



Developing Football Regulation to Encourage Supporter Community Ownership in Football

**“It’s all very well football legislating to punish failure
but they are not regulating to prevent it.”**



About Supporters Direct

Supporters Direct was formed in 2000 as an initiative of the UK Government. Its goal is to 'promote sustainable spectator sports clubs based on supporters' involvement and community ownership'.

Supporters Direct aims to create the conditions in which supporters can secure influence and ownership of their clubs, and campaigns for the wider recognition of the social, cultural and economic value of sports clubs.

It believes that sports clubs and competitions are increasingly being put at risk by short-term vested interests, poor financial management and inadequate standards of governance.

It began its activities in English football but is now working in more than 20 different European countries, and also works in rugby league, rugby union and ice hockey. It has offices in London and Glasgow.

It is a community benefit society registered with the Financial Services Authority and owned by its member supporters' trusts.



Contents

Executive Summary	4
.....	
1 Introduction – Regulating from the top and the bottom	8
.....	
2 Football Finance, Regulation and Supporter Community Ownership	13
.....	
3 A New Regulatory Framework	29
.....	
4 Government’s role in reforming football	48
.....	

Executive Summary

This second Supporters Direct Briefing Paper focuses on the changes needed in the regulation of football in England, to foster the growth of supporter community ownership. It also outlines the role supporter ownership and involvement can play in strengthening the governance of football and its individual clubs.

Supporter community ownership brings greater accountability, reduces short-termism and aligns the interests of the club and its supporters.

Regulatory reform to date has been marginal, dealing with the symptoms of deep seated problems in English football, rather than tackling their cause: the unsustainable financial state of many clubs and the failure to align the interests of clubs and their

supporters and other stakeholders. Supporters Direct believe these can only be addressed by thorough-going structural reform.

‘Bottom Up’ and ‘Top Down’ Reform

- Supporters Direct propose that placing supporters at the heart of the game’s future is key to delivering both a ‘bottom up’ and ‘top down’ remedy to football’s governance problems.
- Supporter community ownership brings greater accountability, reduces short-termism and aligns the interests of the club and its supporters. All of these benefits would support the goals of the new regulatory framework we propose to address financial instability and poor governance in football, built around a club licensing system.
- Although current regulations are ‘ownership neutral’, the practical reality is that supporter community owned clubs have the odds stacked against them due to the ‘casino economics’ that dominate the game.

Financial Instability

- Attempts to date to regulate football’s finances has demonstrably not worked – 52 clubs that have been in the top 92 have suffered insolvency since 1992. The current framework is weak because it tends to punish insolvency rather than actively preventing it in the first place.

- The present method of ensuring football creditors are paid in full leaving others with less is as unsuited to tackling the root cause as it is morally indefensible.
- Clubs are often sustained by ‘soft loans’ creating a dependency and thirst for more loans rather than growing their business in a sustainable manner as would be required in most other sectors.

Fit and Proper Persons Test

- Because of the lack of proactive licensing, the current tests for owners and directors of clubs are ill-suited to preventing owners with unethical, dishonourable or ill-advised motives. It should form part of an enhanced licensing system which will better address these problems.

A Club Licensing System

A club licensing system similar to the Bundesliga and Northern Ireland should be implemented to provide a ‘financial health check’ which challenges poor financial control and unsustainable business planning.

- Supporters Direct advocates a more thorough-going reform to address these problems. It believes a club licensing system similar to the Bundesliga and Northern Ireland should be implemented to provide a ‘financial health check’ which challenges poor financial control and unsustainable business planning.
- Clubs must provide ‘fit and proper business plans’ to ensure sustainability and the integrity of the competitions by preventing ‘financial doping’.
- The domestic licensing system should enshrine key principles:
 - Promotion of financial and social responsibility, and balancing of the sporting, commercial and social objectives of clubs, through supporters’ representation on their club boards;
 - Licensing must work to bring costs and debt under control, and incentivise good financial practice to ensure clubs live within their means;

- Ensure each club starts the season with a clean bill of health, allowing other clubs and communities to trade with the club, confident it will not become insolvent;
- Address the problem of the loss of the game’s asset base by preventing the sale or mortgage of grounds to support revenue losses.
- At the same time, Supporters Direct calls on football’s governing bodies and government to promote supporter community ownership, as more sustainable forms of ownership.

Supporter Shareholder Interests

- Following the Companies Act 2006, clubs should take account of stakeholders’ legitimate interests and reflect them in the way the clubs are managed, particularly by ensuring a club’s long-term survival is never threatened by its short-term activities.

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- Supporters’ investments in clubs are overwhelmingly emotional and long-term, and much less focused on financial returns than is the case with other investors. Currently, company law does not allow for these varying motives to be separately recognised.
- Supporters Direct believes that a licensing system could require clubs to create a ‘supporter class’ of share carrying certain vetos and other rights over some of the key issues in terms of a club’s assets, such as preventing the sale of club grounds.
- In addition, supporters’ trusts could be given certain embedded rights and a role in a club’s governance.
- Introducing asset locks – a means by which community benefit societies can safeguard assets for the good of the community – is another way of protecting the long term interests of clubs.

How can this be achieved?

- The foundations already exist through the membership system operated by the FA and leagues.

It would be better for change to be driven by the football authorities themselves, but there is a role for government.

- The Financial Regulatory Authority (FRA) can be strengthened and be responsible both for implementing and monitoring the new regulatory framework with specific reference to a licensing system.
- It would be better for change to be driven by the football authorities themselves, but there is a role for government.
- In order to fulfill their pledge to encourage increased supporter community ownership, government can promote reform by proposing a Football Regulatory Bill with a 'sunset clause' that allows football time to adopt a robust and appropriate licensing system, and thus negate the need for enforcement – while providing power for ministers, should the game be unable or unwilling to take the necessary steps.

1

Introduction – Regulating from the top and the bottom

This is the second Supporters Direct briefing paper and concerns proposed changes to the regulation of English football. Whilst Supporters Direct's *Briefing Paper No.1* is focused on the role that Government can play in encouraging supporter community ownership¹, much of what that paper suggests is also achievable – and would arguably be much better implemented – via a reformed regulatory framework of English football. This paper outlines how Supporters Direct believes this can be achieved, and why it should be initiated.

52 clubs who are or have been in the top 92 have suffered from insolvency events since the formation of the Premier League in 1992.

In *Briefing Paper No.1*, it was suggested that Parliament enact a Sports Law to create specific corporate forms for sports clubs, including provisions for stakeholder representation and ownership. However, as seen in the Bundesliga, the FA (as the national

governing body) could work to achieve a similar outcome through its own regulatory frameworks.

The dominant view within the Football Association, Premier League and Football League is that increased regulation regarding club ownership is unnecessary and likely to be counter-productive.

1 This term builds on work by research co-operative Substance that identified supporters as communities that are routinely neglected within clubs' formulations of community work (see Brown, Crabbe and Mellor (2006) *Football and its Communities*, London: Football Foundation). Supporter community ownership is used to mean instances where supporters have democratic and constitutional means to influence the club's operations and strategy. The most common means would be through a significant stake in the hands of a democratic supporters' trust (or its members), with significance being where the club has no dominant owner or owners who make key decisions and where the trust's stake gives them real influence at boardroom level, up to and including having a majority stake in the club and on the board of directors.

Supporters Direct's preference is for models based on co-operative and mutual structures, with a club board accountable to its members, but with a wide variety of circumstances at clubs, it is recognised that there are other structures that might deliver similar features. Most important of these is a board accountable to an ownership base featuring strong representation from the supporter base, with no dominant owner or dominant smaller group of shareholders, which can encompass clubs run as members clubs or companies limited by guarantee.

Whilst supporter community ownership is not prohibited, the overriding belief is that ultimately, it is a matter for clubs how they are owned, and regulators have pronounced themselves and their rules to be neutral on the matter.

Whilst some parameters on club ownership have recently been strengthened – restrictions on dual ownership and the Owners and Directors (formerly Fit and Proper Persons) tests, for example – there remains a *laissez faire* approach on the part of the game’s regulators in regards to types of club ownership. This is predicated on the notion that the optimal financial running of clubs (and the game as a whole) is best achieved through the unencumbered action of club owners.

This is not borne out by the financial performance of clubs, which instead attests to a chronic and deep-set financial instability throughout the game: 52 clubs who are or have been in the top 92 have suffered from insolvency events since the formation of the Premier League in 1992. This strongly suggests that even the interests of shareholders – not to mention supporters and the wider community – are not being fulfilled by those that run clubs.

Short-term success is prioritised over longer-term sustainability by many club owners, contrary to their role as custodians. Imprudent financial risks are taken in the pursuit of glory, in a chronically unstable system of competition. This means that administration, CVAs and a merry-go-round of ownership have become the norm, not the exception. Clubs that take risks win trophies, and without action from the centre to regulate this ‘tragedy of the commons’, success and sustainability have become opposite poles, rather than symbiotically linked.

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The impact of this on supporters – the financial and cultural lifeblood of the game – has been two-fold. On one hand they have *de facto* been excluded from ownership and from having a real say in what happens to their clubs.

Even where supporters have taken ownership of clubs they find that the odds are stacked against them, trying to run their clubs within their means but facing other clubs prepared, and allowed, to play casino economics with their futures.

Additionally, this un-level playing field means significant damage is done to the cultural fabric of the game and the social value that it can generate. Research commissioned by Supporters Direct demonstrates that club-led initiatives which can produce wider community benefits – inclusive ticket policies, actions to encourage local business, preferential local employment,

and environmental improvement measures – are harder to deliver because of the unstable financial structures that the absence of regulation on ownership and the running of clubs generate.

However, an alternative regulatory regime is not just about countering the negative impacts of a *laissez faire* approach. Supporters Direct’s social value research² emphasised the benefits which supporter community ownership can bring. These include:

- A longer-term approach that embraces the interests of a wider group of stakeholders and which better aligns differing interests;
- More in-depth and organic relationships with local communities;
- Significant business advantages, including the development of strategic relationships with local authorities, and benefits with regard to facility development;

A more robust regulatory structure in football is not just a means by which supporter community ownership can be brought about; supporter community ownership has a major part to play in ensuring a well-regulated game.

