

Call for evidence: Football Governance

Written evidence submitted by Dr Jan Zglinski

About the author

Jan Zglinski is Assistant Professor at the LSE Law School and Research Fellow of the Oxford Institute of European and Comparative Law. Prior to that, he was Erich Brost Lecturer at the Faculty of Law and St Hilda's College, University of Oxford. Dr Zglinski holds degrees from the Universities of Hamburg, Paris and Oxford and earned his PhD from the European University Institute. He has held visiting positions at Yale and NYU Law School. His research focuses on sports law and regulation, as well as EU constitutional and internal market law. He has published extensively on the European Super League litigation and EU sports law.

Introduction

The Football Governance Bill ('the Bill') presents a historic opportunity to improve the functioning of football. Poor governance standards and misguided financial incentives have negatively impacted on clubs, fans, and local communities. Self-regulation has proven incapable of solving the many problems plaguing the game. English football is not unusual in this respect. Evidence from across the world suggests that meaningful reforms of sports governance rarely come from within, but require outside – typically, government – intervention. Three of the countries hosting the 'Top Five' leagues have, if to different extents, enacted sports legislation covering football (Spain, France, Italy); the only exception is Germany, where clubs are bound by a comparatively demanding set of rules, notably surrounding club ownership, which originate in decisions of the national football governing bodies.

The UK Government has rightly cautioned against the risk of interfering too strongly in English football by imposing unnecessary or overly burdensome requirements. However, the greater risk is doing too little and letting slip a unique chance to change the game for the better. I strongly support the adoption of the proposed Bill, but I recommend, based on my expertise, that it is broadened and deepened in five areas: the regulation of football governing bodies and leagues; fan engagement; regulated competitions; revenue redistribution; and ownership rules.

I. Regulate football governing bodies and leagues

In its present form, the Bill primarily regulates the governance of football clubs. By contrast, the requirements imposed on the game's governing bodies and leagues – the Football Association (FA), the Premier League (PL), the English Football League (EFL), and the National League (NL) – are minimal and do not cover governance aspects. This is an important gap which must be filled, for both symbolic and practical reasons. Governing bodies need governance, too.

Good governance, in sports and other sectors, starts at the top.¹ It is hard for an organisation to be run well if its members or employees are expected to follow certain standards of conduct – not, however, its management. Those involved in the current football reform process have, from the start, emphasised that regulation of the game is needed because self-regulation has failed.² Against this backdrop, it appears contradictory to exclude football governing bodies, who carry the primary responsibility for that failure, from the scope of the legislation. It also creates the paradoxical result that football clubs could end up following higher governance standards than the football authorities regulating them. Perhaps more worryingly still, some of the good work done at club level (e.g. involving fans in decision-making processes or removing unsuitable owners) could be undone at governance level (e.g. by taking decisions without the consultation of supporters or appointing directors to the board of leagues who would fail the requisite integrity test).

To achieve its objectives more effectively, the Bill should be extended to football governing bodies and leagues. The rules in place for clubs could be taken as a starting point and adapted where appropriate. Governing bodies and leagues would have to fulfill financial reporting duties and undergo periodic financial health checks. Their directors would be subjected to a modified suitability test. They would need to ensure that fans are represented or consulted in key decision-making processes (see next section).

Given the central role played by football governing bodies and leagues in managing the game, further good governance duties should be considered, too. Best practices internationally include the setting of term limits for sports functionaries in executive positions and rules on conflicts of interest, to prevent accumulations and abuses of power.³ EDI requirements would ensure a balanced and diverse representation on boards. The recent French law on 'democratising sport', for instance, establishes gender parity obligations for executive bodies of sports federations and leagues.⁴ Player representation could be strengthened, too. Spain requires that every major stakeholder, including athletes, is represented proportionately in the general assemblies of

¹ Arnout Geeraert and Frank van Eekeren (Eds.), *Good Governance in Sport: Critical Reflections* (Routledge 2022).

² Fan-Led Review of Football Governance, 2.7-2.9; White Paper, *A Sustainable Future – Reforming Club Football Governance*, Part 2.

³ The French Sports Code limits the maximum number of terms for presidents of sports federations to three.

⁴ Loi du 2 mars 2022 visant à démocratiser le sport en France.

federations,⁵ an idea that could be transposed to the English context by requiring the inclusion of non-executive representatives for players on governing boards.

