

## Putting the fans in control

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### Outline

- Scottish Ministers are currently consulting on the Community Empowerment and Renewal Bill, which will extend the community right to buy beyond the scope set out in the Land Reform (Scotland) Act 2003. This document is the formal submission of the Green MSPs.
- Greens believe football clubs are prone to suffering from many of the same problems tenants have historically had with absentee landlords, and that football clubs are frequently at the core of communities across Scotland. We believe that a right for fans to buy their clubs, either at any point or when their clubs get into financial difficulties, would be desirable in policy terms and also that the CER Bill represents the ideal vehicle for such legislative changes.

### Purpose and background

#### *Fan ownership in Scotland and beyond*

Fan ownership is a common ownership model for sports clubs, and is the norm in Scandinavia and Germany. However across Scotland and the rest of the UK, private ownership remains the norm. Fan ownership in Scotland has grown during the devolution era, mainly thanks to the efforts of Supporters Direct, and in particular as a response to clubs' financial difficulties.

Several clubs have been majority owned by their supporters, notably Clyde FC, East Stirling, Stirling Albion and most recently Dunfermline Athletic, currently the largest club to hold this status with Annan Athletic expected to join them in the coming months. The current preferred bidder for Heart of Midlothian is the Foundation of Hearts, a fan-led consortium. Both Ayr United and Motherwell are working on plans to be community owned by the start of season 2014-15.

There are two major problems affecting the take-up of fan-ownership.

- At present, owners are under no obligation to even deal with their supporters, let alone involve them in ownership and governance. As a result, fan ownership overwhelmingly comes about against a backdrop of corporate failure, where the lack of willingness of clubs' owners to engage with supporters is followed by the openness of an insolvency practitioner to deal with anyone proposing a realistic rescue plan. However, as a result, most fan ownership arrives against a legacy of failure, debt and limited capital.
- Relatedly, a common model is for a private owner/supporter to commit the club to spending money it cannot afford and to supplement revenue with their own resources. That means that without a wealthy benefactor, Scottish clubs are regularly faced with a dilemma in which sporting goals cannot be achieved through 'normal' trading, i.e. trading where expenditure is based on earned income.

As a result, financial success and sporting success are, for the vast majority of clubs, mutually exclusive. Under this model, clubs continue to be solvent only as long as their benefactors have the

means to support them, but when such means are exhausted, the club quickly moves from apparently good health to severe insolvency. It is this which lies at the root of the deep structural instability of the game, which has seen the majority of professional clubs in the UK go into formal insolvency over the past 20 years, most spectacularly at Rangers - one hundred and fifty four administrations in the UK since 1992.

While there are mechanisms which seek to address this in terms of controlling club expenditure, these efforts have had limited effects at best. The evidence is that expanded fan ownership is the only current option to go beyond those mechanisms in the interests of the sport at both a club and national level. Where the fans are in a position of control unsustainable options are simply taken off the table; if the club has no wealthy benefactor, there is simply no way for it to be run other than as a 'normal' enterprise in which income and expenditure are linked in a sustainable manner.

A critical mass of fan owned clubs would be the most effective way to achieve sustainable Scottish professional football, and sustainable football is also a necessary condition for successful and sustainable fan ownership.

A decisive break is required with the failed models of ownership. While the Scottish football authorities can address overspending in a slow and incremental way, the governing bodies are creatures of their members, and as a result, regardless of the ways in which fan ownership helps deliver their stated goals of a more sustainable sport, the authorities inevitably cannot endorse it as an ownership model. They will remain structurally unable to drive greater fan ownership until such a time as a majority of clubs are fan-owned in order, i.e. when this objective is already largely achieved.

That leaves the Scottish Parliament as the only body with the means and ability to effect change.

### **Constitutional and policy basis**

Schedule 5 of the Scotland Act does not reserve sport to Westminster, meaning the Scottish Parliament can legislate in this area. There are limitations to the powers of the devolved institutions here, though: the prescribed forms of corporate vehicle and terms of their registration are not devolved, so more radical options - such as creating a specific legal form for sports clubs, as is the norm in the rest of Europe - are not possible. Similarly, the Scottish Parliament will not be able to amend insolvency legislation, but can use insolvency as a trigger for the right to buy (see below).