- Greater ‘buy-in’ from supporters, including volunteering commitments;
- Helping to address the ‘democratic deficit’ by involving ordinary people in decision-making over the future of institutions that are important to them.

The regulation of football in England, and in the UK more broadly, stands in contrast to that which is found elsewhere in Europe. In countries such as Germany, the benefits that supporter community ownership can bring are recognised and enshrined in the regulatory frameworks.

However, these benefits are recognised as going beyond individual clubs and their communities. By placing clubs in the hands of supporters, significant benefits are realised in regards to the regulation of the game as a whole.

A more robust regulatory structure in football is not just a means by which supporter community ownership can be brought about; supporter community ownership has a major part to play in ensuring a well-regulated game.

All regulation is ultimately an attempt to make clubs act in a way more in keeping with the good of the game (and the good of the club) in the

2 Brown, A et al, (2010) *The Social and Community Value of Football*, London: Supporters Direct.

Case Study – FC Schalke04

Whilst German clubs are subject to the Bundesliga's annual issuing of licences, the ability and power of fans at club level was critical in changing the club's course under then-manager Felix Magath.

Having taken an unheralded team to a surprise runners-up spot in 2009-10, Magath sought increasing control over the financial performance of the club, in particular to give him a level of control over player transfers which had hitherto been resisted by the club in respect to previous managers.

Over the course of the 2010-11 season, rumours about the club's precarious finances were critical in activating fan protests against Magath (considering that the club had just qualified for the quarter-finals of the Champions League, disaffection with team performance cannot be seen as the root cause), culminating in his departure in March 2011.

Whilst the financial path the club was embarking on might have caused problems with the licence, the club has begun to change course thanks to local pressure on accountable officials at the club level, rather than as a result of central diktat which would come into effect later on by which time more damage would have been done.

short, medium and long-term. Having clubs, boards and officials that are accountable to local stakeholders, including supporters, is a critical factor in improving the overall governance of the game. It promotes transparency, responsible ownership, stable finances and alignment of interests from the bottom up.³

3 The ability of supporter community ownership to provide accountability over club officials is dealt with at greater length by Dave Boyle in the pamphlet *Barca and the Future of Club Ownership* published by Co-operatives UK in 2010.

Essentially, supporter loyalty prevents fans from exiting their relationship with the club that in other sectors would lead them to cease to be customers. As a result, club finances are not damaged by poor performance, and executives are less likely to change policy. When one considers that the shareholders are also often the executive decision-makers, then clubs constructed as private limited companies are insulated from serious accountability for their actions by the people who are affected by them. This cycle of poor performance is a critical issue for sport, and underpins much of the public concern that fuels debates about regulation. By contrast, supporter community owned clubs have a mechanism for the supporters to hold the club to account, bringing improvements they are currently unable to achieve. See <http://www.uk.coop/barca>

Supporter community ownership ensures that the club is owned by a body who are unequivocally focussed on the value of the stadium as the club's home, rather than as an asset, who are much less likely to sacrifice the medium-term-future for short-term glory.

Ownership is both 'out in the open' and democratic, involving hundreds or thousands of supporters, reducing the need for fit and proper persons tests. Clubs are less likely to go into debt – those owned by community benefit societies cannot go into administration – and board officials are more likely to act as custodians than gamblers. This helps to reduce the need for top-down measures such as the football creditors rule and points deductions for insolvency.

Introducing measures which can promote supporter community ownership creates a network of clubs that can dovetail with FA structures to improve governance from above and below.

2

Football Finance, Football Regulation and Supporter Community Ownership

2.1 Mutual Suspicion

The preferred method within the supporters' trust movement for club ownership is to use the Community Benefit Society (CBS), a corporate vehicle used within the co-operative movement, based on the one-member, one-vote structure.⁴

However, the Football League's articles of association actually prevent a club from operating as a CBS, as all member clubs must be registered as companies under the Companies Act. The Premier League does not explicitly state clubs must be companies *per se*, but requires Memorandum and Articles of Association and a certificate of incorporation from clubs. These terms relate to the specific documents used within company constitutional arrangements and the proof these have been legally recognised; whilst a CBS has its own version of these documents, they have different names, and so whether they would meet the Premier League criteria is unclear.

To not allow a corporate form because it has a hard legal edge in keeping with the League's stated preferences seems perversely contradictory.

For the Football League, the stated reason is the different insolvency provisions relating to mutual societies. In the event of insolvency, a CBS must either be wound up, or merged with another CBS; unlike companies, there is no provision for corporate

rescue through administration. Given the levels of insolvencies and league rules (such as points deduction penalties) which seek to *limit* the number of clubs going into administration, to not allow a corporate form because it has a hard legal edge in keeping with the League's stated preferences seems perversely contradictory.

Furthermore, this position does not appear to take into account the greater difficulty a CBS has in taking on the kinds of debts which would lead to insolvency in the first place. As a CBS cannot easily issue equity in lieu of debt, it cannot be acquired in insolvency in the same way as a normal

4 Industrial and Provident Societies can be classed as either community benefit societies or bona fide co-operatives. Impending secondary legislation will allow them to be called Community Benefit Societies and Co-operative Societies respectively, and throughout the series of papers, this new term is used in anticipation of this change. Supporters Direct and all the supporters' trusts using its model rules are community benefit societies.

company, and so responsible lenders will extend credit either on the basis of either the value of any mortgaged assets (which a CBS is much less likely to do given the role of the stadium in the club's identity), and a strong commercial performance that shows strong performance to service repayments.

This is in contrast with club-companies, many of whom owe debts to current or former owners as much as to financial institutions. In all cases, the comfort of the security of the asset has arguably contributed to a decline in lending standards, further contributing to the amount of imprudent debt in the game.

Finally, as argued in our *Briefing Paper No.1*, this restriction on a CBS owning a club may present additional barriers to supporters' trusts should they be allowed to purchase clubs under 'right to buy' legislation.

In practice, any supporters' trust in a position of majority control would not be able to convert the club into a CBS and would remain as majority shareholder of the club-company. Any club operating as a CBS that achieved promotion to the League would be required to create a subsidiary limited company in order to meet league rules.

If co-operative structures were more common, fewer clubs would go into administration, thus reducing the need for regulatory measures dealing with insolvency.

In the latter circumstance, the club would be a wholly-owned subsidiary of an CBS, with the CBS itself and one nominated member of the CBS board acting as the two directors required by law. This places responsibility for the affairs of the club with the CBS

board, avoiding the difficulties which have arisen due to conflicting duties on people who were directors of both a club and a supporters' trust. Even so, despite the possibility of the above work-around, the restriction remains symbolic in two respects:

- It suggests leagues are not attuned to the potential that CBS clubs could bring, such as open, responsible governance, more stable finances and increased social value from football;
- If co-operative structures were more common, fewer clubs would go into administration, thus reducing the need for regulatory measures dealing with insolvency. This appears to be an outcome the League wishes to see more of, yet as evidenced by this rule it is a bullet they are not yet prepared to fully bite.

For these reasons, it is an area where Supporters Direct would welcome a dialogue with the Football League.

2.2 The Absence of Financial Regulation

Aside from the position on mutual ownership structures, football's rules are said to be 'ownership neutral',⁵ as they express no specific preference for the any form of ownership for clubs.

However, whilst in practice supporter community ownership is not prohibited, the absence of regulations on financial matters means the wider framework encouraged by those rulebooks is actively detrimental to it.

The main effect of the weakness of regulation on ownership and of the financial operations of clubs by their owners is financial instability. Whilst both FA and League regulations seek to punish clubs that are insolvent, the regulations don't actively seek to prevent it in the first instance and are reactive.

Dr. John Beech of Coventry University has conducted extensive research⁶ into the financial state of clubs. He has concluded that three characteristics of contemporary football are financial instability, insolvent trading and indebtedness of clubs. His research concludes:

- There is a chronic instability in the finances of clubs. 81 clubs who are or have been in the top five English divisions have suffered from insolvency events since 1986. Because football clubs tend to enter Company Voluntary Arrangements (CVAs) as a way out of administration, such events tend to lead to changes in ownership. Beech says that 'the rate of insolvency is unmatched in any other business sector'.
- Most clubs operate with a trading deficit in pre-tax profit/loss accounts. Beech says that in five seasons from 2001/02 to 2005/06 the 92 clubs in the top four divisions lost a total of £1bn (although around one-quarter was Chelsea's 'benefactor' spending).
- Indebtedness is endemic. Beech reports that aggregate debt levels in the Premier League alone are over £3bn.

Beech goes on to argue the only way football has been able to sustain as many clubs as it has is because of the provision of soft loans by benefactors. Whilst this allows some clubs to continue trading when they would

5 Flowing from that conception, they do not regulate offshore ownership of clubs, control the use of debt used in purchasing clubs, require corporate entities to conform to UK levels of reporting and transparency, and rather than those of the place where they are registered, and many other issues. Whilst these are major concerns, they do not strictly relate to the issue of supporter community ownership and are not discussed in more detail for that reason.

6 Beech's work and other associated resources can be found at <http://footballmanagement.wordpress.com/research-resources/>

otherwise be insolvent, it also means many clubs do not live within their trading means and creates instability as such loans are inevitably called in at some stage, such as when a benefactor withdraws funding.⁷ Even if they are not, it creates a dependency for the club that makes the club's reliant on the continued provision of those loans, which is completely out of their control.

For example, the current recession has hit the property and construction sectors very hard, and so clubs reliant on individuals with business interests in those sectors have become unstable as a result. Sport has often been held to be recession-resistant, with its revenues holding up well in downturns thanks to supporter loyalty, but that advantage is lost when set against the problems caused by the game's exposure to business cycles in other sectors of the economy.

German clubs have a much stronger commercial performance than comparable English clubs because they must, having no recourse to benefactor funds in the same way thanks to the regulations on club ownership.

