



# **Developing Public Policy to Encourage Supporter Community Ownership in Football**

**“It is difficult to think of another social or cultural sector that has as wide a reach, as comprehensive coverage of the nation, as deep historical roots or as big a potential to deliver local social value than football.”**



## 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.



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# Executive Summary

The coalition government's *Programme for Government* made a specific promise to:

‘...encourage the reform of football governance rules to support the co-operative ownership of football clubs by supporters.’

There is a direct relationship between the stated objectives of the coalition government and the aims of Supporters Direct. This paper offers some practical means by which Government policy can be implemented.

## Supporters, Community and Local Social Value

Supporters Direct contends that communities of fans should be viewed by policymakers as important, dynamic and vital to their local areas.

Supporters Direct believes that promoting the ownership of sports clubs amongst the communities they serve has a number of benefits for the sustainability and success of football and football clubs, as well as their communities.

## Existing Company Law

There is nothing in company law that helps deliver the coalition promise to ‘encourage the co-operative ownership of football clubs by their supporters’.

## Community Asset Legislation

There is nothing in existing community asset legislation that gives preference to community ownership in sport *per se*, or to the specific issue of football club ownership, the nature of which presents challenges for supporter communities who might wish to avail themselves of these opportunities. Supporters Direct call for these to be addressed in either the legislation or the guidelines to be produced following enactment.

## UK Sports Law

Supporters Direct believes that, ultimately, a Sports Law provides the most holistic and long-term solution to both the problems faced in the governance of professional football and as a route to encouraging supporter

ownership. However, if this Government wishes to ‘encourage the co-operative ownership of football clubs by its supporters’, then it has to adopt different approaches from previous administrations in order to fulfil this aim.

## Localism Bill

It is difficult to think of another cultural sector that has as wide and far-reaching potential to deliver local social value across the nation than football.

The potential in the Localism Bill is that it seems to create a framework in which supporters’ trusts are regarded as legitimate community interest groups (CIGs) and football grounds and clubs could be listed as assets of community value (ACVs).

However:

- Clearer definitions of both CIGs and ACVs could allow supporters’ trusts to be able to take better advantage of the legislation;
- The Land Reform (Scotland) Act 2003 may also offer a way forward;
- At present, the ‘right to buy’ contained in the Localism Bill is in fact little more than a ‘right to bid’;
- In its current form, the Bill seems to encompass supporters’ groups that are hoping to take over the running of their clubs, but clearer guidelines will assist this;
- The legislation could not at present be viewed as the means by which the coalition government *could* be seen to have fulfilled its pledges on supporter community ownership, but the weaknesses at present could be addressed in the guidelines to be produced after enactment.

Supporters Direct recommends that:

- Whilst proposals are currently drafted broadly enough to embrace supporters’ trusts (based on the Supporters Direct model) as *bona fide* CIGs who can nominate ACVs, it leaves this decision in the hands of local authorities, which can lead to inconsistency. Supporters Direct believes that it would be better to specify some groups (including what constitutes a genuine supporters’ trust) within guidance and/or regulations.
- Likewise, although the criteria for defining ACVs are currently structured so they can include football grounds, it would be preferable to specify them as such.

- CIGs, including supporters' trusts, are given a genuine *first refusal* to ensure that there is a *right to buy* and not just an *opportunity to bid*.
- CIGs are given the right to purchase the football club itself as well as the ground as an ACV, recognising the integral relationship between the two and their links to local social value.
- Supporters' trusts should have first refusal on buying majority stakes in clubs that come up for sale.
- Critically, once an ACV is listed by a local authority, restrictions are placed on the ability of existing owners to secure debt on it in order to prevent existing owners making a purchase near-impossible to achieve.
- The moratorium period should be a minimum of 6 months, given the often complex nature of football club-related finances, and the need to perform due diligence in constructing a business case to purchase football grounds (and clubs).
- Supporters Direct is assisted in pressuring the Football League and Premier League to amend their articles of association to allow a mutual form of ownership (currently clubs are required to be limited companies and this may restrict community ownership opportunities).
- Supporters' trusts are given the right to appeal in order to maintain the listing of their football ground/club as an ACV beyond 5 years.
- Supporters' trusts are required to properly demonstrate the community and social value they are delivering.
- Support is given to supporters' trusts to prepare them for the specific challenges of listing and buying football grounds/clubs.