### **Human rights**

To quote the Land Reform Review Group's Interim Report from May 2013:

*A free society also has to respect the rights of an individual with regard to his or her property. The European Convention on Human Rights, at Article 1, Protocol 1,5 states*

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it seems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

*Central, therefore, to a consideration of land ownership lies the concept of the public interest and the tension between it and individual human rights.*

This tension would similarly apply where the right to buy is extended to non-land assets such as football clubs. However, in our view the public interest arguments (economic and social) for community ownership of clubs will typically be stronger than any human rights arguments used by a transient owner of a football club, especially where a club has a long history of community support.

Indeed, whatever value the club has to its current owners is dependent on it having a pre-existing supporter base in the community, to whom the club is a matter of deep and abiding personal interest. The commercial property's value, to be enjoyed as per the ECHR, is dependent on and pre-supposes a public interest. This enables the Scottish Government to legislate to give the wider community rights in this case.

### **Consistency with the 2003 Act**

The thrust of the CER Bill is to enable communities in every part of Scotland to enjoy the same rights around land reform and related issues as communities in places where the 2003 Act already applies, and in so doing, extend the benefits of community ownership across Scotland.

The assumption inherent in the CER Bill is that community ownership is good for the assets owned by communities and good for communities themselves, indeed that it is in the broader public interest: a principle which the Green MSPs support wholeheartedly. The Bill focuses on local self-determination, and it would be hard to find a situation more likely to lead to feelings of disempowerment than the collapse of a football club.

Football clubs are one of the few places where people across a community meet each other on equal terms, regardless of the differences between them in terms of occupation, income and education. They are critical parts of their various community networks, and benefit from being owned and operated by people for whom that character is more important in their strategic management of the club than its potential to maximise profits for the short term.

A wealth of reports at national, UK and European levels have illustrated the advantages of community ownership of football clubs for the greater sustainability of clubs (and thus incidentally supporting their contribution to general taxation), their greater focus on long-term community engagement, increased usage of local suppliers to maximise local economic multipliers, and their overall contribution to community well-being and resilience.

In short, supporting fan ownership of football is an ideal opportunity to enhance the social, economic and environmental benefits clubs bring to their communities, and to boost local decision-making and control.

### **The first important amendment required**

The 2003 Act is specific in its focus on land and physical assets, and the focus of the CER Bill is consistent with this. In this case, though, the physical assets (the football stadium, training ground) are not the focus of the community interest: that is in the football club itself. It is what is done through the ownership of a form of property - a club - which matters, and it is ownership of the club, not the land, which gives the power to current owners to make the operating decisions they do.

To bring football clubs themselves under the control of this process of community empowerment will require an amendment to the 2003 Act to broaden the scope of eligible assets beyond land and buildings on it to encompass a class of related assets which are better understood as rights that entitle the asset owner to undertake certain functions (although the land clubs use remains important). This could be delivered either as a football-specific amendment or as a more general change.

In this instance, the particular asset aimed for here is the membership share in the Scottish Football Association and leagues (hereafter called 'membership shares'). These are the key asset which underpins football clubs, as they give them the right to play football under the aegis of the respective bodies. No club can be a member of the SPFL which is not already a member of the SFA, and no club without a member share in the SPFL can play in any of the Scottish leagues.

As a result, the right to participate economically in Scottish football flows from ownership by the football club company of these assets. A club without a stadium can share a ground with another club; a club without a league membership share cannot play football against anyone else in the world.

The goal therefore is to enhance in legislation the definition of eligible assets or property to encompass the limited companies that own league membership shares in Scottish football governing bodies. This, ultimately, is what defines a Scottish football club, and is not dependent on whether a club's ultimate corporate parent has a registered office in Cumbernauld or the Cayman Islands.