Furthermore, the reliance on subsidy can inhibit creativity, as club executives become used to a culture where the club makes annual losses that are continually supported through shareholder loans. German clubs have a much stronger commercial performance than comparable English clubs because they must, having no

recourse to benefactor funds in the same way thanks to the regulations on club ownership. By contrast, English clubs might want to increase revenues and try to do so, but salvation will more reliably arrive from their sugar-daddy's cash injection – and everyone knows it.⁸

Compounding this – and in turn feeding it – is the problem of stadia and other fixed assets. Whilst there have been too many instances where clubs have lost assets through the deliberate design of their owners, more common is where clubs have run annual operating losses for many years, subsidised by soft loans. Given the collapse of the transfer market, the reality is that most clubs will never be able to service those debts from normal trading, and so the club's stadium and other fixed assets have in many cases been transferred to the creditors to wipe out those debts.

7 Perhaps the most stark example of this was Gretna FC, who having been propelled up the Scottish football system thanks to the largesse of Brooks Mileson. When he suffered a stroke and became incapacitated, the funds ceased overnight, as did communication with the club. The club was soon in administration, and was liquidated some weeks later.

8 When he was CEO of Chelsea, Peter Kenyon regularly stated they were on schedule to become self-sufficient and decrease the need for support from Roman Abramovich; the date set for this was around 5 years hence; Kenyon's claims were increasingly ridiculed as the annual report each year documented how little progress the club ever made towards this goal.

Case Study – Leyton Orient FC

In 1995, Leyton Orient Chairman Tony Wood's coffee-growing business was destroyed by civil war in Rwanda and he put the club up for sale for £5. Barry Hearn bought it, and financed the shortfall between the club's spending and its income by lending money to the club via his holding company, Matchroom Sport.

As of June 2009 the debts owed to Matchroom were £3.4m and so Hearn transferred the leasehold on the ground to his ownership, in exchange for wiping those debts. Matchroom paid £6m for Brisbane Road, but wiped off the £3.4m, effectively leaving the club with £2.6m, and as tenants on a 20-year, no rent for five years lease. After five years (2014), the club will be required to pay rent of £180,000 per year, an amount which is subject to change after five years. If the ground is sold before 2030, Hearn will split the profit (i.e any excess over £6m) 50-50 with the club.⁹

The root cause was the unsustainable cost base of football, which continue to accrue despite the historic debts being wiped out; the club made a loss to June 2009 of over £1m, falling slightly to just under £800,000 by June 2010.¹⁰

Research by Supporters Direct suggests that since 1992, in the top five English divisions:

- 21 clubs have lost their stadiums to holding companies;
- 10 have been sold to private individuals or families;
- 19 have been forced to sell or been evicted.

In 2001, the Football League executive proposed a rule change to its member clubs to prevent them selling their grounds without permission of the league, with permission conditional on the club securing another ground nearby. The proposal fell, highlighting both the fear clubs had at losing the potential to use grounds as collateral without permission, and also the fact that many of the people voting against such a rule later took advantage of that failure to take ownership of the ground themselves in lieu of debts they themselves had incurred for the club.

Arguably, because owners know that in the stadium and fixed assets there is a way to cut their losses (or even recoup them), they continue to subsidise losses, which continues to raise the cost base, and which otherwise might fall

9 Figures from David Conn's piece in *The Guardian* on 18/02/09: <http://www.guardian.co.uk/football/blog/2009/feb/18/barry-hearn-leyton-orient-brisbane-road>

10 <http://www.leytonorient.com/page/NewsDetail/0,,10439~2332487,00.html>

if demand declined.¹¹ Demand rarely falls, though, as benefactors find new funds, or clubs find new benefactors.

Where owners are unable or unwilling to support the losses, insolvency is the next step, which, thanks to the rules within football regarding football creditors, means it is often local community businesses or charities that are worst hit in CVA arrangements, being paid a fraction of what they are owed whilst ‘football debts’ are met in full. This is discussed in more detail below.

2.3 Instability and Supporter Community Ownership

The effect of the structural weakness in football’s finances is not only illustrative of the underlying poor financial health of the game; it also represents a barrier to supporter community ownership in football.

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Supporter community owned clubs are unable to take on the levels of debt (soft or otherwise) that other clubs can, nor can they be restructured under a CVA in the same way as limited companies. As such they must operate sustainably, as the alternative is not administration, but possible dissolution.

As a result, there is a systemic bias towards owners who can deploy cash quickly; this can support urgent payments in the short-term. This works as much against supporters (individually and collectively) who have smaller stakes in clubs. As the system relies on cash injections against a backdrop of looming insolvency, smaller shareholders who are unable to meet the club’s voracious cash needs are sidelined, with their influence either diluted through rights issues, or wiped out entirely.

This is also the major reason why those clubs which floated on various exchanges in the 1990s eventually de-listed, as the shares became concentrated in the hands of private owners who provided cash support to levels that existing shareholders were unable or unwilling to match; with only one floated club ever paying dividends, the appetite of external investors was limited.

11 *Supporters Direct Briefing Paper No.1* discussed the role the tax system plays as a form of implicit subsidy to club benefactors by enabling them to write off the losses run up by clubs against tax on profits generated in other parts of the corporate structure. Recommendations are made regarding ending that form of taxpayer support to loss-making clubs, and whilst this issue has a major bearing on the continued injections of funds by benefactors, as it is a matter for Government, it is not discussed here.

Case Study – Fans Forced to Sell

The Owls Trust at Sheffield Wednesday FC owned 10% of the club, which had been gifted to them as part of an earlier restructuring of the club in the face of financial problems which continued to beset the club for the next decade. Those issues came to a head in 2010, and unable to provide their own cash injection to contribute to the restructuring of debts, the supporters' trust, along with all other shareholders in the same position, lost their shares to the new owners who pledged they possessed such means.

Some years before, the same new owner, Milan Mandaric, took over at Leicester City, where he forced all existing shareholders to sell upon having other shareholders accept his offer to inject cash into the club. Small shareholders at Sunderland FC lost their long-held shares in the club when Niall Quinn's Drumaville Consortium promised to make investment in the club in return for total control; their shares were eventually sold to the current owner, US businessman Ellis Short.

These instances link to the wider issue of supporters with small shareholdings being forced to sell under current company law provisions. Following the acquisition of a majority holding in Arsenal by Stan Kroenke, there was speculation about whether he would force small shareholders – especially those associated with the Arsenal Supporters' Trust and their Fanshare scheme – to sell their shares to give him sole control. The refusal (at the time of writing) of minority shareholder Alisher Usmanov to sell his equity means that Kroenke cannot use the provisions in the Companies Act to acquire all the shares.

The issue brought home the same point that small shareholders at Manchester United raised in 2005 when forced to sell to the Glazer family: that the legal framework merely ensures shareholders get financially compensated for the sale of their interests; it does not offer protections for those who bought shares for non-financial reasons to retain them, such as ensuring transparency or accountability to a wider stakeholder community.

Whilst such measures could be addressed by a Sports Law (discussed in *Briefing Paper No.1* and below), they are perhaps more readily addressed through football's rules, and recommendations are made on this issue in Section 3 in respect of 'supporter shares'.

Case Study – Brentford

When Bees United (the Brentford FC supporters' trust) helped save Brentford FC through buying a 65% majority stake, they were lent £0.5m by the local authority to do it (a debt which they have had to service since). However, it was the more routine pressures of keeping a club's head above the choppy waters of league football that has proved a more fundamental issue.

'When the trust was managing the club, we were losing £300,000-400,000 a year just to stay in League Two,' says Donald Kerr, Director of Bees United. With a membership of 2,500 raising around £100,000 a year, gates averaging 6,000 in 2009/10 and with severe restrictions on revenue generation at their traditional Griffin Park ground, that was not sustainable.

Although proud of their supporter ownership, and recognising the value it had brought to both the club and the local area, in 2010 Bees United members voted to effectively relinquish their controlling state.

'The madness that exists – unsustainable wages and all the rest – has to stop in order for clubs like us to be proper clubs.'

A wealthy fan, Matthew Benham, had provided £500,000 since the supporter takeover, and in 2010 he proposed to make available a further £3m in the form of a loan based on preference shares until

2013, at which point he can exercise a right to convert this debt to equity, ending the supporters' control.

'The deal with Matthew Benham was a difficult one to negotiate, but it wasn't a difficult decision to make,' says Brian Burgess, Managing Director of the Brentford Stadium Company. 'The decision was put to members, with about 73% turnout; of those 99% voted in favour.' Part of the reassurance supporters received was a 'golden share' that gives the trust a veto over the sale of Griffin Park or the new ground, something that helps enshrine significant supporter community influence even when giving up ownership control.

'If [Matthew Benham] were to want to sell the ground, and the supporters' trust don't think it's reasonable – and there are some tests to determine what is reasonable – they can put it to a vote of their members,' says Burgess.

However, ultimately both Kerr and Burgess believe the only solution lies in reformed regulation of the game. ‘Lack of access to financial clout is the main disadvantage of supporter ownership,’ says Burgess.

Kerr concludes that ‘the madness that exists – unsustainable wages and all the rest – has to stop in order for clubs like us to be proper clubs. We can keep plugging along and doing our best, but ultimately something needs to happen structurally so that the game comes towards us rather than us just getting submerged beneath this mass of debt that nobody can sustain. It’s all very well football legislating to punish failure but they are not regulating to prevent it.’

This overarching framework has led supporter community owned clubs to either change their ownership structure in order to take on finance to ‘compete’, or else struggle to compete with other clubs operating unsustainably. This situation is exacerbated by the diminishing relative redistribution of income between leagues year-on-year.

The lack of a more equitable redistribution of football’s huge wealth between the leagues means that the cost base rises hugely between leagues as clubs progress up. This happens more quickly than income can rise – from increased attendances, sponsorship or distributions from central funds such as media rights. It encourages promoted clubs to bet – overspend – on achieving success (which for most means not being relegated back down again). Removing the imbalance would encourage supporter community ownership by ensuring that on-field success is not a cause of financial instability.

2.4 Controlling Financial Instability

Concerns over the financial sustainability of many football clubs have been raised for a number of years. However, the attempts of the leagues to control financial mismanagement have focused on punishment and deterrence rather than regulation, as noted by Donald Kerr.

In response to the wave of insolvencies in following the collapse of its TV deal with ITV Digital, the Football League introduced ‘sporting sanctions’ where all clubs entering insolvency arrangements were deducted 10 points. The Premier League followed suit, with a 9-point penalty for the same.¹²

12 Rule C67 *Premier League Handbook* and Clause 12.3 *Football League Handbook* respectively; the difference is due to Premier League clubs playing 38 matches a season, as opposed to 46 in all Football League divisions.

