide funding for a shadow

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[199] Competition and Markets Authority, 'Guidance on CMA's approach to short-form opinions' (*gov.uk*, 4 April 2014) <https://www.gov.uk/government/publications/guidance-on-the-cmas-approach-to-short-form-opinions#:~:text=The%20short%2Dform%20opinion%20(SfO)%20process%20provides%20guidance%2C,to%20prospective%20agreements%20between%20competitors> accessed 14 June 2022.
[200] Commission Notice on informal guidance relating to novel questions, OJ C 101, 27.4.2004.
[201] *Fan Led Review* (n 1) chapter 2, option 4.

IREF, which would be responsible for recruiting experts and staff, drafting interim advice and guidelines, as well as seeking agreement from clubs at the initial stage.[202]

The IREF may make payments to clubs (as potentially implicated by e.g. regarding solidarity and parachute payments). This support from the government leaves the question of state-aid/a state subsidy. First, the IREF might have to face the question of whether the payment to clubs of monies allocated for initial operation costs support from the government constitutes a subsidy. To avoid any issues in this respect, the IREF should not allocate, even temporarily, any funds provided by the government as diret transfer payments to clubs, for whatever reason. Solidarity and parachute payments are currently administered by the Premier League. For example, parachute and solidarity payments should be levied from the Premier League and only when received by the IREF disbursed to the English Football League clubs. Second, there is the issue of whether future operating costs and further contingent costs incurred from the IREF's activities, obtained "sustainably", constitute subsidies. Third, it needs to be considered whether non-financial support, such as sums lent by the (shadow) IREF, constitutes state-aid/a subsidy. The IREF will mainly conform to domestic regulations on competition law and state subsidies, as it will be formed to operate in England. However, football is an international activity, and there international legislation on state aid/subsidies may also be implicated.

As the Brexit transition period has ended, EU State aid rules, namely Article 107 and those whose power derives from Article 107, which were developed and adopted to support the EU 'Single Market', no longer apply to subsidies granted in the UK.[203] The only exception is state aid within the scope of the Withdrawal Agreement, specifically Article 10 of the Northern Ireland Protocol, and Article 138 in relation to aid for ongoing EU programmes and activities within the UK's share of the previous Multiannual Financial Framework (2014 – 2020).[204] It is unlikely that any of these articles will be applicable to the IREF.

Instead of Article 107, it is suggested that the IREF should look to the UK Comprehensive Free Trade Agreement (FTAs) with non-EU countries and the UK-EU Trade and Cooperation Agreement (TCA)[205]. This report will only focus on the UK-EU TCA, thereby confining itself UK and EU legislation. "State aid" is a term which will be abandoned in the

[202] *Fan Led Review* (n 1) chapter 2, option 4.

[203] The State Aid (Revocations and Amendments) (EU Exit) Regulations 2020 No. 1470, regulation 3.

[204] Department of Business, Energy and Industrial Strategy, 'Complying with the UK's international obligations on subsidy control: guidance for public authorities' (*gov.uk*, 31 December 2020) s1. <https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities> accessed 24 April 2022.

[205] Department of Economy, 'State Aid Rules after EU Exit' (*gov.uk*). <https://www.economy-ni.gov.uk> accessed 24 April 2022.

UK going forward, with the TCA focusing on the grant of "subsidies". However, the definition of a "subsidy" in the TCA broadly replicates all the key features associated with state aid (although with differences as detailed below), i.e., a "subsidy" means financial assistance from the UK's resources, capable of conferring an economic advantage on the recipient in a manner that could affect trade between the UK and the EU.[206]

The TCA provides six principles including proportionality and necessity as part of the test as to whether a particular subsidy could have a negative effect on future UK-EU trade.[207] A procedural change is that a private complainant cannot challenge a subsidy in front of the European Commission and EU courts; instead, the granting of a subsidy may be the subject of judicial review in the UK courts.

Under Article 363(1) of the TCA, subsidies are limited to "financial assistance", compared to the broader definition of state-aid in Article 107(1) TFEU. The initial financial funding, and contingent costs incurred in the IREF's future operation, provided by the government might fall into the scope of Article 363(1) as a subsidy granted by state. Following Article 364(4) of the TCA, the entire Subsidy Control chapter will not apply to subsidies where the total amount granted is below 325 000 Special Drawing Rights (approx. 350 000 GBP), over any period of three fiscal years.

First, funding a regulator is not covered by the concept of a subsidy. Regulators exercise delegated powers of the government and are public bodies. The subsidy principle only becomes engaged when a private body is subject to financial or non-financial government support. Second, considering Article 366 of the TCA, as long as the financial support granted by the government respects the six principles set forth in subsection (1),[208] it is not likely to be caught by the prohibitions in Article 377. The TCA's regulations on subsidies are mainly concerned with financial assistance, so the UK may not consider non-financial actions as a "subsidy" covered by the TCA. Hence, the UK government's actions of setting up an interim leading entity, drafting guidelines and negotiating with clubs to help establish the IREF, etc., is unlikely to be subject to the TCA.

Any financial assistance the IREF allocates to clubs from funds provided by the UK Government will have to be made public, which then can be subjected to challenges of validity and compliance. This requirement would apply to direct funding from the government, and

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[206] Genevra Forwood, Marc Israel, Kate Kelliher, 'State Aid and the Brexit Trade Agreement: What's new, What's Not, and What's Next' (*White & Case*, 4 Feb 2021) <https://www.whitecase.com/publications/alert/state-aid-and-brexit-trade-agreement-whats-new-whats-not-and-whats-next> accessed 20 April 2022.

[207] ibid.

[208] EU-UK Trade and Cooperation Agreement, Chapter III Subsidy Control, Article 366(1)(a)-(f).

potentially from sustainable IREF funding from fines. It is likely that it also applies to funds generated “sustainably” by levies on clubs and transfers. In particular, in line with Article 369 of the TCA, within 6 months of the granting of a relevant subsidy, officials must make publicly available basic information, including the amount and the recipient, on an official website or a public database. This article also allows for disclosure of the relevant grant to an "interested party" to assess the compliance and challenge the subsidy if a need arises.[209] In addition, the TCA includes provisions for the UK and EU to challenge each other on the award of subsidies they deem unjustified under Article 370 of the TCA.[210]

In the near future, the new government’s legislative proposal for a new UK subsidy control regime, the Subsidy Control Bill, which was introduced to Parliament on 30 June 2021, will be of great relevance.[211] The Bill is now waiting for any amendments made by the House of Lords, having finished its third reading in both Houses on 20 April 2022.[212] By the time the IREF is established, this bill might have already taken effect. It is also vital to note the new body in charge of enforcement of the UK’s subsidy regulations, the CMA.[213] There is also an independent unit, the Subsidy Advice Unit (SAU), which will assume the responsibility of advising public authorities on the compliance of their proposed subsidies in the new UK’s subsidy regime. After a subsidy is awarded, it might be declared in a transparency database if it meets the following conditions: all subsidy schemes and all awards over £500,000 within a scheme (the “scheme” sets the conditions of the grant of subsidies); and all subsidies outside of a scheme (unless covered by an exemption).[214] The IREF’s initial grant might have to be submitted to this database.