Implementing these and similar requirements could be done in three basic ways:

- **Licensing system**

A licensing regime could be introduced, akin to the one which established for clubs. This would be the most coherent solution in light of the general structure of the Bill. Football governing bodies and leagues would periodically have to apply for a licence (e.g. every four years). The independent regulator would check whether they comply with the specified mandatory licence conditions and/or threshold requirements. France follows this model. Similarly, in Spain federations must obtain prior approval from the (governmental) sports regulator for their statutes and regulations.

- **Self-standing governance requirements**

Alternatively, the Bill could set out certain substantive requirements, such as the ones proposed above, and oblige football governing bodies and leagues to comply with them. There would be no *ex ante* control through a licensing mechanism. Instead, the independent regulator would watch over compliance with the duties *ex post* and issue sanctions in the case of infractions.

- **Extended governance code**

Finally, the governance code which the Bill anticipates being adopted could be broadened so that it applies to both clubs and governing bodies. There would be shared rules for common problems (e.g. transparency requirements) and separate rules in areas which raise context-specific issues (e.g. stadium relocation).

II. Strengthen fan engagement

Fans are meant to be at the heart of the legislation. The government's decision to commission a review of football governance was triggered by the announcement of the European Super League and the outrage it sparked among supporters across the country. The final report of the Fan-Led Review – sensibly – proposed to re-empower fans by introducing 'shadow boards' and 'golden shares'. The former would be a body within clubs that would represent supporters and would need to be consulted on all material off-pitch matters. The latter would effectively amount to a veto power in relation to key items of club heritage, to be exercised by a Community Benefit Society formed for the benefit of a club's supporters.

The Bill abandons both proposals, following the approach outlined in the White Paper. In it, DCMS argued that shadow boards would place an undue burden on clubs, 'inhibit new or innovative forms of engagement', and be 'counterproductive if the club believes it has existing processes which work

⁵ Ley 39/2022, de 30 de diciembre, del Deporte.

better for their fanbase' (citing e.g. fan ownership as an alternative).⁶ Similarly, the idea of golden shares was discarded as overly burdensome and deterring investment.⁷ Instead, the Bill establishes a series of consultation rights.

These consultation rights provide only weak protections for fans. Partly, this is due to the very nature of consultation. It merely requires giving a group the opportunity to voice their views; it provides no guarantee that these views will be followed or, indeed, seriously considered. But the real problem is that the safeguards in the Bill remain patchy. The sole issue on which support from a majority of a club's fans needs to be established is the changing of the home shirt colours (clause 49). For other changes, which can be just as significant for the fan community, such as a stadium sale or relocation, no such majority is needed.

What amplifies the problem is that the independent regulator need not, at least not explicitly, take fan interests into account when exercising its powers. The only exception is the specifying of a competition as a prohibited competition, where it must 'determine' and 'have regard' to the views of fans in England (clause 45(8)). (Somewhat contradictorily, clubs can take part in a breakaway competition without consulting their supporters.) The approval of the sale of a club's home ground, its relocation, or decisions concerning revenue distribution do not require an independent consultation of fans. In fact, these provisions do not mention fans as a relevant concern that needs to be factored into the decision at all.

Consider the duty not to dispose of the home ground. Pursuant to clause 46(6) of the Bill, the independent regulator must grant approval where the sale would 'not undermine the financial sustainability of the club' and 'all reasonable steps' have been taken to 'ensure that a team customarily plays its home matches at the ground'. The regulator does not have to consider the views of fans in this decision, even though they may have voiced strong opposition in the prior consultation at club level. Similarly, approval to play home matches outside a club's home ground must be granted where this would not 'undermine the financial sustainability of the club' or 'cause significant harm to the heritage of the club' (clause 48(4)). Again, fan interests are not explicitly part of the regulator's assessment.⁸ The same goes for revenue distribution, where fans need not be consulted at club or governance level either, leaving them entirely without input into the process.

The problem with this system is that fan engagement can easily become a box-ticking exercise for clubs, and a not too difficult one at that. The Bill in this respect follows the assumptions of the White Paper, which is based on the idea that clubs want to involve supporters and will seek to create innovative mechanisms for fan engagement. While this is true of some clubs (e.g. Brentford and AFC Wimbledon), it is certainly not true across English football, as several painful examples from the recent past show (see e.g. Reading or the Super League participants). It will be easy for

⁶ White Paper, paragraph 8.8.

⁷ Ibid, paragraph 8.15.

⁸ Club heritage is defined in clause 4(3) of Schedule 4 and is the object of fan engagement at club level, but does not include fan engagement as such.

intransigent owners to organise pro forma consultations and push through plans at club level in spite of negative feedback. It should be noted in this context that governing bodies do not have a strong track record of improving fan rights either. The fact that the Premier League only adopted its Fan Engagement Standard as a result of government pressure, after the prospect of football regulation materialising, shows that there is little hope of systemic change through self-regulation.