The aim is to punish clubs who have mismanaged their financial affairs to the point where they need to use insolvency arrangements, and so act as a deterrent to others. For a variety of reasons, this is as conceptually flawed as it has been ineffectual.

The timing between clubs benefiting from overspending and being punished for it is often longer than a single season; a club can therefore get promoted before hitting the buffers later on. The penalty comes too late for those teams essentially cheated the previous year by a club playing by different financial rules.

The more clubs owned by their supporter community, the fewer will go into debt and the less frequently clubs would use soft loans to support negative cash flows.

Furthermore, the individuals who determine to set the club on this path are invariably no longer involved by the time it unravels, as they will invariably move the club onto others, who will have to manage the consequences. As a result, those

directors who act imprudently are long gone by the time the club is penalised collectively. To add insult to injury, the Fit and Proper Person Tests mean that the individuals who act correctly will be deemed to have been involved in an insolvency event which counts against their record, whilst those who did the real damage are free to do so again.

The penalties are a classic case of bolting the stable door after the horse has bolted, and because the deduction of points often propels a club into relegation places, means that the impact is to worsen the club's financial position.

Like much of the game's financial regulatory framework, it deals with symptoms reactively, rather than the causes proactively, seeking to address the consequences of overspending by clubs rather than preventing it in the first place. Supporters Direct believe a club licensing system, as proposed in Section 3, is the most effective way to tackle this problem.

In addition, a more 'organic' solution to the issue of financial instability in football is simply through greater supporter community ownership. The more clubs owned by their supporter community, the fewer will go into debt and the less frequently clubs would use soft loans to support negative cash flows. However, there is a catch-22 situation; whilst supporter community ownership will contribute to greater financial stability, that stability is also a necessary condition for its achievement in the first place.

2.5 Football Creditors

The most striking example of the game tackling the symptom rather than cause is the ‘football creditors’ rule’, which has become a highly contentious measure following a series of claims that have been brought by HMRC in respect of tax owed by football clubs entering administration.¹³ According to Premier League rules C.57-66 and Football League articles of association, a club can only exit from administration by agreeing a Company Voluntary Arrangement (CVA) with its creditors. In order for the CVA to be approved by the Premier League, all ‘football creditors’ must be paid in full; non-football creditors receive only partial payment of the debts owed to them out of the funds remaining once the football creditors have been paid. Under Rule C.53, football creditors are defined as: other football clubs, the Premier League and related companies, any pension or life assurance scheme administered by or on behalf of the Premier League, the Football League and its related companies and the Football Foundation. If a club fails to pay these football creditors in full, it is expelled from the League.

The aim of the rule is to ensure that a club cannot benefit from its own profligacy by, for example, buying a player it cannot afford, going into administration and then only paying the selling club a fraction of the player’s real value to the detriment of that club’s financial position whilst themselves having reaped the benefit of the services of better players whom they could not actually afford.

However, preferential treatment of the football creditors means that less remains for all unsecured creditors. Clubs with cash flow issues have a history of not paying PAYE on player salaries and VAT on their sales in favour of paying more immediate costs, and so have essentially used the taxpayer as an overdraft of last resort leaving the HMRC as a major creditor (the same approach has also often been taken towards suppliers in the local community, particularly local suppliers of goods and services).

The football authorities contend the rule protects the game because it ensures the financial problems of one club do not start a chain reaction of insolvencies amongst other clubs because of sums still owed by the insolvent club on player transfer deals. This may well be the case in some circumstances given the present financial architecture of the game, but it another example of football is tackling the symptom rather than cause.

Furthermore, it contributes to an inflationary pressure within the game, where the majority of the costs that need to be restrained down have an

¹³ The most high profile of which involved Portsmouth FC, Re Portsmouth City Football Club (In Administration) [2010] EWHC 2013 (Ch).

artificially high floor built into them; put simply, all the people whose co-operation is needed to reign in expenditure have strong incentives to do the opposite. It effectively acts as a guarantee to clubs and players that regardless of how unlikely it might seem that they will be paid in full, they are guaranteed it, with the loss being borne by the non-football creditors, overwhelmingly locally based.

Case Study – Portsmouth

When Portsmouth went into administration in 2010, they had a total debt of over £128m, of which £500,000 was owed to trade creditors, charities and public sector bodies in the Portsmouth postal. The CVA gave a dividend to unsecured non-football creditors of 20% of the money owed, so the net impact of the club's meltdown locally was to deprive local enterprises of £400,000 in the midst of a recession.

Even so, thanks to the parachute payments received on relegation from the Premier League, these local creditors did considerably better than those at other clubs with no such largesse to benefit from; payments in the region of 1% have been common in many of the all-too-frequent insolvencies affecting football clubs in recent years.

Portsmouth's local creditors included:

<i>BMI Hospital</i>	<i>Portsmouth City Council</i>
<i>Chichester College</i>	<i>Portsmouth FC Supporters' Club</i>
<i>Cowplain Community School</i>	<i>Portsmouth Students' Union</i>
<i>Eastleigh Borough Council</i>	<i>Priory Community Sports Centre</i>
<i>Everest Community College</i>	<i>Ryde School</i>
<i>Fareham Borough Council</i>	<i>Scout Association</i>
<i>Fort Hill Community Centre</i>	<i>St John's Ambulance</i>
<i>Friends of Ropley School</i>	<i>St John's College</i>
<i>King Edward VI School</i>	<i>The Littlehampton Community School</i>
<i>Nightingale Surgery GP</i>	<i>The No.1 Football Academy</i>
<i>Nuffield Health –</i>	
<i>Bournemouth Hospital</i>	
<i>Hampshire Hospital</i>	

And, although clubs have no option but to comply with this rule if they enter administration, it creates a disconnection between the club and the community in which it is based when the multi-million pound salaries of the players are met in full but the wages of those who have supplied the clubs are left unpaid.

The preferred alternative is for the football authorities to abolish the rule and in its place have a fully-fledged licensing system which involves due diligence on clubs to give them a ‘clean financial bill of health’. However, supporter community ownership also offers a solution as it encourages clubs to be run within their means, making insolvency less likely in the first place.

2.6 Fit and Proper Tests, Owners and Assets

The wellspring for the Fit and Proper Person Test being introduced was increasing concern about the conduct of directors at clubs such as Chesterfield and Hull City. Premier League Rules D2.3-D2.11 and Appendix 4 of the Football League Rules contain what is usually popularly referred to as the ‘Fit and Proper Persons Test’, and contain further prohibitions on specific classes of prospective club owners and directors.

The rules of the two Leagues are broadly similar and aim to prevent people who do not have the necessary integrity from holding key positions in football clubs. In particular, those who will not be considered to be a ‘fit and proper’ person to own or act as a director of a football club include anyone who:

Is prohibited by law from being a company director;

- Has committed an offence resulting in a prison sentence of 12 months or more, or any offence of dishonesty, either in the UK or abroad;
- Has been declared personally bankrupt;
- Has been a club director during two instances of insolvency;
- Has been banned from being involved with the administration of sport by a governing body or one of the UK’s Sports Councils;
- Has been struck off by their professional regulatory body;
- Is on the sex offenders’ register;
- Has been found guilty of betting on football matches in contravention of FA Rules.

A major problem is due to tests being couched in objective terms, and focus on a series of crimes and misdemeanours that are deemed to be incompatible with involvement in club ownership or direction. However, whilst they prevent those with certain relevant criminal convictions from becoming owners, they do little to prevent those with unethical goals, because the absence of a more subjective, proactive regulation leaves little by way of deterrent and the tests do little to probe the intentions of prospective owners, nor their abilities or the realism of their plans.

Case Study: York City and bringing the game into disrepute

In 1999, York City FC transferred ownership of its Bootham Crescent stadium to a new holding company, Bootham Crescent Holdings (BCH), all with the permission of the FA. In 2001, the majority owner of the club and BCH, Douglas Craig, sold the club to John Batchelor and 10% of BCH to a housing company.

As a result, the current regulatory framework deems swearing or using the referee's toilet to bring the game into disrepute, whilst stripping a club of its long-held assets for private gain is not.

At the time, the football club had a 25-year lease to play at the stadium, but Batchelor promptly accepted £400,000 to accept a new lease from BCH with a one-year term, upon which the housing firm lodged plans for 93 houses on the site of the stadium. The club saw

none of the money paid for either the land, or the renegotiation of the lease. All of this was entirely legal, and allowed under football's rules, even when the net effect was that a football club had to find £1m to purchase an asset built by supporters in the 1930s over which it had previously had complete control.

Despite their action clearly being contrary to the best interests of the club, neither Craig or Batchelor were pursued by football and banned for their actions and so were free to undertake similar acts elsewhere; until his death in 2010, Batchelor was linked with several clubs including Stockport County, Mansfield Town and Chester City.

The FA remains unwilling to pursue former owners and directors for acts that, whilst legal, are clearly out of step with the best interests of the game. As a result, the current regulatory framework deems swearing or using the referee's toilet to bring the game into disrepute, whilst stripping a club of its long-held assets for private gain is not. Most supporters would consider that a wrong-headed approach, but it is a reasonably predictable outcome of a regulatory system designed by club owners without influence from players or fans.

Furthermore, by couching the behaviour predominantly in terms of morality or criminality, it fails to address a much larger danger to clubs where owners undertake perfectly legal behaviour to asset-strip them, either as part of a pre-defined plan, or more often, as an exit strategy after a ruinous experience brought on by the financial instability described above.

Given the financial problems of many clubs, this will remain a major fear, as many clubs find the value of their assets is significantly greater than their value as poorly-resourced football clubs. Whilst this could be prevented through proactive regulation, the example of the Football League proposal in 2001 above demonstrates the difficulties of this apparently simple problem.

Case Study – Asset Locks

Clubs themselves can safeguard the use of assets for community benefit through the imposition of an asset lock. Supporter community ownership offers an example of best practice in this regard. As a CBS can impose legally binding and irreversible restrictions on the disposal of club assets, if the society realised assets in a football club it ran, or sold shares it owned in a company which ran a football club, the proceeds would have to be used for community benefit and could not be divided among the members. This removes any personal incentive for members to sell, and focuses their minds in any decision that has to be made on what would be best for the community.