2.2.2 The Solidarity Transfer Levy

[209] EU-UK Trade and Cooperation Agreement (n ?) article 369(6): “interested party” refers to any natural or legal person, economic actor, or association of economic actors whose interest might be affected by the granting of a subsidy, in particular the beneficiary, economic actors competing with the beneficiary or relevant trade associations.
[210] The Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development will adjudicate such complaints.
[211] Graham Lanktree, ‘UK unveils post-Brexit state aid regime with Subsidy Control Bill’ (*Politico*, June 30 2021) <https://www.politico.eu/article/uk-unveils-post-brexit-state-aid-regime-with-subsidy-control-bill/> accessed 20 April 2022.
[212] UK Parliament, ‘Subsidy Control Bill Status’ <https://bills.parliament.uk/bills/3015/stages> accessed 24 April 2022.
[213] UK Parliament, ‘Post-pandemic economic growth: State Aid and Post Brexit Competition Policy’ <https://committees.parliament.uk/work/1534/postpandemic-economic-growth-state-aid-and-post-brexit-competition-policy/> accessed 24 April 2022.
[214] Department of Business, Energy and Industrial Strategy, ‘Overview of the subsidy control regime - a flexible, principles-based approach for the UK’ *(gov.uk*, 30 June 2021). <https://www.gov.uk/government/publications/subsidy-control-bill-policy-papers/overview-of-the-subsidy-control-regime-a-flexible-principles-based-approach-for-the-uk> accessed 24 April 2022.

The Solidarity Transfer Levy is a proposed policy instrument to facilitate the redistribution of wealth and utilise home grown talent in domestic football.

It proposes to add a 10 per cent tax onto the transfer payment for a player. Fundamentally, a professional football transfer refers to the transferal of a player's sporting registration from a holding club to a debtor club[215]. It is classified as an intangible asset.[216] Thus, a Solidarity Transfer Levy is a regulatory levy applied to a transfer of an intangible asset.

FIFA governs the football transfer market worldwide. Solidarity payments are already in place under the FIFA transfer regime. The payments are distributed to all clubs that trained the player between his 12th and 23rd birthdays at a proportional rate depending on how long the player was at each club. 5 per cent of the transfer fee is withheld and divided up proportionally via that scheme.[217] That scheme encourages clubs to invest in the development of players by rewarding them proportionally to the player's market value even after their departure. Conversely, the Solidarity Transfer Levy "would be paid by Premier League clubs on any player transfer within the Premier League or any international transfer"[218] so will only not apply to transfers from domestic lower league teams. "By excluding EFL players from the levy, they become more attractive, shifting money back to the EFL. This would encourage domestic player development".[219] However, the Fan-Led Review acknowledges that the Solidarity Transfer Levy "would not be without consequences. Primarily, it would add costs to some parties in the industry".[220] It is these parties, British Premier League clubs whom the tax is imposed upon, who are likely to attempt to challenge the Solidarity Transfer Levy. Initial challenges can be envisaged.

2.2.3 Potential Challenges to the Solidarity Transfer Levy

[215] Feess and Muehlheusser, 'Transfer fee regulations in European football' [2003] 47 European Economic Review 645.

[216] Deloitte, 'Presentation of Player Transfer Payments' (IAS Plus, 26 November 2019) <https://www.iasplus.com/en/meeting-notes/ifrs-ic/2019/november/ifrs-15-player-transfer-payments> accessed 24 April 2022.

[217] FIFA, 'Regulations on the Status and Transfer of Players' (27 October 2017) <https://digitalhub.fifa.com/m/41c272bcbc3b19df/original/c83ynehmkp62h5vgwg9g-pdf.pdf> Accessed 24 April 2022.

[218] Fan-Led Review of Football Governance (n 1) chapter 9, paragraph 9.29

[219] Fan-Led Review of Football Governance (n 1) chapter 9, paragraph 9.33

[220] Fan-Led Review of Football Governance (n 1) chapter 9, para 9.34

Whether a transfer system excessively limits the ability of clubs to participate in the market for elite players has proven a frequent ground for the invocation of legal challenges. In 1998, the European Commission, supported by FIFPro, the worldwide representative body for professional footballers,[221] opened an infringement procedure against FIFA.[222] This concerned whether the post-*Bosman*[223] transfer system interfered with the market for the supply of players to clubs, particularly by limiting the ability of smaller clubs to enter the market for elite players. This infringement procedure was closed after changes to transfer rules, including the introduction of the training compensation transfer payment (mentioned above).[224] More recently in 2015, FIFPro filed a Legal Action against the FIFA transfer system alleging that the transfer system "fuels and sustains increasing competitive and financial disparity" by permitting only the few wealthy clubs to compete for the elite talent.[225] The complaint was withdrawn after a six-year deal was agreed between the two organisations.[226] Both instances illustrate that issues of elite player recruitment and unequal access are a clear ground of concern and for challenge.

Firstly, British clubs competing against each-other directly may feel that the levy distorts competition within the league, with the wealthiest British teams (i.e. Manchester City) able to access international talent unlike less wealthy teams. The Fan-Led Review focuses on "the distribution of money from the Premier League to the rest of the pyramid"[227] rather than disparity within the Premier League. Although every Premier League club will be subject to the tax, this may disproportionality impact less wealthy teams who have less means to then recruit international players and players from higher clubs in the league. In a 2020 article, it was noted that Burnley, one of the lower placed and less wealthy Premier League clubs mainly aimed to recruit domestically because overseas recruitment is 'not easy' due to 'relatively tight purse strings' meaning it was 'far behind' other Premier League sides.[228] Thus, they have

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[221] FIFPro, 'Who We Are' <https://fifpro.org/en/who-we-are> accessed 7 May 2022

222 European Commission, 'Football transfers: Commission underlines the prospect of further progress' <https://ec.europa.eu/commission/presscorner/detail/en/IP_00_1417> accessed 24 April 2022.

[223] Case C-415/93 *Bosman* (n 133).

224 European Commission, 'Commission closes investigations into FIFA regulations on international football transfers' <https://ec.europa.eu/commission/presscorner/detail/en/IP_02_824> accessed 24 April 2022.

225 Reuters Staff, 'FACTBOX-Soccer-FIFPro complaint against the transfer system' <https://www.reuters.com/article/soccer-transfers-factbox-idINL4N11N4NO20150918> (*Reuters*, 18 September 2015) accessed 7 May 2022.