## Financing Supporter Community Ownership

### Big Society Bank

The most obvious way for the Big Society Bank to help the government deliver its promise of encouraging supporter ownership in football is for it to enable supporters' trusts to put together the required finance to buy their club as a community asset. One way they could do this is to facilitate the issuing of 'community shares'. Supporters Direct is requesting that the Big Society Bank provide matched funding to that coming from football in order to help deliver this ambition.

## **Finance from football**

Supporters Direct is requesting that 1% of future television income is used to support the growth of supporter community ownership, in conjunction with funds from the Big Society Bank.

## **Tax Regime**

If anything of general benefit to supporter ownership is to be provided, a new, specific form of relief would be required. A supporters' trust that meets the appropriate criteria could be a proper vehicle through which a tax relief might be implemented. Supporters Direct believes that the present companies tax regime encourages business losses to be run up at football clubs (as part of wider group company ownership), and therefore discourages supporter ownership.

## **Community Shares**

Within set parameters, the community benefit society model used by the supporters' trust movement represents a sound structure for the development of supporter community ownership and sustainable football clubs. The work on community shares undertaken by the Development Trusts' Association, Co-operatives UK and Baker Brown Associates demonstrates the potential these vehicles have for capital raising.

## **Fanshare Regulation**

Supporters Direct calls on government to work alongside it, the Financial Services Authority and HMRC to resolve issues surrounding the tax and regulation regimes currently applied to Fanshare schemes.

# 1 Introduction

## 1.1 New Government, New Opportunities

The election of the coalition government in May 2010 has resulted in significant changes in the public policy landscape. These changes have had significant implications for the future of football, its supporters, and the work of Supporters Direct, whose mission is to:

‘Promote sustainable spectator sports clubs based on supporters’ involvement and community ownership.’

A number of new initiatives, as well as legislation and policy themes, have emerged from the coalition government, which relate directly to this aim of Supporters Direct. Chief amongst these is the promise made in the coalition government’s *Programme for Government*, to:

‘...encourage the reform of football governance rules to support the co-operative ownership of football clubs by supporters.’

In addition, the Agreement also stated that the Government would:

‘support the creation and expansion of mutuals, co-operatives, charities and social enterprises, and enable these groups to have much greater involvement in the running of public services.’

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Therefore, there is a direct relationship between the stated objectives of the coalition government and the aims of Supporters Direct. This paper offers some practical means by which government policy can be implemented.

The principal areas of policy development relating to these two coalition promises are:

- The Department for Communities and Local Government (DCLG) and the Localism Bill which seeks to create a ‘community right to buy’. This is explored in Section 3 of this report;
- The Department for Culture Media and Sport (DCMS), and in particular the current House of Commons Select Committee inquiry into football governance. Aspects of this are also covered in *Briefing Paper No.2*.

However, there are also a number of other areas of policy development which relate directly to the aims of Supporters Direct.

- The Cabinet Office/Office of Civil Society and the desire to encourage co-operative or community enterprises as part of the ‘Big Society’.
- The Treasury, HMRC and Financial Services Authority, and the financial regulations pertaining to mutuals and supporter ownership.
- Citizenship and volunteering, and the development of a National Citizen Service.

## 1.2 Supporters and ‘Community’

‘Community’ is a term that all recent governments have utilised in their approach to public policy. It implies a sense of belonging, the sharing of values amongst groups of people, togetherness, and a shared sense of purpose. It is overwhelmingly conceived of as a positive value.

The Government itself has talked of the importance of ‘community’ in relation to ownership of local ‘assets’: delivery of public services, improving local areas, making neighbourhoods safer and community self-help providing local needs. These underpin discourses of ‘civil’ or ‘big’ society.

People who support football clubs (as well as other sports clubs) are both important members of their own club’s and locality’s communities as well

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as communities in their own right.. Indeed, amongst other sports and forms of cultural expression, football in particular seems to lend itself to such an understanding of ‘community’. There is considerable historical, sociological and applied research that supports this assertion.