It is, however, possible for a CBS to convert to a company and for the members then to divide assets between them; a process that came to be known as demutualisation. For that reason, some supporters' trusts that have acquired clubs or interests in clubs have been through the statutory procedure to adopt an asset lock.

The effect of the asset lock is to impose a permanent block on the distribution of assets to members; if the trust itself ceases to exist, its assets have to be transferred to a charity or asset locked organisation. It would seem advisable that the acquisition of football clubs by supporters should take place through an asset-locked vehicle – certainly it is difficult to see how regulatory or statutory support for supporter community ownership could be justified on any other basis.

FC United of Manchester have introduced an asset lock ahead of developing their new stadium and community sports complex in order to enshrine the community benefit function of their new asset; discourage 'carpet baggers' who may view the club as a more attractive proposition with a valuable physical asset; and prevent distribution of profits from any sale to members.

One way forward might be for local authorities to list clubs as 'Assets of Community Value' under the provisions of the Localism Bill as argued in Supporters Direct's *Briefing Paper No.1*. Alongside this, local authorities can

also use planning and other local regulation to prevent alternative use of football stadia sites in order to discourage property speculators.

Even so, supporter community ownership offers the strongest way of reducing the need for additional regulation. By introducing ‘asset locks’, supporters’ trusts that own their clubs can prevent the stripping of assets or the use of them to secure unsustainable loans.

Supporters Direct recommends that football’s regulators require clubs to put such restrictions in place in order to protect the club’s assets for longer-term community use. Similar provisions used to be in place in the FA’s former ‘rule 34’ detailed by David Conn in his book *The Football Business*, which regulated the extent to which clubs could be used for personal enrichment, including provisions for the use of club assets.

The rule was quietly dropped by the FA following an internal review in the late 1990s, which deemed that the rule’s ability to achieve its goals had been undermined by the practice of using holding companies beyond the regulation of the FA. That conclusion though neglects two key issues. Firstly, it was the FA’s own negligence in failing to prevent those holding companies being used to circumvent its rules that led to their proliferation. Secondly, they reflect a worldview which sees the FA as having to accommodate itself to the wider corporate world rather than set the standards expected by corporate actors inside the game as a strong and self-confident governing body.

Ultimately, by focusing on individual owners and directors, the tests fail to tackle the more active danger to clubs by having no regard for ‘fit and proper business plans’. The amendments to the Premier League’s owners and directors test do require potential new owners to provide details of their business plans and proof of funds prospectively rather than retrospectively. Clubs are now also required to report on tax payments due to HMRC in the Premier League, and in the Football League, the data is shared by HMRC with them. Whilst these are welcome steps, they fall significantly short of the licensing system approach advocated in section 3 below.

Even so, it needs to be emphasised that supporter community ownership provides a much more useful solution to these issues than the approach currently taken. Placing clubs in the hands of supporters and communities, in a democratic and transparent structure, the issue of one owner being ‘unfit’ does not arise, and by placing the decision over who sits on a club’s board of directors with the community of fans affected by their actions, there is a degree of accountability that simply is not present at the moment.

3

A New Regulatory Framework

Supporters Direct believes there needs to be a new regulatory regime in football, within a clear legal framework that specifies the social function of sport and clubs. Supporters' stakeholdings in their clubs are qualitatively different to normal consumer relations and the operation of the sport mean it cannot be seen as a 'normal' business.

The football authorities have long argued there is no need for major reform to the regulatory structures of football.

The football authorities have long argued there is no need for major reform to the regulatory structures of football. Indeed, the FA, the Premier League and the Football League have all opposed previous attempts to reform the governance of the game ranging from the Chester Report to the Football Task Force and the Burns Review (which still remains to be implemented in full). More recently, their submissions made to the House of Commons Select Committee Inquiry into Football Governance defend the status quo, whilst over 80% of the submissions received take the contrary view.

However, there are good reasons why football's regulatory bodies need to embrace the interests of supporters further and this provides the 'umbrella' under which a more robust club licensing system could operate.

3.1 Supporter Stakeholders

In a paper prepared for Supporters Direct,¹⁴ Cobbetts LLP argued:

- The aim of legislation and regulation should be 'to reflect the nature and consequence of the supporter stakeholding;
- If supporter stakeholding is recognised and protected, 'many of the troublesome issues in football are addressed as a matter of course';
- There is a legitimate interest reflected in two areas: that supporters 'should have a voice in the affairs of the club'; and that the club 'should operate in a sustainable way so that its assets and heritage cannot be dissipated or destroyed by those who control it at any particular point in time'.

The paper contends that protection of these legitimate interests have precedent in other areas of life which suggest a framework for which those interests can be protected in football:

14 Jaquiss, K (2010) *Building on Football's Heritage*, Manchester: Cobbetts LLP

- **Embracing Stakeholder Interests:** the Companies Act 2006 establishes the principle that directors have a duty to have regard to various legitimate interests, including employees, suppliers, customers and the community.
- **A Long-term View:** that legislation also contains the principle that directors must have regard for these interests ‘in the long term’.
- **Information:** in various contexts – such as beneficiaries from pension trusts – people with legitimate interests are given an ongoing right to information.
- **Consultation:** public bodies – including in planning and health – have extensive obligations to consult with people who may be affected by decisions or actions.
- **Taking Views into Account:** in both public and private sectors there are provisions for people who have their lives and rights affected to have their views taken into account through consultation. This includes issue relating to working conditions and redundancies.
- **Remedies:** where legitimate interests are not taken into account, the law provides for remedies to be made.

3.2 The Role of the FA

If the FA is to be an effective regulator then it needs a clearer legal framework in which to regulate. Cobbetts outlined how this could be structured:

- **Establishing the ‘interest principle’:** This should be done along the lines of and subject to Section 172 of the Companies Act) which states that a person acting as a director of a club must take heed of the legitimate interests of supporters and in particular regard to establishing ways in which the views of supporters can be taken into account and the importance of the sustainability of the club for the benefit of future generations.
- **Regulation of the Interest Principle:** The FA should make compliance with the interest principle a key issue for club registration.
- **Best Practice and Reporting:** Recommended practice should be made clear and clubs should be required to demonstrate their adherence to the interest principle through:

- An annual report to the FA;
- Reporting on club sustainability annually to the FA;
- Summarising information provided to the FA;
- Conducting consultation exercises before making major decisions (such as land sale, incurring debt, selling the club).
- **Continuous Improvement:** Reporting and development of good practice should underpin continuous improvement, which the FA should be required to report on annually.
- **Right to Request:** Supporters should be given a right to request purchase of a stake in clubs, or the whole club, and owners should be

Owners should be expected to have very good reasons as to why market-rate offers from supporters are not taken up.

required to respond with reasons that ‘take account of the importance of sustainability of the club for the benefit of future generations’. Owners should be expected to have very good reasons as to why market-rate offers from

supporters are not taken up.

- **Remedy:** Serious breach of any of the above would give the FA the right to take regulatory action, including warnings, fines, conditions on continued registration and withdrawal of registration.

3.3 The Responsibilities of Supporters

The above proposals will only operate effectively if supporters are formed into appropriate, transparent and sustainable structures through which they are able to engage with their clubs. The supporters’ trust model provides the best way this can be achieved, in that it enshrines the principles of:

- Community benefit function;
- Social benefit generation;
- Economic benefits;
- Potential for introducing an asset lock.

3.4 A Club Licensing System

As argued above, current regulations on the finance and ownership of clubs deal with the symptoms and not the causes of instability in ownership and unsustainable financial management. At present, there are no coherent licensing requirements that can be used to force clubs to manage their finances more effectively.

There are of course some demands made on clubs as a condition of entry into leagues or the FA: Appendix 1 of the Football League's rules focuses on the suitability of the stadium, media facilities, pitch dimensions and so on, but is silent on club finances save that clubs submit their annual accounts to the League (clause 16).

Part 2 of Premier League Rule D requires reports to be made of any important transactions to be included in a financial report made annually to the League, but in both cases, there is no requirement that the accounts must report finances within league-mandated thresholds, rather just that the report be made.

All member clubs of the FA must apply annually for re-entry into the Association, and provide certain information to the FA. However, membership of the FA is not a precondition for membership of a league, and FA membership has hitherto been an internal category entitling members to vote in meetings and access tickets to FA-organised matches such as the FA Cup Final.

The football authorities have collectively been slow to adopt strict regulations in respect of clubs' finances.

The football authorities have collectively been slow to adopt strict regulations in respect of clubs' finances. Although reports must be made each year, these are for the sake of transparency rather than to ensure a club is being run in a financially prudent manner.

Even so, the building blocks are already in place for a more thorough-going system, as the key principles already exist. Specifically, it has long been accepted that membership of the FA and Leagues is conditional on satisfying whatever criteria those bodies insist upon. The licensing systems in place in other countries use exactly the same architecture to add greater scrutiny and control of club finances to the standard criteria found here.

3.4.1 UEFA Financial Fair Play

A further impetus to this direction came from the introduction of UEFA Club Licensing and Financial Fair Play Regulations in May 2010.¹⁵ The guiding principle of the regulations was to attempt to safeguard the long-term health of European football, and the philosophy of not spending more money than you can generate.

A key tenet of the new regulations was that from the 2012-13 season, all clubs that want to play in European competition must break-even. The break-even requirement is to be phased in from the 2010-11 season before finally being fully assessed from season 2012-13 onwards. The ‘phasing in’ aspect is important due to the fact that the pre 2012-13 years will be taken into account when considering the granting of licences. Without such a licence, clubs will be unable to participate in the UEFA competitions, i.e. the Champions League or Europa League.

The key stipulation of the break-even requirement is for a club’s ‘relevant income’ to not exceed its ‘relevant expenses’. Therefore, in theory, a club would only be able to spend money generated from gate receipts, broadcasting rights, sponsorship and advertising, commercial activities (merchandising, food and beverages etc), other operating income, profit on disposal of player registration and excess proceeds on disposal of tangible fixed assets (Article 58, and noted in *World Sports Law Report 2010*).