226 'FIFPro Withdraws Complaint Against FIFA's Global Transfer Rules' (*Sports Business Journal*, 11 July 2017) <https://www.sportsbusinessjournal.com/Global/Issues/2017/11/07/International-Football/FIFPro.aspx> accessed 7 May 2022.

[227] Fan-Led Review of Football Governance (n 1) chapter 9, para 9.4.

[228] Alex James, 'The reason Burnley rarely sign overseas players as Clarets plot transfer path' *Lancs Live (*Lancashire, 12 August 2020) <https://www.lancs.live/sport/football/football-news/reason-burnley-rarely-sign-overseas-18756920> accessed 8 May 2022.

reason to oppose the extra 10% tax, and will wish to challenge. This challenge would be focused on domestic competition concerns, thus the TFEU is unlikely to be applicable to such a challenge, lacking an international competition component.

Secondly, as the levy will only apply to British Premier League clubs when they purchase international and current Premier League players, they may argue that the levy will adversely affect them in the transfer market when competing against clubs who do not have a competitive transfer levy for the recruitment of elite players. This is likely to be a particularly prevalent concern for top British clubs competing against foreign clubs in non-domestic competition (i.e. UEFA Champions League, Europa League and Europa Conference competitions) who may argue that they are disadvantaged in comparison to teams they directly compete against in football competition. Steve Parish, chairman of Crystal Palace F.C., was critical of the levy on this basis. He stated, "We're in a global market for talent a further 10 per cent levy would make English clubs extremely uncompetitive".[229]

However, the wealth of British clubs in comparison to their European counterparts whom they will compete against in the trade of players and football competition, suggests that their ability would not be limited excessively and this would likely inform the proportionality balancing test of the TCA subsidy regime. The wealth of British clubs is considered in the Fan-Led Review itself: 'English clubs are very wealthy in comparison to other European clubs – an advantage that will grow in the next broadcast cycle'[230]. British clubs rank as some of the richest in the world, in fact, Manchester City, the richest club in the world in 2022 according to Deloitte's Sports Business Group, is 10 per cent wealthier than Barcelona, the 4th richest club. Moreover, of the top 20 wealth ranked clubs, 10 are British.[231] Kieran Maguire echoes these considerations, looking at the 2021 Deloitte rankings, he stated that "Crystal Palace which has twice been in administrations was ranked twenty fifth, generating more income than Ajax and AC Milan, which have won ten Champions League/European Cups between them."[232] Finally, Deloitte (2022) reports that the Premier League accounted for almost 50 per cent of spending across Europe's 'big five' leagues in the January 2022 transfer window. The Fan-Led Review notes that "[t]he additional costs of such a levy would *likely* still be within

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[229] Steve Parish, 'Why we must not hand over the running of football in this country to the government' *The Sunday Times* (London, 27 November 2021) <https://www.thetimes.co.uk/article/steve-parish-why-we-must-not-hand-over-the-running-of-football-in-this-country-to-the-government-bwcjlmlz7> accessed 24 April 2022.

[230] Fan-Led Review of Football Governance (n 1) chapter 9, para 9.35.

[231] Deloitte Sports Business Group 'Restart – Football Money League' (*Deloitte*, March 2022) <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-dfml22.pdf> accessed 24 April 2022.

[232] Kieran Maguire, 'Fan-Led Review of Football Governance: A Kick in the Right Direction or a Moist Collective Power Grab?' [2022] 93 PLQ 154-159.

the means of clubs" (emphasis added).[233] Due to the international element of this challenge, TFEU provisions may apply despite European Union withdrawal. Thus, clubs may still wish to challenge this on some ground of competition distortion.

Therefore, the first ground for challenge seems the most likely. Context of who may bring challenges has already been given, now possible grounds that such clubs (and other private parties) could use to challenge shall be explored.

2.2.4 Subsidies and the UK-EU Trade and Cooperation Agreement

Instead of the EU state aid regime, the TCA subsidy regime may be engaged. The EU-UK Trade and Cooperation Agreement[234] (TCA) covers the trade of goods and services. It aims to limit disruptions from withdrawing from the EU trade system, and accordingly, takes over functions of the TFEU in ensuring fair market conditions for trade.

The "Subsidy Control" provisions effectively replace the TFEU 107 State Aid provisions. The question is whether IREF Solidarity Transfer Levy distribution activity could qualify as a "subsidy" under the TCA. The IREF would take funds from higher wealth clubs and distribute them to lower clubs. The redistribution of funds from the Solidarity Transfer Levy will not, however, be deemed a "specific" subsidy (definition in Article 363). Even if the Solidarity Transfer Levy was deemed to fit the majority of the "subsidy" definition, Article 363(2)(c) excludes special purpose levies from the definition of "subsidy" "if their design is required by non-economic public policy objectives, such as the need to limit the negative impacts of certain activities or products on the environment or human health, insofar as the public policy objectives are not discriminatory". The meaning of "discriminatory" is defined in the statute: "[T]hat there is less favourable treatment of an economic actor compared with others in like situations and that that differential treatment is not justified by objective criteria". The provision states an example of relevant public policy objective: "such as the need to limit the negative impacts of certain activities or products on the environment or human health''. Clearly of utmost importance is whether the provision can be interpreted to cover policy objectives concerned with football.

The TCA is an international treaty and thus subject to interpretation by the rules of international law. According to Article 4(1) TCA, the provisions of the TCA and any

[233] Fan-Led Review of Football Governance (n 1) chapter 9, para 9.35
[234] EU-UK Trade and Cooperation Agreement (n 208).

supplementing agreement are to be interpreted in good faith, in accordance with their ordinary meaning in their context, as well as in light of the object and purpose of the relevant agreement, in accordance with customary rules of interpretation of public international law. These latter rules are codified in the 1969 Vienna Convention on the Law of Treaties.

The qualifier “such as”, by its ordinary meaning conveys that the example of environment or human health is not exhaustive; thus policies that are not environmental or human health centred may conceivably be protected. However, football preservation may not fall within this, being arguably less critical than environment and public health concerns. However, the policy objectives being pursued via the Solidarity Transfer Levy relate to preservation of important “cultural and historical” clubs[235], relating to community cohesion. Framing the policy in this manner shows that the objective being pursued is larger than just sporting interests; thus it is conceivable that the provision may well cover the policy objectives that the Solidarity Transfer Levy promotes. After exiting the European Union, Parliament has intentionally kept regulation of market competition open to a higher discretion than before, at least where policy driven levies are in question, and, therefore, the provision is likely to be interpreted more liberally. Justified non-economic policy objectives underline the distribution of funds aim of the Solidarity Transfer Levy (economic sustainability of football for example), and, therefore, thesubsidy provisions of the TCA likely do not apply.