- Sports historians have described how football clubs were one of the principal agents through which collective social identities were created and reinforced, thus enabling communities to ‘know themselves’.<sup>1</sup>

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1 Holt, R. (1989) *Sport and the British: A Modern History* Oxford: Oxford University Press

- Sociologists have described how football clubs help to create ‘collective consciousness’ amongst their supporters and ‘repair much... social damage by enhancing the cultural bonding and integration of disparate individuals within modern societies’.<sup>2</sup>
- In Substance’s research for the Football Foundation, *Football and Its Communities*, it was argued that, even in contemporary society, for fans:
 

‘being a football supporter is a regular, structuring part of their lives which enables them to experience a real sense of belonging in an otherwise uncertain world.... being part of a fan ‘community’ is far more substantial than merely an escapist form of momentary bonding... [and is] based on ‘thick’ ties of family, kinship, friendship and neighbourhood.’<sup>3</sup>

We summarise why football should be regarded within contemporary policy frameworks in Section 3 of this report. However, it is important to state at

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the outset that it is Supporters Direct’s contention that communities of fans which form around football clubs should be seen by policymakers as important, dynamic and vital to their local areas, in the same way as other community groupings built around libraries, public houses, parks or other ‘assets of community value’.

Recent research commissioned by Supporters Direct, *The Social and Community Value of Football*, concluded that:

In an age of increasing globalisation, foreign ownership of English clubs, debt and a perception of growing distance between clubs and supporters, it is important to note that football clubs remain key players within local communities.<sup>4</sup>

2 Giulianotti, R (1999) *Football: A Sociology of the Global Game*, Polity: 14

3 Brown, A, Crabbe, T and Mellor, G (2006) *Football and its Communities*, London: Football Foundation

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

Furthermore, Supporters Direct believes that promoting the ownership of sports clubs amongst the communities they serve, notably their supporters, has a number of benefits for the sustainability and success of football and football clubs, and the generation of wider social value for the communities in which they are situated. Key advantages of supporter community ownership<sup>5</sup> identified by Supporters Direct include:

- **Clubs are able to integrate a variety of interests** into the decision-making processes of clubs, creating longer term thinking and more sustainable futures.
- **Clubs can deliver greater social value** to their localities and various stakeholders, helping to create community cohesion and identity formation.
- **Community ownership adds value to enterprise** by unlocking goodwill on the part of supporters and wider private, commercial and public entities.
- **Community ownership of clubs** within the democratic structures of sports governing bodies means that sports are themselves better governed.

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5 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, we recognise that there are other structures which 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.

# 2

## Existing UK Legislation

### 2.1 Company Law

In the UK football clubs, like all other businesses, are subject to UK company law. The dominance of the private limited company as the corporate form of choice for British football clubs means they are treated exactly the same as other companies. Success is defined narrowly (in terms of financial performance) and the fundamental basis for the duties of directors is the requirement to serve the interests of shareholders, which is also pursued in narrow economic terms. There is no requirement to report on their wider social or cultural role, or on levels of community engagement and ownership (unless they are specified as company objects). Attempts at broadening responsibility to embrace other stakeholders (such as that in the Companies Act 2006) have not been successful.

**Essentially, there is nothing in company law which helps deliver the coalition promise to ‘encourage the mutual ownership of football clubs by their supporters’.**

Existing legislation on the various means of buying and ultimately owning and operating an undertaking is therefore neutral as regards the possibility of either a supporters’ or community group taking over a football club. By the same token, there

is also nothing to stop such a group from purchasing a club from its current owners. The only restrictions are those imposed by the football authorities – and not the law – regarding, for example, the appropriateness of purchasers to run a football club and their need to comply with the Owners’ and Directors’ Test.<sup>6</sup>

Where a club is in the process of disposal by its current owners, those owners are either under a *prima facie* duty to maximise shareholder value, or if wholly owned to merely satisfy their own interests and wishes. They have no legal obligation to consider the long term, sustainable interest of that club, or its communities.

Essentially, there is nothing in company law which helps deliver the coalition promise to ‘encourage the mutual ownership of football clubs by their supporters’.

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<sup>6</sup> *Football League Handbook 2010-2011*, Appendix 4 and *Premier League Handbook 2010-2011* Rule D2.