So whilst the regulations do not prohibit clubs from receiving income from ‘sugar daddies’, a club would not be able to use such income to fund its ‘relevant expenses’, defined in Article 58(2) as including, for example, cost of sales, employee benefit expenses and other operating expenses, the money from such benefactors could be used in other ways to fund elements outside of these relevant expenses.

For example, ‘relevant expenses’ does not include depreciation of tangible fixed assets, amortisation/impairment of intangible fixed assets (other than player registrations) and expenditure on youth and community development. Therefore, in theory at least, money from a benefactor could be used to fund stadium development or youth development projects, and on the face of it this could look to be progressive, curtailing excess and encouraging more incremental, long-term sustainable developments. Clubs who fall foul of the requirements and criteria for a licence face a number of potential sanctions (Article 8) including cautions, fines or the obligation to fulfil further requirements in order to obtain a licence, with this to be regulated by the member association.

¹⁵ See further, <http://www.uefa.com/uefa/footballfirst/protectingthegame/financialfairplay/news/newsid=1520059.html>.

Of course, the key sanction is that without such a licence, a club is unable to compete in European competition. The question then is whether the regulations actually do what they purport and whether they go far enough.

Weaknesses of UEFA Club Licensing Regime

When the regulations were adopted, Michel Platini made a great play on the fact that their intention was to protect, not punish. He went on to note that ‘this approval today is the start of an important journey for European football’s club finances as we begin to put stability and economic common sense back into football’.¹⁶ This is reiterated in the Article 2 of the Regulations with its objective to ‘further promote and continuously improve the standards of all football in Europe’ and ensure an ‘adequate level of management and organisation’.¹⁷

The new regulations also do not cover how much debt a club is able to incur, therefore it appears to be the case that owners who can service the interest on their debt and show an operating profit, will not be penalised.

A key problem rests with the possible lack of effectiveness of the break-even requirement. There are a number of possible loopholes in the regulations that have been identified. Key here is that whilst theoretically income from a benefactor would be seen as non-relevant income, because of the time lag with the regulations coming into

full force it is possible for such a benefactor to inject money into the club before these regulations take effect, notwithstanding the fact that this could have a longer-term impact.

The new regulations also do not cover how much debt a club is able to incur, therefore it appears to be the case that owners who can service the interest on their debt and show an operating profit, will not be penalised. It therefore seeks to prohibit behaviour by clubs that is deemed detrimental to the system; behaviour detrimental to the club itself by its owners or directors is not issue tackled by the system.

Other examples of possible loopholes have been identified. For example, in certain situations, the Club are able to provide an estimate of ‘fair value’ for income transactions (Annex X B 1j). Situations where this might apply include transactions regarding sales of sponsorship rights or the sale of corporate hospitality tickets. However, clubs do not have to provide an estimate of fair value if such income is derived from third parties, leaving the way open for a club to receive a cash injection from a third party via sponsorship or corporate hospitality. These are undoubtedly the tip of the

¹⁶ UEFA Media Release 038, 27/5/10

¹⁷ UEFA Club Licensing and Financial Fair Play Regulations Edition 2010

iceberg (*World Sports Law Report 2010* which provides some other potential loopholes here) and the remit of the Club Financial Control Panel and its ability and to adequately monitor such activity is unclear, as is their willingness to actively prohibit clubs from competing for breach of the framework.¹⁸

Even so, as regulations addressing entry to European competitions only actually bite the elite within national football (i.e. currently the four Champions League representatives and the Europa League Representatives, currently two, potentially three). Whilst in most countries, all top-flight league participants have sought to comply with the regulations in case they qualify for European competition, this season has seen speculation that Birmingham City's entry into next year's Europa League is in doubt because on financial grounds.

As such questions remain as to whether UEFA's Club Licensing system is adequate enough on its own and therefore whether it could be extended through adoption by all Premier League and Football League affiliated clubs as a requirement of entry to those leagues.

Perhaps the most crucial impact, though, could be that by making these rules apply for entry to the pinnacle of club football, the very clubs who previously might have fought similar regulations at domestic level would now be much more accommodating, seeing the benefit from all their domestic rivals playing by the same rulebook as they must. Furthermore,

18 These concerns relate to whether the system will work; if it does, critics have noted that it could well reinforce the hegemony of the elite clubs, as clubs with a higher spending capacity will be in a better position to achieve entry into European competition, which in itself will allow them more opportunity to develop more income streams and revenue, and therefore make it increasingly difficult for clubs outside of the elite to break into this. By contrast, those clubs with smaller fanbases or from countries with smaller TV markets will be trapped by those demographic factors into never being able to compete with the clubs with larger fanbases and revenues.

However, whilst this is a legitimate concern, the answer is not to allow greater benefactor input for those smaller teams but to facilitate greater competitive balance and 'churn' through better solidarity mechanisms to clubs currently outside the pool of regular participants in European competition.

Interestingly, UEFA have recently begun a system where all its member association will pool their individual media royalties for equal distribution, effectively redistributing from countries with large TV markets to smaller ones, a system whose principles could be extended to UEFA's club competitions. UEFA could also begin to iron out competitive imbalances across Europe's league and within them by reinforcing the collective sale of domestic TV rights, which remain the largest revenue stream for all of Europe's elite clubs; under this proposal, no club would be permitted entry to UEFA competition if they did not participate in a collective media rights pooling arrangement domestically, and would be required to do the same for UEFA competitions.

as the regulations apply to all teams wishing to challenge for the Champions League, these major clubs have no need to oppose domestic regulations on the grounds they limit their ability to compete as representatives of their domestic leagues at the European level.

3.4.2 The Bundesliga

Alongside the Football Supporters' Federation¹⁹ (our sister organisation in England), Supporters Direct advocate a system akin to the regulatory licensing regime employed by the Bundesliga, the professional football league in Germany.

This places severe penalties on clubs that are not financially sustainable. If clubs fail viability tests, their professional licences are revoked and the club is relegated to the semi-professional leagues. This deterrent has clearly worked, with no insolvencies in the Bundesliga since its formation in 1963, in stark contrast to the record in England.²⁰

If clubs fail viability tests, their professional licences are revoked and the club is relegated to the semi-professional leagues. This deterrent has clearly worked, with no insolvencies in the Bundesliga since its formation in 1963, in stark contrast to the record in England.

In order to succeed under this system, clubs must maximise their revenues, leading to a much better commercial performance than any other European league. However, the social commitment to lower ticket prices, the lack of a benefactor-subsidy culture and the smaller size of the German pay-TV market all leave Bundesliga clubs with less revenue than Premier

League equivalents; even so, they do generate greater profits, and indeed the league as a whole has net assets.

Furthermore, there is a social function that German football enshrines in its member ownership rules in which the majority of votes in a club must be owned by members (popularly known as '50+1 rule'); this ensures a closeness to supporters and accountability to them, which impacts on ticketing policy and stadium design, both of which are noticeably more fan-driven than in England.

The system works as a consistent whole; the ownership regulations need financial controls to stop the cost-base escalating beyond what can be

19 Football Supporters Federation (2011) Written evidence to the enquiry into the governance of association football: 7.2

20 For more detail on the Bundesliga Licensing System, see the submission to the DCMS Select Committee Inquiry by former Bundesliga CFO Christian Mueller: <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmcomeds/writev/792/fg84.htm>

serviced through formal revenue generation and would otherwise require owners with similar liquidity as in England. Furthermore, community ownership ensures accountability to supporters, leading to more fan-friendly policies, not to mention a mindset at the club which fosters a much clearer understanding and commitment to the club's role in the social fabric of the community.

Unlike English clubs, German local authorities feel more confident in spending public funds as the clubs who will benefit are financially sustainable and owned by and run for the benefit of the community.

As argued in Supporters Direct's *Social Value of Football Report*, such an approach can have major commercial benefits, not least in terms of facility development. Unlike their English counterparts, German clubs have been able to persuade their local authorities to finance new stadia, which they

have benefitted from use of. However, unlike English clubs, German local authorities feel more confident in spending public funds as the clubs who will benefit are financially sustainable and owned by and run for the benefit of the community.

3.4.3 Northern Ireland

Licensing is not just undertaken in major countries with well-funded governing bodies; a clear majority of UEFA members have a licensing system, including some of the smaller associations.

The Irish FA (IFA) has also developed a club licensing system which offers a model that English football could follow. This could extend the principles enshrined in the UEFA Club Licensing scheme beyond elite clubs as well as embed community obligations within club operations and governance structures.

The IFA club licensing policy has been developed to conform with all applicable legislations, statutes and rules of FIFA and UEFA, and has the following objectives:

- Improving the economic and financial capabilities of clubs, increasing their transparency and credibility, and placing the necessary importance on the protection of creditors;
- Further promotion of, and continuing priority given to, the training and care of young players in each club;
- Safeguarding the continuity of international competitions for one season;
- Monitoring the financial fair play in those competitions;

- Assuring clubs have adequate levels of management and organisation;
- Providing spectators and media with well-appointed, well-equipped and safe stadiums.²¹

It asks clubs to report against five criteria: sporting, infrastructure, personnel and administration, legal and financial.

Crucially, given the debates considered in this paper, the criteria have been developed with the objective of levelling the standards amongst clubs in terms of playing, finance and community relations. The regulations state clubs have to satisfy all requirements but ‘most notably in fields such as development teams, child protection, anti-racism/sectarianism, infrastructure, coaching qualifications, safety certifications, audited accounts and information relating to payments due to employees or other football clubs.’²²

The role of the Licensing Department offers an example of best practice, in that it:

- Has established a benchmarking system so clubs can view their performance within Northern Ireland and across Europe, which helps clubs to plan more effectively for their future;
- Has a transparent process which enables it to demonstrate to all their stakeholders including clubs, public bodies, football governing bodies and others they adhere to the highest ethical standards;
- Ensures all persons directly involved sign confidentiality agreements and confirm their independence at the beginning of all licensing meetings;
- States all applicants are treated equally and equitably and can seek confirmation that persons involved have no conflict of interest and are independent;
- Is supported by the IFA who offer a sizeable portion of its resources towards managing the scheme, making available a number of funding initiatives to clubs;
- Is staffed by qualified and competent individuals that administer the licensing scheme and assist the clubs through the licensing process.²³

21 <http://www.irishfa.com/domestic/club-licensing/> accessed on April 7th 2011

22 Ibid.

23 IFA (2010) IFA Club Licensing Scheme, MA.03.1 Club Licencing Policy: Belfast: IFA

3.5 Supporters Direct Recommendations For Club Licensing

Supporters Direct supports the general approaches taken by UEFA's Financial Fair Play regime and in domestic licensing systems like those in Germany and Northern Ireland.