Moreover, it is noted in the government’s guidance on the legislation that under Article 363(2)(c), a measure can be considered non-specific by objective criteria “if it is available to all enterprises who are in the same legal and factual position on the same terms. This provision is designed to provide clarity on how levy schemes can be designed to fall outside the scope of the TCA”.[236] As the levy would apply to all Premier League clubs, who, due to their Premier League standing, are the only clubs in the same legal and factual position, the levy is likely to avoid categorisation as “specific” and thus be unchallengeable under Article 363. It is difficult to find applicable provisions elsewhere in the TCA.

Thus, the Solidarity Transfer Levy will likely be unchallengeable by those objecting to its introduction.

2.3 NATIONAL SECURITY LEGISLATION AND SANCTIONS

[235] Fan-Led Review of Football Governance (n 1) chapter 9, para 9.7.

[236] Department for Business, Energy & Industrial Strategy, ‘Guidance on the UK’s international subsidy control commitments’ (*gov.uk*, updated June 2021) <https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments#contents> accessed 8 May 2021

a. National Security and Investment Act

The National Security and Investment Act ("NSI") allows the government to scrutinise and intervene in certain acquisitions that could harm the UK's national security.[237] In accordance to section 6(2) of the NSI, if the acquisition is conducted in one of 17 sensitive sectors of the economy, the acquirer must notify the government.[238] The 17 enumerated sectors relate to national security. Sports, or specifically football, is not on this list. Therefore, clubs and individuals are not obliged to inform the government of any acquisition. Neither is it likely that the Secretary of State will issue new regulations that include football. Nevertheless, Section 18 of the NSI allows voluntary notification: a seller, acquirer or the qualifying entity concerned may give a notice to inform the Secretary of State of a trigger event, defined in Section 8, that has taken place or is likely to take place. The Secretary of State must then decide whether to reject or accept the notice and proceed accordingly. In light of the current sanctions against Russia, to safeguard a sustainable future for English football, and given the IREF's knowledge of the financial situation of clubs and ensuing changes in control, it is proposed that the IREF assume the duties to monitor acquisitions across clubs and encourage clubs to notify the government if the IREF considers that a legitimate governmental interest may be furthered by referral of the transaction to the Secretary of State.

b. Sanctions

Foreign ownership of UK assets, including football clubs, will continue to be a subject of considerable political debate moving forward, particularly given the sanctions imposed on Russia in recent months. This report does not analyse the potential impact of sanctions imposed as a result of the Russia-Ukraine on changes in control and financial support for clubs, but comments may be made in relation to the effect of the conflict on the establishment of the

[237] National Security and Investment Act 2021 (UK); UK Department of Business, Energy and Industrial Strategy, 'Security, and Investment Act: guidance on notifiable acquisitions' (*gov.uk*, updated 4 January 2022) <https://www.gov.uk/government/publications/national-security-and-investment-act-guidance-on-notifiable-acquisitions/national-security-and-investment-act-guidance-on-notifiable-acquisitions> accessed 7 July 2022.

[238] National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021. These sectors are: Advanced Materials, Advanced Robotics, Artificial Intelligence, Civil Nuclear, Communications, Computing Hardware, Critical Suppliers to Government, Critical Suppliers to the Emergency Services, Cryptographic Authentication, Data Infrastructure, Defence, Energy, Military and Dual-Use, Quantum Technologies, Satellite and Space Technologies, Synthetic Biology (formerly known as Engineering Biology, and Transport.

IREF. For example, the current events in Ukraine and the subsequent economic sanctions have had a significant impact on the finances of English football clubs, particularly in relation to the ownership of Chelsea FC. As the Financial Times reported,

> "The sanctions placed on Chelsea owner Roman Abramovich have also put a spotlight on the need for tougher checks on the suitability of an individual to own a club, although it is thought unlikely that a new regulator would have stopped a Saudi-led consortium taking over Newcastle United last year."[239]

These ongoing issues are likely to further legitimise the IREF's establishment, as well as diminish the prospects of future challenges to the IREF's functions (particularly relating to club ownership) on grounds of disproportionality.

[239] George Parker, 'English Football to Have Independent Regulator by Next Election, Pledges Dorries' *Financial Times* (London, 3 April 2022) <https://www.ft.com/content/13912e50-94c4-4c17-a9e8-a70401802570> accessed 24 April 2022.

PART III – Challenges to Decisions of the Regulator

Executive Summary

- The IREF should be structured as a full-service regulator with powers of advocacy, investigation and enforcement.
- The IREF must derive its powers from careful drafting of the statute and must integrate itself into the system of regulators and tribunals.
- The structure of the IREF – both statutory and through subordinate legislation – must be in line with the general principles of administrative law and those stipulated in this Report.
- The IREF is structured through a two-tier structure in line with the powers of different tribunals in the UK.
- The information request powers of the IREF must be closely tied into information security and data protection prerogatives.
- The investigations of the IREF must be conducted in accordance with the Salmon Principles and the detailed investigative powers of the HMRC and the Finance Act 2011.
- The penalties stipulated in the Fan-Led Review need to be carefully stipulated in the statute empowering the IREF with the IREF retaining a discretion of implementing them.
- The penalties need to be implemented in line with the principles of specificity and proportionality.

3.1. ENFORCEMENT POWERS

a. Objectives from the DCMS Report

The Fan-Led Review envisages an IREF with strong enforcement powers exceeding those of the existing non-regulatory authorities – such as the FA, the leagues, and international bodies such as FIFA and UEFA. The Fan-Led Review also foresees that the IREF's powers of regulation must be independent of the targets of its regulation and that the IREF must be able to enforce the measures it seeks to take against the individual clubs as license holders, the individual owners and shareholders of clubs, as well as other third-party stakeholders.[240] An

[240] *Fan Led Review* (n 1) 1.33-1.36.

associated issue is presented by the need for powers of the IREF to **compel** the disclosure of information when the targets of such a request are unwilling to comply.[241]

The Fan-Led Review argues that the enforcement actions by the IREF should broadly take the following form:

- **Advocacy and Compliance**. The IREF will reach out to the clubs to promote compliance without an enforcement procedure and help them to understand the obligations with which they are required to comply and best practices to implement such compliance measures.
- **Investigations**. Investigations are initiated when the target does not voluntarily comply with the requirements of the IREF. Investigations could also be met with voluntary informational disclosures if the target complies.
- **Enforcement and Sanctions**. A host of measures that may be taken to penalise the clubs and to deter other targets from undertaking any deviant actions. This is to include fines, points deductions, transfer bans, individual sanctions, and in the most extreme cases IREF administrators.[242]

b. What is the overall enforcement regime that the IREF supposes?

The Fan-Led Review does not provide a comprehensive structure for the enforcement of its actions, but certain parts of this Report propose structural elements that must be put in place to achieve some of its objectives.

The National Audit Office outlines a general structure for regulators from non-ministerial departments which may be used as the general structure to understand the enforcement realm of the IREF.

[241] *Fan Led Review* (n 1) 1.38.
[242] *Fan Led Review* (n 1) 2.39-2.45.