## 2.2 Local Assets

There has been a growing interest over the previous decade in regarding designated sites, businesses or buildings as forms of ‘community asset’. Section 2 of the Local Government Act 2000 gave local authorities the power to undertake actions they consider likely to enhance the economic, social or environmental well-being of its area. The Local Government Act 1972: The General Disposal Consent (England) 2003 gave local authorities freedom to dispose of land at less than the best price and grant a lease in excess of seven years, where it could be demonstrated that it could help secure the promotion or improvement of the economic, social or environmental well-being of its area.

‘Community asset transfer’, as it came to be known, allowed local authorities to transfer land or buildings from themselves to a community, voluntary or other non-statutory organisation either on leasehold over 25 years or freehold.

Given the private ownership of football clubs in the UK – and in the majority of cases the private ownership or long-term leasing of their grounds – it has to date had little relevance in encouraging community ownership of football clubs.

As such, there is nothing in local asset legislation that gives particular preference to community ownership in sport *per se*, and the character of football ownership in particular means that it has even less relevance. The Localism Bill, which is explored in the next section, has the potential to have a greater impact.

## 2.3 Sports Policy and Sports Law

There have been a number of occasions where the UK Government has passed legislation specifically relating to sport – and in particular football. These include:

- The Safety at Sports Grounds Act 1975
- The Football Spectators Act 1989
- Football (Offences) Act 1990
- Football Disorder Act 2000<sup>7</sup>

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<sup>7</sup> See further: M. James, *Sports Law*, (Palgrave Macmillan 2010) chs 9 and 10.

However, there is no legislation that seeks to regulate football, or sport, in order to promote particular forms of ownership. There is also nothing in current law that helps the government deliver its promise of encouraging supporter ownership in football clubs, leaving few – if any – specific tools to shape sport in response to these public concerns.

**The most straightforward way for the government to deliver on its promise to encourage the co-operative ownership of football clubs by supporters would be to enact legislation to do so.**

Thus, the most straightforward way for the government to deliver on its promise to encourage the co-operative ownership of football clubs by supporters would be to enact legislation to do so. In theory, there would be nothing to stop Parliament enacting primary legislation that

sought to promote the supporter ownership of football clubs specifically, or that sought to create a special status for sports clubs as local community assets.

To do so would require some legal tests to be met concerning restrictions on private property ownership – which are discussed in relation to the ‘right to buy’ below – and it would have to satisfy both European and FIFA regulations about interference in football. However, recent statements by UEFA suggest that such ‘interference’ would not be an issue and indeed that sports-specific law to enforce football governance reform would be welcomed.<sup>8</sup>

### **2.3.1 A Sport Law for the UK?**

Another way in which supporter ownership in football could be encouraged is through a change in the legislative relationship between the state and sport in this country. Admittedly, such a change is likely to take some time, and would require a consensus across the world of sport. A full exploration of the possibilities is beyond the scope of this paper. However, we provide some thoughts on this below.

#### **i) What would the long-term aim of a Sports Law be?**

One way in which both supporter ownership and wider concerns about the governance of football (and sport) could be addressed would be for Parliament to enact a Sports Law. Parliament is sovereign and can create new laws at any time, provided they are in compliance with the UK’s various international treaty obligations.

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<sup>8</sup> ‘Sports law to force through reform of FA would be welcomed by UEFA’, Guardian 23rd March 2011

The advantages of this could include:

- Provision of a framework for governance of all sports, similar in scope and purpose to the ‘Loi du Sport’ in France;
- Its scope could be as wide or as narrow as Parliament considered necessary and appropriate;
- It could provide for the increased regulation of governing bodies, and require standard legal forms and processes to be utilised by sports governing bodies;
- It could create new legal forms for sports clubs, enabling greater supporter involvement in the running of sport and ownership of sports clubs.

Supporters Direct advocates a Sports Law that will:

- Recognise that sport is a specific and discrete sector of cultural life which is in crucial areas free to be treated differently than other commercial sectors;
- Provide legal certainty to governing bodies with regards to their regulatory role, whilst facilitating the means to ensure those governing bodies are acting properly, proportionately and in the wider public interest;
- Provide statutory force for the specificity of sport and discourage sudden legal change based on case law;
- Create specific legal vehicles for sports clubs that enable them to better balance commercial activities with their sporting and social purposes.