It recommends there should be a fully-fledged domestic licensing system based on criteria for membership of the FA and the various leagues.

It recommends there should be a fully-fledged domestic licensing system based on criteria for membership of the FA and the various leagues. This licensing system should enshrine what would be considered to be a 'fit and proper club', and, by ensuring only

those clubs meeting that standard can participate, would protect the game as a whole from the instability and lack of sustainability it has experienced.

By reducing the need for 'financial doping', it would create a level playing field which would assist the development of supporter community ownership. However, it could also be used to stipulate and drive forward supporter involvement in the ownership of clubs.

The domestic licensing system should be aimed at enshrining the following principles:

- Promotion of financial and social responsibility, and balancing of the sporting, commercial and social objectives of clubs;
- Recognition of the club's first priority to its community to ensure it exists; licensing must work to bring costs and debt under control, and incentivise good financial practice, to ensure clubs live within their means and that those who do not are penalised;
- Recognise the social and sporting dimensions of clubs by requiring them to have supporter representation on their boards as part of good governance measures to promote better decision-making and transparency;
- Ensure every club has a due diligence exercise undertaken on it by the regulatory authorities and is given a clean bill of health, allowing other clubs and communities to trade with the club confident they will be paid, obviating the major causes of the football creditors' rule;
- Address the problem of the loss of the game's asset base by ensuring security of tenure of clubs by preventing the sale or mortgage of grounds to support revenue losses.

Supporters Direct proposes the domestic licensing system would operate as follows:

- The principles of the licence would be set by the FA, through its Financial Regulation Authority (FRA). Each league would be tasked with proposing how it intended to translate those principles in the context of the scale of the clubs competing in it. Some principles (e.g. supporter representation) would not be needed to be refined at league level, whilst others, such as debt-gearing and other financial criteria, would. The FRA would agree on all intended implementations;
- Clubs would submit a licence application in the spring of each year, assessed by the appropriate league under the overall regulation of the FRA;
- Included in the application would be a detailed cash flow projection for the forthcoming season, along with proof of funds included in that cash flow projection, and a rolling business plan for the next three years. The application would also have to demonstrate their most recent detailed and audited accounts shown against predicted performance given to the league in previous years' applications.
- The League and the FRA would have the power to undertake spot checks of all clubs at any time, and would undertake detailed scrutiny of clubs deemed to be 'at risk'; and allow lighter touch checks of clubs meeting their targets year on year;
- Benefactor funding, soft loans, and other means of 'financial doping' would be limited by imposition of regulations based on UEFA's Financial Fair Play criteria;
- Underpinning this, any revenue support from benefactors would need to be lodged in advance and registered as a 'bond' or similar to remove the instability caused by sudden withdrawal of finance promised at the point contracts were entered into;
- In order to stop capital assets being destroyed in support of revenue losses, all mortgages or charges on the club's stadium and other fixed assets would need approval by the relevant league, with that league only giving it where the debt to be incurred was for other capital development, or where the club could demonstrate any asset-backed debt would be cleared by normal trading revenues within the next 10 years;
- Linked to the above, clubs would not be able to use land assets to repay existing soft loans from directors and owners, in order to protect the game's asset base. Over time, the provisions on sustainable financing will

in any case lessen this pressure as clubs will not be incurring losses in the first place;

- All new owners of clubs would need to provide full evidence of the source of their funds and their legality, and any investment did not rely on debt finance beyond set levels.²⁴

3.6 What else could licensing do?

3.6.1 Involving Supporters In Ownership and Governance

In addition to the provisions of the licensing regime, clubs should be encouraged to develop supporter community ownership through a number of other measures. These include:

In addition to the provisions of the licensing regime, clubs should be encouraged to develop supporter community ownership through a number of other measures.

- Creating a supporter class of shares (see 3.4.2 below);
- Having supporters' trust representatives involved at board level, with a veto over key issues such as sale of ground;
- Offering shares that become available on a first refusal basis to bona fide supporters' trusts (on a similar basis to the provisions of 'right to buy' legislation);
- Clubs to make remuneration of executives and agents public;
- Clubs to behave as if they are domiciled in the UK regardless of where they may actually ultimately be owned – for example via accounts published in the UK and AGMs held in public and meeting UK standards;
- Where ownership of the club is not possible, clubs could be encouraged to create a holding company in supporter community ownership (such as the trust) to hold 'foundation' assets such as the league membership share, the stadium and the club name and crest.

²⁴ It is instructive that the Glazer family's takeover of Manchester United was subject to greater regulatory oversight by the National Football League in the USA, who wished to ensure that the Tampa Bay Buccaneers franchise in the league was not being used as collateral for the loans taken out to buy Manchester United; neither the Premier League or the FA had any provisions in this respect.

Case Study – Supporter Liaison Officers

The UEFA Licensing System also requires that in addition to financial provisions, clubs implement a series of measures in a variety of areas. One of these is that, from 2013, clubs should have a Supporter Liaison Officer.

Supporters Direct proposed the initiative to UEFA in 2010, based on experience in several European countries, and it was accepted into the new licensing system agreed later that year. Since then, Supporters Direct have been developing the concept and training materials in association with UEFA and existing supporter liaison officers.

The idea and implementation demonstrates how a licensing system can create a framework for other policy proposals to be promoted through the game.

3.4.2 Supporter Shares

Clubs could be encouraged through a licensing system to create a ‘supporter class’ of shares.

Company law allows considerable flexibility with regards to the rights that can be attached to shares and allows in particular the creation of different classes of share with different rights. It is therefore possible to envisage a class of ‘supporter shares’ in a football club that would have limited financial rights but weighted voting rights on issues that affected the club’s relationship with its community, and in addition gave the right of representation on the club board.

This would address the problem discussed in section 2 where owners launching full takeovers of clubs can force all shareholders to sell. Supporter shares would be required to be kept in supporters’ hands as a condition of FA membership, so although company law might give the right for an owner to force a sale, the ‘law of football’ would stop them doing so in practice. This would protect the rights of small shareholders who view their shares as emotional investments, or with a view to ensuring the club runs in a transparent manner.

Issues associated with the club’s ground, name and colours are often cited as important concerns but there is no reason in principle why the rights associated with a class of supporter shares should not be linked to a broader agenda about the ‘legitimate interest’ of supporters in the affairs of a club, involving special voting rights in relation to proposals to:

- Sell land;
- Incur a significant level of debt in relation to the club's turnover and assets;
- Sell the club or significant assets.

There are broadly four ways in which supporter shares might come into existence:

- By action by a club on a voluntary basis;
- By negotiation in the context of supporters putting money into a club;
- In the context of a new regulatory regime of the kind described in this section;
- By legislation.

On the basis of experience, the first of these seems a remote possibility, although clear commercial benefits can be identified which would accrue to a club which built strong and positive relationships with its supporter base.

The second is a real possibility but history has shown that supporters putting money into a club often do so at haste in emergency circumstances and are not resourced to address this level of detail. Should the proposal find support, Supporters Direct will produce model supporter share provisions, in consultation with supporters' trusts and the football authorities.

A model of this kind would increase the effectiveness of a new regulatory regime and would have the advantage of making clear that supporter ownership is not directed at depriving existing owners of the legitimate commercial benefits associated with running a football club.

It is important to note the concept of supporter shares is not dependent on legislation to be effective. It would, however, be a logical part of any new Sports Law and if a new tax relief encouraging supporter ownership was contemplated, a definition of supporter shares would be a significant part of the structure.

In broad terms in the football context, the relief would be available to supporters' trusts as community benefit organisations in connection with money raised by them to acquire supporter shares or shares having as a minimum the rights associated with supporter shares.

3.4.3 Social Accounts Reporting Framework

In Supporters Direct's 2010 report, *The Social and Community Value of Football*, it was argued that although football clubs of all kinds can generate social value in their communities, more needs to be done to both encourage this and monitor its achievement. The report made a number

of recommendations about football's governance, saying that football's authorities:

- should develop a better understanding of how the core business of clubs has wider community impact;
- should enable and assist the adoption of social value reporting through: development of an agreed indicator set; guidance, training and encouragement; and online tools and forms of assessment that make reporting user-friendly;
- should tie funding for community schemes to the reporting of environmental policies, actions and criteria;
- should recognise the added value the involvement of supporters and other community stakeholders in club ownership and governance can provide and, through regulation, promote a broader stakeholder model of corporate governance at clubs that involves supporters.

These could be implemented via a set of licensing criteria including requirements focused around community engagement, benefit and targets. Such criteria would support the non-financial, social aspects of football clubs and further encourage and embed community aspects of the club.

3.5 How Could This Be Done?

As noted above, leagues and the FA already operate membership regimes. The above proposals, whilst radical, would not be so new they would require a fundamentally different architecture in the game. In the Football Regulatory Authority (FRA), there is already a semi-independent body that could be driving and monitoring the system. Essential to making licensing work would be some key reforms:

- Extending the number of independent members of the Authority, currently four, with defined sectors of expertise provided for, in law, accountancy, supporter representation, regulation, monitoring and so on;
- Addressing the representation of national game representatives, which would seem unnecessary as the system would only apply to the professional game and the upper echelons of the National League system outside the four professional leagues. There could be a sub-committee of the FRA to manage the translation of the ethos and principles to the national game system, to ensure consistency where it was required;

- Introducing a requirement that whilst the FRA will benefit from the services of people with experience of the professional game, the individuals bringing that expertise must have no active positions within any clubs it seeks to regulate;
- Ensuring the FRA was adequately resourced to give it the security and independence to undertake its work, with funds to undertake the policy work informing the licensing system and the means to actively implement it, including spot checks.
- Finally, whilst the FRA cannot be a law unto itself and must be accountable, that accountability would be best served by removing the ability of clubs to have influence over its day-to-day operations. For example, in the Rugby Football League, the Board act independently of the member clubs, and those clubs have a ‘nuclear option’ to sack them, but cannot otherwise direct them. There could well be a role for government in arbitrating the means by which certain powers could be taken over the FRA by the FA should the latter lose all confidence in the former.