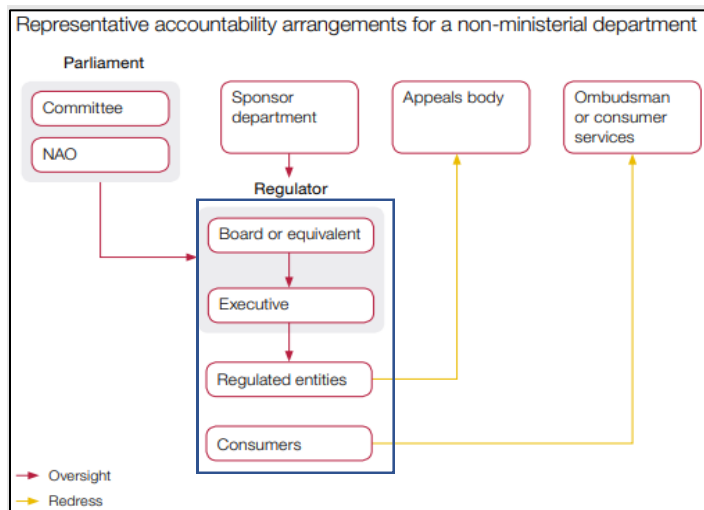

Figure 1

In Figure 1, the area highlighted in blue is where the enforcement actions would function. The regulated entities would have the ability to appeal some or all of these actions to the appellate body that is stipulated by the IREF. This appellate body might refer either to an internal appellate mechanism and then to judicial review, or may directly provide for judicial review. The Fan-Led Review provides that an appeals mechanism with an arbitration process is an important aspect of the structure of the IREF.[243]

c. How does the IREF derive its powers of enforcement?

The IREF is placed in a unique position regarding its enforcement powers as it is proposed to be independently created by a statute being designed specifically for the creation of a regulator. Most sports governing bodies do not rely on statutory powers but are governed by contractual frameworks. The powers of the IREF should be demarcated clearly and with appropriate scope within the statute, to ensure sufficient enforcement powers to achieve its objects, and to prevent the creation of excessive regulatory power stifling investment and impeding legal certainty.

For instance, Part XI of the Financial Services and Markets Act 2000 ("FSMA") stipulates the detailed scope of investigation by the market regulators stipulating the power of the regulator to gather information, appoint investigators, and conduct investigations. This creates the statutory threshold which is relied upon by the Financial Conduct Authority and the

[243] *Fan Led Review* (n 1) 8.23.

Prudential Regulatory Authority ("PRA") to create elaborate investigation and penalty mechanisms.

The lack of such a specific statutory authority opens up the Premier League and other existing regulators not just to challenges against the provision of information, but also the creation of a confidentiality regime where through agreements, the players and clubs can create a regime of non-disclosure of sensitive information. The Fan-Led Review envisages that the IREF must have the power to seek disclosure of information, e.g. financial information, and strategic information regarding transfers.

The recent decision in *Manchester City Football Club Ltd*[244] demonstrates that clubs are concerned with the publication of information and seek to closely guard the information, preventing judges from including the mere existence of an arbitration in judgments. The Court of Appeal in *City of Moscow v Bankers Trust*[245] has stated that a judicial decision-making body, including a regulatory tribunal, must prepare and deliver a judgment without the disclosure of any significant confidential information, and thus the IREF would have to derive its powers from a statutory regime that is clearly stipulated, circumscribed and promises confidentiality of the information of which that it seeks disclosure.

For instance, FSMA specifies different procedures (although they are not extremely different from each other) for appointment of persons to conduct general investigations,[246] appointment of persons to conduct investigations in specific circumstances,[247] and supporting overseas regulators.[248] FSMA also stipulates some measures that may be undertaken by the PRA specifically due to its need for financial flexibility.[249] These carefully drafted provisions have shielded the PRA and the FCA from challenges to their power to seek information disclosures, or to open investigations by themselves, unless based only on the fact that the procedural errors exist in the investigations or that the statutory timelines were not adhered to. Thus, to protect the power of the IREF to seek information disclosures, initiate investigations and impose penalties, each of these powers must be drawn expressly from the statute establishing the IREF.

The procedures and other stipulations surrounding the investigation are open to judicial scrutiny on the grounds of the investigation being ultra vires of the rules of the regulator or not

[244] *Manchester City Football Club Ltd v The Football Association, Premier League & Ors* [2021] EWCA Civ 1110.
[245] *City of Moscow v Bankers Trust* [2004] EWCA Civ 314.
[246] Financial Services and Markets Act 2000, s167.
[247] Financial Services and Markets Act 2000 (n 360), s168.
[248] Financial Services and Markets Act 2000 (n 360), s169-169A.
[249] Financial Services and Markets Act 2000 (n 360), s165A-C.

being in consonance with the general objective of the regulator. The High Court arrives at this finding in *Fallon v Horseracing Regulatory Authority* where it unequivocally held that

> "It is well established that sports governing bodies may act only intra vires, in a manner consistent with their own regulatory frameworks, and within the general objectives of the organisation. It may also be possible for sports regulators to behave unlawfully where account is taken of irrelevant factors or, conversely, they fail to take account of relevant matters."[250]

In order to grant flexibility in administration, the statute establishing the IREF might also delegate the responsibility of detailing some of these procedures to the Board of the IREF subject to the general principles of administrative law.

As to choosing which power should be exercised in an individual case, the IREF's establishing legislation should statutorily reserve the discretion to use any mode of enforcement that it deems fit based on the factual matrix of a situation. These modes however should be stipulated as detailed below to prevent a challenge of excessive powers.

3.2 GENERAL TRIBUNAL STRUCTURES IN THE UNITED KINGDOM

While there is a great diversity in the nature of tribunals in the United Kingdom, inspiration may be drawn from the tribunal administration of Her Majesty's Courts and Tribunals Service (HMCTS) which operates a two-tier tribunal system, with a First–tier Tribunal and an Upper Tribunal divided into Chambers. Each Chamber is composed of comparable categories of experts to hear appeals. The two-tier structure of the tribunal would fulfil three distinct but interrelated purposes.

First, the two-tier structure would provide a formal structure compliant with the Leggatt Report seeking uniformity in the structure of UK tribunals and would allow the allotment of judicial function and inquisitorial roles between the two levels of tribunals. Second, the structure would streamline the flow of disputes through the IREF itself and provide a mechanism for the appellate review to take place seamlessly. Third, the two-tier mechanism

[250] Simon Boyes, *Sport in court: assessing judicial scrutiny of sports governing bodies* (July 2017) Public Law 363; see also *Fallon v Horseracing Regulatory Authority* [2006] EWHC 2010 (QB).

would conceptually aid in understanding the avenues and the scope of judicial review of the decisions of the IREF.

