

Football Consultation
Active Scotland Division
Area 2-E South
Victoria Quay
Edinburgh
EH6 6QQ

14 January 2016

Dear Sir,

Consultation on Supporter Involvement in Scottish Football Clubs

On behalf of ICSA I am pleased to respond to your consultation on supporter involvement in Scottish football clubs.

ICSA, the governance institute, is the professional body for governance. We have members in all sectors and are required by our Royal Charter to lead 'effective governance and efficient administration of commerce, industry and public affairs'. With more than 120 years' experience, we work with regulators and policy makers to champion high standards of governance and provide qualifications, training and guidance.

We are the professional body qualifying and supporting Chartered Secretaries, corporate governance, risk and compliance professionals in all sectors of the UK economy. Members are educated in a range of topics including finance, company law, administration and governance, which enables them to add value to any organisation.

ICSA has an extensive pedigree in the governance arena, advising governments and regulators on company law, charity law and corporate governance. The breadth and experience of our membership enables ICSA to access a variety of applied experience in order to provide pragmatic insights into effective practices across a range of organisations. Our members' wealth of expertise and experience, together with their detailed understanding of charity and company legislation and regulation, has informed our response to this consultation.



General comments

Upon reading the document, it is unclear as to whether the majority of SPFL football clubs are companies limited by guarantee (pages 5 and 13) or companies limited by shares, with shareholders (p8). This causes confusion as to the potential options available to many of the questions posed as the structures have very different ownership models. Consequently, our response covers both these models, along with references to other corporate structures, where appropriate.

Specific questions

Q1. What are your views on making a law to give supporters the right to influence their club?

For any organisation to be successful, it is important that the voices and concerns of customers and other stakeholders are heard in the boardroom. Directors are responsible for the governance of an organisation and they should set the tone from the top, shape the culture of the organisation and embody those values in the way they perform their duties. This cannot be achieved in a vacuum and requires the directors stepping outside the boardroom and walking the “shop floor” – in the case of football clubs it means that directors should get out of the director’s box on match days and talk to the fans on the terraces.

It is questionable as to whether enshrining in law the right for supporters to influence their club is desirable or necessary. Under company law, it is for each director to make decisions in a manner “...he considers, in good faith, to be most likely to promote the success of the company for the benefit of its members as a whole” (s172 Companies Act 2006). When fulfilling that duty, directors must have regard (amongst other matters) to the:

- a) likely long-term consequences
- b) interests of the company’s employees
- c) need to foster the company’s business relations
- d) impact of operations on the community and environment
- e) desirability of retaining a reputation for high standards for business conduct
- f) need to act fairly between members of the company.

Providing a right to influence does not necessarily equate to those concerns being acted upon in a meaningful manner. Furthermore, introducing a law permitting supporters to influence their club could be seen to cause confusion as to where the legal responsibility, and liability, for decision-making lies.

An alternate approach might be to encourage all football clubs to amend their articles of association so that there is a mechanism for the club to introduce a “supporters’ council/forum” where they can formally articulate their support and concerns on the direction of the club. For more democratically minded clubs, the changes could extend to widening the membership (for companies limited by guarantee) or shareholding (for companies limited by shares) of the company thereby providing a recognised legal interest in the football club with specific powers to hold the directors to account. Either approach would not require new legislation.

Given the existing s172 duty of directors, it could be argued that a well-run football club applying the principles of good governance would already have in place a mechanism whereby the voices of fans could be heard and their concerns presented and debated in the boardroom in a formal and meaningful manner.

Q2. What are your views on making a law to give supporters the right to govern their club?

As the consultation document rightly identifies, introducing a legal requirement for a representative supporter/director nominated by supporters presents issues around the legal duties of the directors, specifically acting in the best interests of the organisation and avoiding conflicts of interest (s175 Companies Act 2006). There is widespread evidence within the charity sector of conflicts of loyalty impacting adversely on decision-making where representative trustees are on the board. This has resulted in decisions being challenged, with scarce resources being expended on correcting a misperception or erroneous decision.

The introduction of a “supporters’ council/forum” is a mechanism that could be introduced by clubs with relative ease, depending on the exact nature of their articles of association, without the need for legislation. This therefore seems to be a more proportionate approach in the first instance. It is likely that for any such changes to be embraced by clubs and supporters would require a dedicated campaign to change attitudes and culture.

An agreed model articles of association would help clubs to introduce necessary changes, with specific clauses on the introduction, administration and powers of the “supporters’ council/forum”. The company secretary, or other governance professional, should also be made available to provide technical, legal and governance guidance to the representative group, including organising or delivering a thorough induction to appointees on not just their role and responsibilities, but those of the board too. For the “supporters’ council/forum” to make the maximum positive impact there needs to be a sound understanding of and respect for their respective roles, responsibilities, powers and liabilities on the part of both council/forum members and directors.

**Q3. What are your views on making a law to give supporters the right to bid for their club?
and**

Q4. What are your views on making a law to give supporters the right to buy their club?

In theory, extending the Localism Act 2011 to Scotland to enable supporters to register a football club (however that may be defined) as an ‘asset of community value’ provides supporters with an important tool in trying to ensure their club remains local and serves the community. In practice, there is a crevasse between the option of registering an ‘asset of community value’ and actually purchasing the asset. Experience in England has shown that while an asset can be so designated, there is no compulsion on owners to sell to the community, with the result that many assets are mothballed and facilities run down – to the detriment of the wider community – while the lock-out period for other purchasers is allowed to pass. For an ongoing business, the uncertainty over ownership is likely to have an adverse impact on the business relationship with suppliers, customers and other stakeholders thereby risking the long-term sustainability of the business. For a football club, this is likely to have an impact on potential and existing sponsors, footballers and backroom staff, and shareholders.

ICSA therefore urges that further evidence be sought as to how the Localism Act works in practice and whether it provides the powers the consultation seeks for football supporters.

There are further considerations that also must be taken into account when considering legislation covering the right for supporters to buy their club, specifically surrounding the corporate structure of the club. For a club structured as a company limited by shares, there is already the ability for the club to be bought and sold as any other company. For listed companies, the purchasing of shares is covered by

specific legal and regulatory requirements. For companies limited by guarantee and some co-operatives, the process is rather less straightforward, requiring a motion to be passed by members at a general meeting. This will be further complicated by any asset locks or retrenchment clauses within the football club's governing document. For charities, any agreement to transfer assets could only be to another charity with similar charitable purposes. In short, it will not always be possible under existing legislation to sell the club to a supporters group, even if that was what all parties desired.

Any attempt to introduce a right to buy is therefore likely to mean a fundamental change to the way in which other types of organisations are legislated for and governed.

Q5. What are your views on raising the necessary funds, including the amount of time allowed for supporters to do so, to give supporters a right to buy their football club?

Please refer to the comments detailed above.

Q6. What are your views on defining assets, in the context of making a law to give supporters rights in decision making or ownership of their football club?

As a matter of good corporate management and governance, the organisation should be able to provide an accurate and up-to-date list of assets and liabilities at any given point in time. This information is likely to be presented to the board periodically and also detailed within the annual report and accounts presented to shareholders or members. For a football club, it is likely that assets involved are all those that are central to the effective functioning of a football club – tangible and non-tangible.

ICSA appreciates the opportunity to comment on the Scottish Government's thinking in developing governance arrangements in Scottish football clubs. Should further information or clarification be required, please do not hesitate to contact me.

Yours faithfully,

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