## ii) A Long Game

**Unlike many European jurisdictions, sport in the UK has always been considered to be a private activity with traditionally a minimal level of state involvement.**

Sport is, of course, subject to the law and must comply with it at all times. Further, in its application to sport the law acknowledges that variations from the norm may at times be both necessary and proportionate (such as the football spectator legislation mentioned above).

The enactment of such far-reaching legislation would require a fundamental change in Parliament’s attitude to sport. Unlike many European jurisdictions, sport in the UK has always been considered to be a private activity with traditionally a minimal level of state involvement; meaning that Parliament

has been extremely reluctant to legislate for sport in all but the most exceptional of cases. The traditional demand within sport that its responsible minister have Cabinet status misses the bigger point that, regardless of their rank, without legislation they will still have very few powers to act.

Thus, to date there has not been the political will or the necessary stakeholder support for a 'Sport Law'. That is not to say that this cannot, or will not, happen but in order for it to do so, it will require:

- Extensive lobbying from all sectors of all sports and all of the relevant stakeholders in sport; and
- For sport to occupy a much more important position on the policy agenda than it has ever previously managed.

That said, Supporters Direct believes that ultimately a Sports Law provides the most holistic and long-term solution to both the problems faced in the governance of professional football and as a route to encouraging supporter ownership of clubs.

### iii) Interim Measures

In the shorter term Supporters Direct calls on the Government to fulfil its Coalition Programme pledge to encourage supporter ownership through an investigation of the following measures:

- Creation of a new legal form by which sports clubs are owned requiring a minimum degree of supporter community ownership;
- Creation of a means by which football's regulation (something which is in the wider public interest) can be ensured, including a licensing system for clubs that enshrines supporter community ownership. We suggest Parliament should legislate to give ministers power to reform football governance if the game is either unwilling or unable to do so. We explore this further in our *Briefing Paper No.2* on football's regulation;
- Identify football grounds, clubs and fans as community formations within new legislation (see section 3 on the Localism Bill).

## 2.4 The Problem of Neutrality

The problems with the 'neutral' legal status of football clubs and the absence of measures encouraging supporter community ownership are twofold. Firstly, it does nothing to encourage supporter community ownership – and therefore does not assist in achieving the Coalition Agreement promise.

Secondly, supporter communities often face significant disadvantages compared to other potential owners of football clubs – such as the ability of other owners to operate at a loss that is written off against wider group profits, which we discuss below.

Some of these disadvantages are common to many community-based mutual organisations – they are largely voluntary, often poorly resourced and face restrictions on the ways in which they can raise finance, leading to them being comparatively under-capitalised relative to the alternative bidders. Others are specific to football, especially where a club is in administration or for sale – supporters’ trusts can be competing against individuals or consortia that have access to capital through ownership of other assets. Also, judgements by administrators or vendors about who is best placed to take over a club are almost always made purely on market value at that particular point in the enterprise’s cycle, rather than the broader social, cultural and sustainability advantages that supporters’ trusts can deliver in the future.

**Supporters Direct believes that ultimately a Sports Law provides the most holistic and long-term solution to both the problems faced in the governance of professional football and as a route to encouraging supporter ownership of clubs.**

A succession of governments have considered the issue of both supporters’ involvement in football and the role of football clubs within their communities, ranging from the Lord Justice Taylor’s Inquiry into the Hillsborough Disaster and the Football Task Force from 1997-2000. Despite numerous recommendations of how

the game could better reflect the wider interests of supporters, none of these have resulted in policy or legislative changes that encourage supporter community ownership in football.

Indeed, calls for supporter representation date as far back as the Chester Report in 1968, which recommended sweeping changes to the FA’s governance, tighter controls over club financial management and supporter representation on the boards of clubs. Despite government support for change at the time, nothing was implemented.

The key conclusion is that if this Government is to fulfil its promise to ‘encourage the co-operative ownership of football clubs by its supporters’, then it has to both summon up the political will and adopt different approaches than previous administrations in order to do so.