The Upper Tribunal reviews and decides appeals from the First–tier Tribunal, but not solely. As is the case with the High Court, it is a superior court of record. In addition to the current specialised judges of the senior tribunals judiciary, it can rely on the services of High Court justices.

The First-tier Tribunal accepts appeals from citizens against judgments made by Government departments or agencies, however the Property Chamber, like the Employment Tribunal, hears cases on a party-v-party basis.

Tribunals frequently convene in panels comprised of a legally trained tribunal judge and panel members with specialised knowledge. They hear testimony from witnesses but make their own determinations. Tribunals have limited authority to impose fines and penalties or to award compensation and expenses (depending on the jurisdiction of the case). Other types of tribunal judgments may affect the allowance or disallowance of a benefit; the right to remain in the UK or the extent to which special educational assistance is provided to school-aged children.

Many instances include individuals presenting their case on their own, without the assistance of a lawyer, and hence the system must be accessible to all. Tribunal judges frequently assist in ensuring this by assisting parties who are not legally competent through the proper procedures, if necessary. It seems likely that some cases, such as cases relating to the Golden Shares, might be initiated by litigants in person.

If this framework was followed, the establishing legislation could allocate the tribunal powers of investigation, issuing of information notices and determination of penalties to the first-tier tribunal and allow the second-tier tribunal to perform appellate functions. This should be avoided.

The Fan-Led Review envisages the IREF with broad inquisitorial powers of investigation. In the interest of efficiency, it would be prudent to vest the first-tier tribunal not with investigatory powers as well but merely with powers of review whether the IREF correctly exercised its discretion and acted *intra vires*. Since these are essentially equivalent to the role of the Upper Tribunal, it is recommended that the IREF establishing legislation only include one level of appellate review.

It would also be prudent to allow this single appellate tribunal to review issues of fact but to constrain this authority by requiring the tribunal to defer to the IREF as a fact-finder. This is common practice in appellate and judicial review arrangements. Judicial review acts as

an additional backstop to guarantee that the IREF and the tribunal acts correctly, but is unlikely to be of frequent application due to the enhanced requirements of getting a case before the Courts and the higher standards to succeed in those cases.

In the interest of efficiency and given the nature of claims and disputes that would exist before the IREF, it could also examine the possibility of fulfilling the function of promoting the settlement of claims by the parties before the commencement of formal tribunal procedures.

3.3 INFORMATION REQUEST POWERS

The IREF must be statutorily equipped with the power to issue information request notices to clubs, within a statutorily stipulated timeline. An information notice essentially entails the power of the regulator to derive information from the target of regulation entailing consequences for non-compliance with such a request. Regulators whose entire investigation process is concerned with information which remains in the personal domain of the target of regulation rely on information notices as the point of commencement of the investigation. This includes:

- Her Majesty's Revenue & Customs ("HMRC") under the Finance Act 2008
- The Commissioner under the Investigatory Powers Act 2016
- The Information Commissioner under the Data Protection Act 2018.

Inspiration maybe drawn from the detailed structures that are laid down under these legislations for the specific provisions. However, the basic structure of these provisions are:

- Stipulating the purposes for which the IREF may issue an information request notice
- The DCMS Report specify the following genres of information that the IREF must have the power to seek information about:
    - Character of the owners[251]
    - Real time financial monitoring[252]
    - Financial transactions and transparency at a club level[253]
    - Accounting data for monitoring purposes
    - Strategic data (e.g., commercially sensitive information)

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[251] *Fan Led Review* (n 1) 4.15-4.17.
[252] *Fan Led Review* (n 1) 3.39-3.40.
[253] *Fan Led Review* (n 1) 5.17.

- These purposes need to be laid out in reasonable detail, but the statute may provide the board of the IREF with the power to stipulate additional reasons in its administrative role.
    - The timeframe within which the information notice must be complied with
    - Circumscriptions to the power of the IREF – if any specific pieces of information should be outside the scope of the IREF.

The implementing legislation should also provide IREF with the duty to protect strategic data from public disclosure and restrict access to strategic information in order to guarantee the legitimate business interests of regulated clubs. Additionally, note that information notices may take various forms including:

- Warning Notice (compare s387 FSMA): states the action which the regulator proposes to take giving reasons and the opportunity for representations. Reforms made in the Financial Services Act 2012 make provision for information about certain warning notices to be published at an earlier stage in the process.
- Decision Notice (compare s388 FSMA): states the reasons for the action the regulator has decided to take. The FCA and PRA must publish such information about the matter to which the Decision Notice relates as they think appropriate.
- Final Notice (compare s390 FSMA): states the terms of action being taken. The same publication requirement as for a Decision Notice applies.
- Show cause notice: Demanding an entity to explain its actions or provide information.

Information notices by other regulators are subject to appeal by the target of the notice and specifically under the tax regulatory regime, a HMRC information notice has been successfully challenged on the grounds that the information notice demanded documents that were not reasonably required for the purpose of assessing the taxpayer's liability.[254] In *Bank Mellat v HM Treasury*, a notice was successfully challenged for want of reasonable timeframe for compliance and an opportunity to be heard either before or after the issuance of such a notice.[255] Moreover, certainty of procedure followed by regulator is a key issue - the court in

[254] *Kevin Betts v HM Revenue & Customs* [2013] UKFTT 430 (TC).
[255] *Bank Mellat v HM Treasury* [2013] UKSC 39.

Modahl v British Athletic Federation Ltd overturned the decision of regulator as investigation was conducted in an uncertain and arbitrary manner.[256]

The Fan-Led Review mandates that the IREF have significant flexibility to issue information request notices to clubs when warranted. However, the IREF must be careful while exercising its supervisory jurisdiction (limited) and disciplinary jurisdiction (full). In *Forsyth v Financial Conduct Authority & Prudential Regulatory Authority*, the Courts have clarified that the power of any regulatory authority when it is seeking information, exercising its disciplinary powers and enforcing a penalty is subject to compliance with the applicable disclosure obligations.[257] This is particularly important given that the IREF would function alongside other regulators and the civil court system.

Information security must also be respected by the IREF in the course of information-sharing and collection during information requests or investigations. The Information Commissioner's Office has created a detailed Guide for Data Protection[258] which contains the Guide to Law Enforcement Processing[259] and the Guide to Intelligence Services[260] which may be adapted for the information request and investigation respectively. The HMCTS has implemented a Privacy policy which details the acquisition, sharing and processing of sensitive information.[261] This may also be adopted by the IREF.

The information requested may lead the IREF to issue further requests for information into the issue under investigation, or summon individuals based on the information received in order to conduct further investigation. For the investigative power of the IREF to be exercised effectively, the powers of investigation should be statutorily made available not only against the clubs and the leagues, but to third parties as the IREF sees fit in the conduct of its investigation as well.