If fans are really at the heart of the Bill, more is needed. Several possibilities should be explored during the legislative process. From most to least protective:

- **50+1 rule**

This is also referred to as social or fan ownership, a model that has been successfully applied in Germany and Sweden. Clubs are required to be majority-owned by supporters, meaning that the percentage of shares held by outside investors must remain below 50%. Although the rule can reduce levels of investments, it also significantly decreases the likelihood of clubs taking decisions that go against the interests of their fans and harm local communities. Tellingly, no German team decided to join the European Super League.

- **Golden shares and shadow boards (or independent advisors)**

This is the model proposed in the Fan-Led Review. It would, with the exception of fan ownership, provide the strongest protections for supporters. Golden shares would give fans the power to prevent undesirable changes to the most significant aspects of club heritage. Shadow boards would allow them to participate in the club's decision-making on a regular basis. A similar, but more ambitious option would be to oblige clubs to have a fan representative on their board. The Spanish Sports Act imposes such a requirement on sports companies (the legal form of most football clubs), which must name an 'independent advisor' who looks after the interests of season ticket holders and fans. Although this does not guarantee that a club's decisions will always be made in line with the preferences of supporters, it does ensure that their voice will be heard. To encourage a 'race to the top' and facilitate innovation, this could be set as a minimum standard, meaning that clubs seeking to give their supporters more extensive rights, for example through fan ownership, would be free to do so.

- **Stronger consultation rights**

Even if the legislature decides to stick to the consultation model, the existing rights in the Bill should be widened and strengthened. Fan interests should be part and parcel of every decision taken by the independent football regulator. This could be achieved by inserting a horizontal 'have regard'-clause into the Bill, which would oblige the regulator to consider fan views in all of its decisions. In addition to – not in lieu of – such a clause, supporters should be on the list of stakeholders which the regulator proactively engages with (clause 8(b)). For cases in which there are serious doubts about the genuineness of the consultation undertaken by a club, the regulator could additionally be given backstop powers to re-do that consultation. Joining a new or leaving an existing competition should be part of the aspects of club heritage on which fans need to be consulted by their clubs.

Finally, and regardless of which of these solutions is adopted, protections should be established at regulatory and governance level. This could take the form of a fan representative on the board of the independent regulator and the football governing bodies.⁹ Supporter input at the top of football governance and regulation will increase the likelihood that decisions for English football are made with consideration of what is best for fans.

III. Update regulated competitions

In addition to regulating club governance, the Bill stipulates requirements for football competitions and matches. Three issues warrant attention:

1. *European Super League*

The Bill obliges clubs to not participate in a prohibited competition (clause 45). The regulator has the power to determine whether a competition is prohibited and, in this context, must have regard to five criteria: whether the competition (i) is merit-based; (ii) operates on the basis of open and fair competition; (iii) jeopardises the sustainability of existing competitions (with exclusively or predominantly English teams); (iv) jeopardises the sustainability of clubs operating in these competitions; (v) harms the heritage of English football. This is meant to prevent a Super League.

The creation of new football competitions has recently been the object of the *European Superleague* litigation before the Court of Justice of the European Union (CJEU).¹⁰ The dispute concerned FIFA and UEFA regulations which prohibit the organisation of football matches without prior authorisation. The CJEU ruled that this restriction violates EU competition law. While football governing bodies have a legitimate role to play in regulating the sport and ensuring that the actors involved in it comply with certain values (including sporting merit and financial solidarity), they cannot exclude third parties from organising new competitions altogether. An authorisation system with clear, transparent, and non-discriminatory criteria must be in place to prevent conflicts of interest inside of the football governing bodies, which also act as competition organisers.

EU law no longer applies in the UK post-Brexit, but English football continues to operate inside of international football structures. It is to be expected that FIFA and UEFA will amend their regulations to comply with the *Superleague* requirements. As part of this, they will be able to keep clauses of the (i) and (ii) type which promote valid sporting values. However, clauses along the lines of (iii) and (iv) are likely to violate European competition rules due to their discriminatory nature: they prioritise the sustainability of existing competitions – which presumably fulfill the requirements – at the expense of new formats.¹¹ Clause (v) is probably too vague to pass the *Superleague* test, at least without further concretisation as to what falls under the ‘heritage of English football’.

⁹ See also the proposal of the Everton Fan Advisory Board which goes in this direction (23 April 2024).

¹⁰ Case C-333/21 *European Superleague Company* [2023] ECLI:EU:C:2023:1011.