Much has been written in the past about the sovereignty of club-companies, and that of their shareholders to act with freedom in how they enjoy their property. It is worth remembering though that clubs join Leagues and Associations voluntarily. The precedent in English law is for governing bodies to be free to impose proportionate restrictions upon clubs as long as they have been designed to achieve sporting benefit, rather than economic impoverishment to those on the wrong end of the rules.

Some clubs would undoubtedly resist a licensing framework, but dislike of the provisions should not be confused with their illegality.

There are already several regulatory changes that have been accepted which interfere with the shareholder sovereignty. The Fit and Proper Persons Tests are specific to football, and impact on who an existing owner

can sell the club’s shares to, or invite onto the board of the club. The football creditors’ rule is accepted in law to be a condition of membership of the football system, even though it goes beyond the legal requirements of the insolvency framework.

Furthermore, the FA’s own existing rules require member clubs to insert clauses governing the disposal of assets on distribution into their articles of association. This principle could be extended so that all member clubs of the FA would insert a clause that gave legal effect within the club to the regulatory regime, or could even enshrine key provisions directly in those articles.

Some clubs would undoubtedly resist a licensing framework, but dislike of the provisions should not be confused with their illegality. Similar objections were made upon the introduction of the Fit and Proper Persons Tests, yet their provisions have been implemented without a single challenge. To some degree, the charge of illegality is a paper tiger; regulations must be carefully designed and properly implemented, but if they are, there is every chance they will be deemed legal by the courts under any challenge. If introduced with the support of a Sports Law as recommended in *Briefing Paper No.1*, regulators would be able to act in much greater confidence.

Case Study – Lord Triesman’s Proposed FA Reforms

At Supporters Direct’s Conference in 2008, Andy Burnham, then Secretary of State for Culture, Media and Sport, posed 7 questions of the game’s governing bodies around issues of supporter involvement and financing.

In response, Lord Triesman, then Chair of the Football Association, proposed some radical changes to the governance of English football with respect to club finance, which he laid before the FA Board. Triesman’s proposals were ultimately rejected by the FA’s board²⁵ but have since been made available to the DCMS Select Committee inquiry into Football Governance in 2011.²⁶ Whilst he has been associated with them, the actual content was drawn up by officers of the FA, and as such represent the combination of qualified and knowledgeable staff working with officers with political will; what is proposed here requires nothing more than this.

The proposals stated the FA needed a stronger and overarching role in governing football, particularly over its financial affairs, and must ‘incorporate long-term sporting and social objectives’ including competitive balance, integrity, club sustainability ‘as vital social institutions’ and ensure the positive social impact of football.

They proposed that the FA should introduce a domestic licensing system ‘like France, Germany, Holland and Spain’ which entailed:

‘...one common standard for financial reporting by clubs on an annual basis, prepared by independent auditors, with the information to be lodged with the FA and the league in which

25 <http://www.telegraph.co.uk/sport/football/5363940/Lord-Triesmans-FA-reform-proposals-rejected.html>

26 <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmcomeds/writev/792/fg88.htm>

the club competes. The report should, for the clubs in the top four divisions (the FA Premier League and the Football League Championship and Divisions One and Two), be based on:

- (a) The financial criteria of the UEFA Club Licence;
- (b) The auditor's statement on the 'going concern' audit requirement;
- (c) Any further stress tests that the FA through the FRA may from time to time consider necessary;
- (d) Any additional information that the leagues require;

Group business accounts should be treated on the same basis.'

Furthermore, this system should:

- Regulate 'an appropriate ratio between equity and "soft loans" to be sustained at all times';
- Introduce 'a more proactive approach to the financial security of clubs including measures to improve stability, enhanced financial information, specify equity/debt ratios, equity levels, sources of funds and beneficial ownership';
- Include non-financial criteria including:
 - Minimum level of community involvement;
 - Minimum levels of supporter involvement and a customer charter;
 - Investment in youth development;
 - Security of tenure of ground;
 - Open meetings – including, of course, shareholder meetings where appropriate.

These proposals would, said the document, allow the FA the power 'to alert any club to an identified problem and... require a proportionate set of conditions to be met to provide an appropriate solution.'

Such a proposition would have gone a considerable way towards developing a regime that could not only regulate but prevent many of the financial problems English football has experienced. It would have also enshrined the social and sporting objectives of clubs in the membership criteria and registration of clubs. Whilst it seems – regrettably – that these proposals will not be taken forward within the FA in that form, they demonstrate the FA possesses the will and capability to develop the regulatory framework the game needs, but suffers from the inability to be master of its own cause.

4

Government's role in reforming football

All of the above issues are possible within the FA's role of governing body of football. As reference to Germany and Northern Ireland demonstrates, national associations can make these interventions.

However, from the Chester Report to the Burns Review and the current DCMS Select Committee inquiry, it has been demonstrated that change is difficult to achieve. The FA's decision-making structures are predicated on a balance of power between the vested interests of County FAs and their Councillors, and the professional clubs.

In this context, the clubs affected by such regulations would instruct their representatives to oppose them, whilst the County FA representatives would not wish to impose them in the face of opposition. For different reasons, both sides of this divide will cohere around the status quo rather than force any change against the opposition of the other, a point made by Lord Triesman in his oral evidence to the Select Committee Inquiry.²⁷

As a result, whilst the FA *could* do all these things, they are *unlikely* to do so as things stand. As Lord Triesman's attempt in 2009 to achieve this demonstrated, questions of policy and strategy at the FA ultimately become questions of governance.

Questions of policy and strategy at the FA ultimately become questions of governance.

On a number of occasions governments have indicated a desire for reform of football's governance and they will give football's regulators time to introduce reform. This

happened following the Chester Report in 1969, when Sports Minister Denis Howell recommended to the House of Commons that the FA adopt its recommendations; following the Football Task Force in 2000 when Secretary of State Chris Smith said the FA and leagues 'had two years' to address issues raised; and following the Burns Review in 2006.

Part of the reason for this is that such recommendations and time limits have never been backed up with any force, namely the threat of legislation.

Supporters Direct's *Briefing Paper No.1* outlined the ways in which government action could encourage the development of supporter community ownership as pledged in the Coalition Programme for Government.

²⁷ <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmcomeds/c792-i/c79201.htm>

Supporters Direct believes that, by taking this action, the regulation of football will be improved ‘from below’ as clubs operating in the democratic structure of football governance will have an increasingly important say. Recommendations in that paper include:

- Identification of football grounds, clubs and supporters as legitimate community assets and interests under ‘right to buy’ legislation in the Localism Bill;
- Ongoing support for Supporters Direct as the only national body that directly facilitates the creation of supporters’ trusts, including financial support from the Big Society Bank and from football’s own TV revenues;
- Changes to tax regime to eliminate incentives for clubs to be operated as loss-making businesses within broader ownership groups;
- The promotion of community shares as a viable way for supporters to gain shareholdings in their clubs.

However, Supporters Direct also believes that there is a need for action to reform the regulation ‘from above’. Ultimately, as argued in *Briefing Paper No.1* this requires a UK Sports Law to enshrine the legitimacy of sports governing bodies. This would enable:

- The regulatory regime in football to be overseen by a regulatory body, operating within a clear legal framework which recognises the specific requirements of sport to ensure a level playing field for healthy sporting competitions;
- Government intervention to be focused on driving change within football and providing support to overcome obstacles where necessary.

Short of passing such a law, the government should still act to help clear the logjam in the reform of the governance of English football. Indeed Lord Triesman’s aborted proposals for the FA included a request that ‘Government should actively consider, in discussion with all sports authorities, whether it can assist them by clear specification of rights and responsibilities in financial and other matters either through legislation or other levers in public policy.’

Supporters Direct believes government can promote reform by proposing a Football Regulatory Bill with a ‘sunset clause’ that allows football time to adopt a domestic licensing system along the lines proposed in the previous section and for the FA to reform its structure. If football fails to deliver such change within a specified time-frame, independent regulation enforcing change would come into force.

This could take the form of a semi- or wholly independent Football Regulatory Authority (which currently sits within the FA), with supporter representation, acting as a commission overseeing a club licence system. Underpinning this has to be a willingness to enforce a ‘regulation of the regulators’.

In addition, given the ultimate aim of all of this is to create wider community benefit in the public interest, Supporters Direct has advocated in its *Social and Community Value of Football* report that all public authorities should:

- Establish the principle that clubs, associations and leagues providing evidence of their social benefit impacts should be entitled to preferential treatment that recognises their social benefit functions;
- Ensure that where preferential treatment is given, those clubs, associations and leagues must provide long-term commitments and be able to demonstrate their social benefit impacts on an ongoing basis.

Finally, Supporters Direct has driven supporter involvement since 2000 through its work developing the network of supporters’ trusts seeking to achieve it. As has been seen in a multitude of sectors, in order to ensure volunteers can add value in their communities, those volunteers require assistance from non-volunteers.

Therefore, in addition to other measures to increase supporter involvement and ownership, the government needs to ensure that Supporters Direct is appropriately funded to continue this work, either through its own resources, or more realistically in the current climate, through using its influence to see it supported through the funds available to football as a whole; it is worth noting that the current turnover of Supporters Direct is equivalent to around 0.05% of the TV deals currently enjoyed by the Premier League, the Football League and the FA.

The Supporters Direct Briefing Papers

In 2011 Supporters Direct will launch four Briefing Papers prepared by Substance in conjunction with a number of partners, including Cobbetts LLP, Salford University, Manchester Metropolitan University and Westminster University. The papers are:

- **Briefing Paper No.1:** Developing Public Policy to Encourage Supporter Community Ownership in Football
- **Briefing Paper No.2:** Developing Football Regulation to Encourage Supporter Community Ownership in Football
- **Briefing Paper No.3:** Financing Supporter Community Ownership in Football
- **Briefing Paper No.4:** The Business Advantages of Supporter Community Ownership in Football

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