That might be done through direct legislation. Better, however, would be to allow a broader definition within constraints, such as:

- Eligible assets upon which the Community Right to Buy powers may be exercised shall be any land in Scotland (unless deemed to be excluded under the terms of the Act), and other property of a consistent community character which may be deemed to be included.
- Ministers shall be responsible for all determinations as to which assets may be included and excluded under this definition.
- In defining what non-land property shall be included, Ministers shall have regard for assets whose ownership and operations are a matter of significant public concern and interest in their community of operation.
- Ministers may only define such non-land property as included by reference to a specific class of assets or asset and not by direct reference to a specific asset in isolation of comparable assets in the same sector of economic or cultural activity, to avoid discrimination or the appearance of same.

- The process by which each class of assets shall be registered, the groups eligible to register and launch a bid and the terms under which they may do so may be varied by Ministers to reflect the specific operating environment of assets in that class, within the framework established by the Act.

Once this has been legislated for, we propose at the same time that Ministers are directed to include all companies registered in the UK which own a league membership share in a Scottish football governing body. The result would be that football clubs would be classed as suitable cases for community right to buy.

### **Detailed options**

Beyond that, several other options should be considered, in part to reflect the diversity of Scottish clubs, in terms of scale, value, indebtedness, and wealth of the community they are based in.

For all of these options, the assessed prices of any club would be subject to revaluation at the end of every football season, and in the event of a club entering insolvency, the fair price is determined by the insolvency practitioner at the time.

#### *1. Right to buy when clubs are being sold.*

This would require a time limit to assemble funds - provisionally six months - and would probably also require a cooling-off period after any unsuccessful bids, perhaps two years, to reduce uncertainty for clubs. There could be an exception to the two year restriction where the assessed price falls sufficiently far to allow the sum raised during the six month period to be viable (e.g. if land is sold off or if a club is relegated). This is aligned with the existing model for rural land reform.

#### *2. Right to a say when clubs are sold.*

Where fans simply can't afford to buy a club, and where more than one bid meets that assessed price, the fans get to be involved in the decision. This would ensure bidders take account of fans' views, and might include incentives to offer fans' trusts free shares, seats on the board, or other increased involvement.

#### *3. Right to buy when clubs go into administration.*

We do not believe that changes to insolvency and company law would be required: those areas are reserved, but the relevant parts of this proposal would merely use insolvency as a trigger.

#### *4. Right to buy a proportion of the shares at any point where a right to buy overall exists.*

This would probably apply in blocks of 5% or 10%, allowing fans' trusts to make a start and head towards control without having to find the entire sum. It could be particularly useful for the larger clubs, whose fans might find a full purchase in one go impractical. The same time limits would apply as above.

#### *5. Right to buy at an independently assessed price at any time.*

This would keep owners in check, and would protect against sale of grounds without change of ownership. A change of this sort would be powerful in particular in combination with 4 above.

*6. Access to SG funding to support clubs.*

Funds will be made available for urban community purchase through this Bill, and it would be straightforward to adding clubs to the list if the other amendments pass. The objective here would be merely to add clubs to the list of assets for which such funding could be applied, rather than to pursue new money or to mandate specific amounts of funding. The decisions here would be for Ministers, who would merely be empowered to act in this way.

In addition, the current consultation by the Scottish Government asks for views on the issue of which legal forms can be considered eligible for the purposes of exercising rights to buy. It is imperative that this definition includes Industrial and Provident Societies in general, and specifically in the case of football.

The supporters' trusts, who would be the bodies in football who would seek to exercise a right to buy, are all legally registered as IPS Community Benefit Societies, and so these legal entities need to be included to allow supporters trusts to be able to access these rights.

Secondly, IPS are not regulated by the Financial Conduct Authority for the public offer of equity, and so can undertake share offers to raise capital quickly and cheaply. Since the right to buy is dependent on the ability to raise the necessary capital, a vehicle which has proven very effective at raising capital for community ownership would seem to be essential; such vehicles have raised over £20m in the last 3 years over the UK across all sectors, and are on track to increase that to £30m by the year-end.