¹¹ On the similarly-worded UEFA provisions, see Stephen Weatherill, ‘Football Revolution: how do the Court’s rulings of 21 December 2023 affect UEFA’s role as a “gatekeeper”?’ *EU Law Analysis* (4 January 2024).

Consequently, there is a risk that the Bill will be out of sync with FIFA and UEFA's authorisation regulations once these have been updated. There are two possible solutions to this issue. The first is to align the criteria for prohibited competitions with those from the *Superleague* judgment. This would ensure coherence with international football rules. It would also prevent English football from having to comply with two sets of potentially contradictory rules, for instance in a scenario where an updated Super League proposal is approved by UEFA (due to requirements from EU law) but rejected by the independent regulator. The second is, perhaps counterintuitively, to keep the criteria as they are. The UK Parliament can depart from both EU and UK competition rules if it so desires. Also, unlike in the *Superleague* scenario, the decision to authorise a new competition would be in the hands of the independent regulator, not the football governing bodies or leagues, which does not present the same conflict of interests. However, the consequence of this way of proceeding should be clear: it would, to an important extent, shield existing organisers from ordinary market forces and basic principles of competition law. This would be a considerable concession to the FA, PL, EFL and NL which should, in return, be subjected to good governance requirements (see I.).

2. *Matches played abroad*

The Bill imposes a duty on clubs to notify the independent regulator and obtain its approval where they plan on playing 'home matches at a ground other than the club's home ground' (clause 48). Given recent reports according to which several European leagues, including the Premier League, are exploring the possibility of playing official games abroad (notably in the US),¹² the question arises as to whether the regulator would be able to prevent such a 'game 39'. It would – in my view – not, at least not without further clarifications to the legislative text.

Although the above-cited passage may seem to apply to any game played outside a club's home ground, a look at its overall objective suggests otherwise. The relevant section is entitled 'duty not to *relocate* without approval', implying a permanent moving of grounds, not a one-off game elsewhere. This is supported by the wording of clause 48(1) which refers to 'home matches' in the plural. Should the legislature want to include a protection against a 'game 39', this would need to be rephrased.

However, it is worth reflecting on whether and why such outside matches pose a problem in the first place. The key issue seems to be that they run against the interests of fans and deprive them of seeing the club which they support. If so, an alternative solution to expanding the powers of the regulator would be to expand the power of fans, who could be given the right to veto plans of games played abroad (but may, in certain scenarios, be convinced that plans to this effect should go ahead if they promise to increase club revenue in a significant way, thus allowing their team to compete more effectively).

¹² Adam Crafton, 'Why European football matches might finally be coming to the U.S.' *The Athletic* (16 April 2024).

3. *FA Cup replays*

Changes to the format of existing competitions are, at present, not caught by the Bill either. The duties on specified competition organisers include consulting the regulator before making material changes to a 'specified competition rule' (clause 54(7)). Yet, the term 'specified competition rule' appears to be directed at requirements that could result in penalties or sanctions for clubs (clause 54(4)), such as the profit and sustainability rules, not modifications of the way in which a competition is played. Consequently, the decision to scrap FA cup replays, which was announced shortly before the second reading, would not require approval of the independent regulator. To create protections against such changes, this part of the Bill, too, would have to be expanded.

Again, alternatives exist. The pushback against the removal of FA cup replays is, partly, due to the financial impact it would have on smaller clubs and, partly, due to changing the traditional format of the competition against the wishes of football fans. Therefore, the issue could potentially be dealt with through appropriate revenue distribution agreements and increasing fan rights in this area.

IV. Broaden revenue distribution

Revenue distribution is a crucial element of the Bill. Undue financial pressures and misguided economic incentives are the root cause of many of the problems which the legislation seeks to tackle. Therefore, the backstop powers of the independent regulator are welcome, but should be extended.

Procedurally, the regulator can only get active if a specified competition organiser triggers the backstop process (clause 56) which involves mediation and, if unsuccessful, a distribution order based on the proposal of one of the competition organisers (clause 61). This system gives priority to football-led solutions, which has certain advantages – although it also presumes, perhaps overly optimistically, that the negotiations between the PL and EFL occur on a level-playing field and will yield fair outcomes. Be that as it may, a situation could arise where, despite the lack of a redistribution agreement, none of the competition organisers activate the process, perhaps even against their best interests. Given the key importance of revenue distribution for the sustainability of the English pyramid, the regulator should have the power to step in in such a scenario. Further, it seems unduly restrictive, and potentially counterproductive, to force the Expert Panel to choose between the proposals submitted by the competition organisers (clauses 60 and 61), both of which may be inadequate and inconsistent with the legislation's objectives. It should have the power to propose its own solution.