Given that the investigative powers of the IREF will stem from statute, the exercise of its powers is subject to an appeal or litigation when it exceeds the powers in the statute. Therefore, the statute must be drafted both widely and flexibly in order to ensure the power of

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256 *Modahl vs British Athletic Federation Ltd.* [2001] EWCA Civ 1447; [2002] 1 WLR 1192.
257 *Forsyth v Financial Conduct Authority & Prudential Regulatory Authority* [2021] UKUT 0162 (TCC).
258 'Guide To Data Protection' (*Ico.org.uk*, 2022) <https://ico.org.uk/for-organisations/guide-to-data-protection/> accessed 5 May 2022.
259 'Scope And Key Definitions' (*Information Commissioner's Office*, 2022) <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-le-processing/scope-and-key-definitions/> accessed 5 May 2022.
260 'Scope And Key Definitions' (*Information Commissioner's Office*, 2022) <https://ico.org.uk/for-organisations/guide-to-data-protection/intelligence-services-processing/scope-and-key-definitions/> accessed 10 May 2022.
261 'HM Courts And Tribunals Service Privacy Policy' (*gov.uk*, 2022) <https://www.gov.uk/government/publications/hmcts-privacy-policy/hm-courts-and-tribunals-service-privacy-policy> accessed 7 May 2022.

investigation. As a result, the forms of investigative notices and other powers of investigation should be listed in detail. However, the reasons for such investigation should be specified broadly.

3.4. PENALTIES

The IREF envisages that the IREF will have access to the following penalties and mechanisms:

- Reputational regulation – naming and shaming
- Awards of Compensation
- Interim powers against "particularly heinous actions"
- Fines
- Point deductions
- Transfer bans
- Individual sanctions against owners and directo
- IREF administrators

Historically, penalties enforced by various sports governing bodies and regulators have been subjected to judicial scrutiny on the basis of substantive reasonability, public policy and natural justice. Denning LJ in *Russell v Duke of Norfolk*[262] noted that Jockey Club had "a monopoly in an important field of human activity. It has great powers and corresponding responsibilities." Consequently, any penalty decision by such a regulator would entail serious consequences, hence the regulators have "an obligation to act in accordance with the rules of natural justice." This principle was reiterated in a recent judgment in *The Football Association v José Mourinho*[263] where the court held "sports governing bodies (a) are subject to the court's supervisory jurisdiction and (b) must abide by public law principles".

It is vital for the regulators to ensure that their decision does not contravene any substantive law of the land in force. The courts have given precedence to instruments with legislative backing over orders/penalties by executive/administrative regulators. Mr Justice Wilberforce in *Eastham v Newcastle United Football Club* held that "although the rules formulating the retain and transfer system may not have been against the FA and League, it

[262] *Russell v Duke of Norfolk* [1949] 1 All ER 109.
[263] FT/TA/18/0404.

cannot be within the powers of associations such as these to commit their members to action which is against the public policy."[264] This implies that substantive compliance of any order of the regulator with statutory law is of peremptory importance. Another example of the precedence given to substantive laws is *Greig v Insole,* wherein 3 cricketers brought claims against the TCCB and ICC seeking declaration that the rules of the International Cricket Council (ICC) were in restraint of trade. It was held by the courts that *"[n]either the ICC nor the TCCB had shown that the bans were reasonable and the Claimants were entitled to declarations that the rules were ultra vires and void."*[265]

a. Proportionality of Penalties

The Fan-Led Review envisages these remedies to be used in different contexts according to the seriousness of the violation of the entity before it. The statute must clearly stipulate the situations in which each of these remedies must be used. For example, the Fan-Led Review itself specifies that the appointment of an IREF Administrator is a situation that must be used only in dire circumstances or that ad-hoc injunctions must be used only to prevent "particularly heinous actions". It should be reiterated here that, in the first place, the statute must expressly vest the IREF with the power to impose any of these penalties in cumulation. Additionally, the IREF's powers and their exercise should constitute a proportional response to the damage caused by the entity and the penalty proposed.

First, it is a well-established principle of English public law that the penalty cannot be excessive, unreasonable or arbitrary.[266] Courts of law have been willing to examine a primary legislation on the ground of proportionality of the remedy posited in a statute and *Wednesbury* reasonableness.[267] A reasoning or decision is Wednesbury unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it.[268]

Second, the penalties must not be such that they contravene or derogate from any established public norm or policies and shall remain within the constraints of the statues in force at the time. Previously, the court has assumed supervisory jurisdiction over private

[264] *Eastham v Newcastle United Football Club* [1964] Ch 413.
[265] *Greig v Insole* [1978] 1 WLR 302, 304.
[266] *R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [2015] 3 CMLR 20 (discussed at 14.3). On its place in English law, see J Jowell and A Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1987] *Public Law* 368.
[267] See e.g. *A v Home Secretary* [2005] 2 AC 68.
[268] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223.

regulators of sport if they were found to be in contravention of public policy.[269] Such jurisdiction will only exceptionally extend to the IREF's regulatory actions since most regulatory actions are, almost by definition, within the scope of public policy.

Third, the regulator must follow the guidance it establishes. The IREF may and should issue guidance on how it intends to enforce the law and exercise its powers. In *Hartlepool United FC, Green, Chandler & Buncall v The FA*, the participants appealed against "excessive" sanctions following a finding by a Regulatory Commission that they had been involved in sham scouting agreements.[270] Cases involving similar such (deliberate) breaches had begun to lead to agents being banned for about 6 months but they were banned for around 13 months. The FA justified this as "taking a firmer view of penalties" than in earlier cases, enhancing deterrence. While reducing the punishment and promoting adoption of sanction/penalty standard and rules of proportionality the court pointed out the danger of not having a sanction policy -

> "In the absence of standard sanction guidelines (as exist in doping, for example), there is a danger of sports disciplinary panels applying widely inconsistent sanctions to similar offences. Another danger arises where tribunals take it on themselves to increase sanctions because of a concern previous sanctions might had not prevented the breach[271]"

b. Discretionary Penalties – Isolating strictly football remedies

Reducing the scope of powers reduces the scope for challenges to their exercises but reduces the ability of the regulator to respond as necessary. The better approach is to couple strong discretionary powers with substantial and sound enforcement guidance. The enforcement guidance must conform to the first two principles set out above and further principles discussed below.

The IREF should be established with discretionary powers to impose an enumerated set of penalties. This would have two particular benefits. First, discretionary clauses which vest

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[269] *Bradley v Jockey Club* [2004] EWHC 2164 QB; [2005] EWCA Civ 1056; *Flaherty v The National Greyhound Racing Club Limited* [2005] EWCA Civ 117.
[270] *Hartlepool United FC, Green, Chandler & Buncall v The FA* (21 September 2018, FA Appeal Board).
[271] ibid.

the discretion of a particular action or penalty with a particular authority result in the partial ouster of the possibility of judicial review and courts have been reluctant to interfere with such clauses.[272] It must be noted that the discretion, even if worded in an extremely broad fashion would not carry a "carte blanche" power of the IREF to take any action – but would significantly cover the actions of the IREF – penalties imposed, as well as inactions.