Substantively, the redistribution rules cover revenue from the sale of broadcasting rights relating to 'football matches included in a competition organised by the specified competition organiser'.¹³ Only revenue from domestic competitions appears to fall into the scope of the provision, given that

¹³ Clause 55(2)(a)(i). In addition, revenue from 'any other source specified... in regulations made by the Secretary of State' could be added in the future (clause 55(2)(a)(ii)).

the Bill defines ‘specified competitions’ as those in which the participating teams are ‘exclusively or predominantly English teams’.¹⁴ This is too narrow. The money made from existing European competitions (notably the Champions League) and, if approved, future breakaway competitions (e.g. a modified Super League) is not captured. Yet, the vast sums generated here significantly affect the domestic competitive balance¹⁵ and create an unhealthy financial cycle. Clubs seeking to enter these elite competitions feel forced to overspend to keep up with the clubs already participating in them, thus putting economic pressure on the entire league and football pyramid.

For similar reasons, revenue tied to relegation, which is currently excluded from the provisions on redistribution,¹⁶ should be included. The prospects of promotion – and the dramatic increase in revenue connected with it – pushes many clubs in lower tiers to gamble financially, a problem which is particularly pronounced in the Championship.¹⁷ Parachute payments fuel this dynamic. They give relegated clubs a considerable financial advantage over their rivals who, consequently, have to invest even more money to stay competitive, money they do not always have. The regulator’s long-term objective should be to narrow the financial gap between the top and lower tiers of English football. Greater redistribution should be a core component of its strategy.

V. Tighten ownership rules

The Bill replaces the different owner and director tests applied across English football with a coherent legal framework, which is to be welcomed. However, a tightening of the rules should be considered, in particular in relation to state ownership. State or state-related investments in football clubs have become increasingly common. The Bill allows, potentially even facilitates these by requiring the regulator to ‘have regard to the foreign and trade policy objectives’ of the UK government when making determinations concerning club ownership (clause 37(2)). Although state investments can provide clubs with capital, they also present significant risks for fans, local communities, and the game in general. The merits and demerits of their presence should, therefore, be considered carefully. Two dangers bear highlighting.

The first concerns geopolitics. Autocratic regimes have used sports investment as a tool for improving their public image and extend their political influence, a phenomenon known as ‘sportswashing’. Allowing them to own English clubs means allowing them to present themselves in a positive light in the world’s premier football competitions. While this – in a country committed to liberal democracy and human rights – should already raise alarm bells on principled grounds,¹⁸ it should also worry lawmakers for practical reasons. We seem, once again, to be entering of period of heightened geopolitical tensions. States engage in acts of aggression, commit war crimes, and

¹⁴ Clause 2(1) and (3).

¹⁵ This is true not just of English football, but across Europe; see Efe Ünsal, ‘How the UEFA Champions League divided Europe and harmed competitive balance within domestic leagues’ (2023) 24 Soccer & Society 492.

¹⁶ Clause 55(2)(a)(iii).

¹⁷ Kieran Maguire and Christina Philippou, *Still ill? Assessing the financial sustainability of football* (2023); Christina Philippou and Kieran Maguire, *Assessing the Financial Sustainability of Football* (2022).

¹⁸ See FairSquare, Letter to Secretary of State for Culture, Media and Sport (14 March 2023).

violate fundamental rights of domestic and foreign citizens. This will force the UK government to impose sanctions in some cases. Where these sanctions will be directed at owners of English teams, there will be significant knock-on effects for the club and local community. The difficulties following the measures taken against Roman Abramovich in 2022, a result of its proximity to the Russian government, should serve as a cautionary tale for the potential distress suffered by fans and the reputational damage done to English football.

The second risk concerns financial sustainability. State or state-related club ownership often comes with financial resources which, by far, extend those available to ordinary private owners. When state owners invest significant sums into their club, private owners have to match their levels of spending to be able to compete in the race for players and staff, which creates financial pressure on the entire football ecosystem. The Bill, at present, is only designed to ensure that clubs do not have too little money. It does not control whether clubs spend too much money. This is meant to be the role of the financial fairplay mechanisms that football governing bodies have put in place, such as the Premier League's Profit and Sustainability Rules and UEFA's Financial Sustainability Regulations. Yet, the enforcement of these mechanisms has been inconsistent. Poor enforcement enables overspending which, in turn, endangers the financial sustainability of the football pyramid. Therefore, backstop powers for the regulator should be considered in this area.