In *R v Secretary of State for Trade and Industry, ex p Lonrho plc*, it was held that a discretionary power of a statutory authority would be examined on the basis of whether the discretion existed and whether it was exercised in a manner consistent with the statutory intent and purpose.[273] The Court laid down that the merits of the action of the authority could only be called into question on grounds of grave violations of due process.

Given that strictly sport-related penalties such as points deductions and transfer bans are well within the statutory scope of the IREF – it would seriously limit any challenge to such measures taken by the IREF.

Second, the discretion to impose penalties should be supplemented with a duty on the IREF to provide reasons. Such a requirement is good governance and might be a legal requirement of natural justice.[274] The provision of reasons when discretion is stipulated indicates to a judicial forum that the regulator exercised judgment in exercising its discretion. It provides judicial review and appellate proceedings with a record to evaluate the reasonableness of the decision. Moreover, it explains the decision to the target of the penalties. If the quantum of penalty is required by statute, there can be no review of reasonableness, thereby insulating the decision effectively from appellate and judicial review.

c. Time Limit Protections

The establishing legislation should establish an time limit within which an appeal must take place against its actions generally, and particularly against penalties imposed, to limit appellate review. Limitation periods for judicial review already exist. The decisions in *R v Secretary of State for the Environment, ex p Ostler*[275] and *Smith v East Elloe Rural District Council*[276] indicate that the courts wil not interfere with the time limits stipulated in statutes

[272] Leyland P, and Anthony G, *Textbook on Administrative Law* (8th edn, 2016) .
[273] *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 2 All ER 609.
[274] *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531.
[275] *R v Secretary of State for the Environment, ex p Ostler* [1976] 3 All ER 90.
[276] *Smith v East Elloe Rural District Council* [1956] 1 All ER 855.

except where it can be demonstrated that the delay was caused by the regulatory authority or was vitiated by other grounds of Wednesbury unreasonableness.[277]

Similarly, there should be a time limit on the initiation of investigations and the imposition of penalties by the IREF. This promotes legal certainty for those subject to IREF regulation.

3.5. JUDICIAL REVIEW OF IREF DECISIONS

Judicial review of decisions of sports regulators has been contentious. The dispute revolves around the nature of function performed by such regulators and whether it falls within the purview of private or public law claims. The previously held position was that such regulators establish a contractual relation, and any breach thereof must constitute a claim under private law and consequently not be subject to judicial review. This was enshrined in one of the earlier judgments, *Law v National Greyhound Racing Club* wherein a greyhound trainer was suspended for six months after his dog was found to have been doped.[278] The National Greyhound Racing Club ("NGRC") sought to have this action struck out for want of jurisdiction arguing that the claim should have been brought in judicial review. This proposition was unanimously rejected by the Court of Appeal. Lord Justice Lawton considered that "there was no public element in the jurisdiction itself" even though its exercise "could have consequences from which the public benefited. The authority to perform judicial or quasi-judicial functions was solely derived from contract."[279]

This debate is not applicable to the IREF. The IREF will be established by statute and will be a public body. The decision in NGRC applies to sports governing bodies maintaining contractual relations with the regulatees, whereas in the instant case the regulator is a statutory body binding parties through legislative authority. In *R v Panel on Take-overs and Mergers* (upheld in *Ex parte Datafin*),[280] Lloyd LJ stated that:

> "Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the

[277] Leyland and Anthony (n 386) 252-54.
[278] *Law v National Greyhound Racing Club (NGRC)* [1983] 3 All ER 300.
[279] ibid 1312.
[280] *Ex parte Datafin plc* [1987] 1 All ER 564.

> body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual ... then clearly [this is] not subject to judicial review."[281]

In addition, amenability to judicial review can be based not only on the source but also the nature of the body's power.

> "But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may... be sufficient to bring the body within the reach of judicial review".[282]

By both standards, the IREF will be subject to judicial review as a public body invested with public law functions.

There are broadly three well established heads of judicial review which may be utilised to hold a public body to account, Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*[283] referred to these as illegality, irrationality and procedural impropriety. The three grounds tend to overlap, with decisions often challenged on several grounds.

To ascertain the legality of the regulator's action, the court will look at the rules and regulations of the regulator along with objective consideration of the ambit of the decision maker's powers and decide whether or not the particular act is permissible. Illegality, or ultra vires, contains several subcategories. This includes: an error of law and fact; abuse of discretionary power (acting for improper purposes, having regard to irrelevant considerations, and/or failing to take into account relevant matters); and abdication of discretionary power (i.e. the undue fettering of discretion).

Lastly, challenges on the basis of procedural impropriety i.e. that the body did not adhere to the principles of natural justice are available. Lord Morris in *Wiseman v Borneman*[284] has held that "[n]atural justice is simply 'fair play in action'". There are two key principles of natural justice which decision makers must observe. Firstly, the parties have the

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[281] *R v Panel on Take-overs and Mergers* [1986] EWCA Civ 8 [722]
[282] ibid.
[283] *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6.
[284] *Wiseman v Borneman* [1969] 3 All ER 275, 278.

right to be heard *(audi alteram partem),* and secondly, the decision maker must be disinterested and unbiased *(nemo debet esse judex in sua causa).* A failure to comply with minimum standards of procedural protection prescribed by either principle may result in a successful challenge. As Catherine Bond puts it, "[t]he functions of Judicial Review carry similarities with the functions of Sports Governing Bodies namely the main points that Sports Governing Bodies operate as Tribunals carrying out quasi-Judicial Functions with the addition of performing Public acts and Duties".[285]

Under Article 6 ECHR and the Human Rights Act 1998, there is a right to a public hearing in exceptional circumstances like in the interest of morality, public order or national security, or where the interest of minors require. The UK is likely to replace the Human Rights Act with a new"Bill of Rights" but it is unlikely that this requirement will change substantially. Relevantly here, the IREF and its appellate body should not hold public hearings in such a way as to disclose confidential strategic information of the parties and should be endowed with a discretion to hold hearings in private where necessary to prevent such disclosure. In some circumstances, there is no need for a public hearing at all - for example in cases where there are no factual or legal disputes - but such circumstances are rare and subject to the scrutiny of the court.[286]

It is certain that the decisions and actions of the IREF will be subject to judicial review. This is unavoidable. Proper design of the regulator's powers and proper exercise of the powers and the IREF's discretion will reduce the number of challenges. The IREF's decisions should also be subject to appellate review as set out in the establishing legislation.

[285] Catherine Bond, *'Judicial Review of the decisions of sporting bodies'* in Edward Grayson*, Sports and the Law* (Tottel Publishing Ltd 1999).
[286] See *Mutu & Pechstein v Switzerland* [2018] ECHR 778 (2 Oct 2018).