In the next section we consider a number of new legislative and policy initiatives that could help change this.

# 3

## New UK Legislation

### 3.1 The Localism Bill

The Localism Bill was introduced before Parliament in December 2010 and is expected to receive Royal Assent in autumn 2011, with the right to buy elements coming into force in April 2012. A consultation document, *Proposals to Introduce a Community Right to Buy – Assets of Community Value* was released by the Department for Communities and Local Government in February 2011.

In its stated aim of creating a means by which communities can identify and list assets of community value, and also give them the right to buy those assets and run services, it is the area of new legislation that perhaps offers the most potential for encouraging and facilitating the ownership of football clubs by communities of supporters.

#### 3.1.1 Context

The Localism Bill needs to be seen within the broader context of the Coalition's stated aim to:

- Encourage decentralisation, transparency and new finance in public service delivery;
- Create greater local involvement in the delivery of 'public services';
- 'Empower communities' to improve the platform for social enterprise, co-operatives and civil society organisations in tendering for public service contracts;
- Encourage 'civil society' organisations (charities, community organisations, co-operatives and social enterprises) especially in the delivery of local services and in increasing 'citizen involvement';
- Create greater social, environmental and economic value in localities;
- Increase levels of giving and mutual support in our society and catalyse a culture shift that makes social action a social norm.

These aims have been posited within a wider brief to 'decentralise' power and empower 'communities':

'The government believes that it is time for a fundamental shift of power from Westminster to people. We will promote decentralisation and democratic engagement, and we will end the era of top-down government by giving new powers to local councils, communities, neighbourhoods

and individuals. We will introduce new powers and opportunities to help communities save local facilities and services threatened with closure, and give communities the right to bid to take over local state-run services.<sup>9</sup>

As part of this, the *Coalition Programme for Government* pledged to:

- ‘Give communities the right to bid to take over local state-run services’;
- Introduce new powers for communities to save local facilities and services threatened with closure;
- Support the creation and expansion of mutuals, co-operatives, charities and social enterprises;
- Give communities the time to bid to buy and manage assets that would otherwise close down.

These aims are being pursued through a number of initiatives, notably:

- The Localism Bill
- The Green Paper on Modernising Commissioning
- The Green Paper on Giving

**The clear potential in the Localism Bill for Supporters Direct, supporters’ trusts and football supporters more generally is that it may be possible for them to identify football clubs or their grounds as Assets of Community Value; and be given the ‘right to buy’ them under certain conditions.**

The Government uses the term ‘differently or better’ to describe the types of approaches and business models they expect to encourage through these measures, including innovation, social/community value and responsiveness. This approach has been criticised as being difficult to implement at a time of widespread cuts,<sup>10</sup> based on a belief that the ‘third sector’ can deliver ‘more for less’<sup>11</sup>

and is a ‘shorthand for cheaper’. Cost-saving is certainly an element of the government’s approach: ‘introducing a community right to challenge will... help local public bodies make savings’.<sup>12</sup> Nonetheless, it is an approach that seems to offer distinct possibilities for supporters’ trusts as organisations that are ‘alternative’ and socially responsive.

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9 The coalition government (2010) *Our Programme for Government*

10 Phillip Blond ‘Big Society under pressure’ Guardian Online 24th January 2011 <http://www.guardianpublic.co.uk/tory-advisers-raise-big-society-concerns>

11 Stephen Bubb speech to Acevo 27 May 2010 ‘Big Society from romanticism to reality’, available at <http://www.acevo.org.uk/Document.Doc?id=682> and Public Finance 23rd September 2010 <http://www.publicfinance.co.uk/features/2010/09/the-big-issue/>

12 DCLG *Localism Bill: community right to buy Impact assessment*

### 3.1.2 The Localism Bill and Community Ownership in Football

#### i) The Potential

The clear potential in the Localism Bill for Supporters Direct, supporters' trusts and football supporters more generally is that it may be possible for them to identify football clubs or their grounds as Assets of Community Value; and be given the 'right to buy' them under certain conditions.

Further, for football clubs more generally there is the potential for those that are constituted as mutuals, or for football club community departments formed as charitable trusts, to bid to run local services as 'civil society' organisations. However, in order for this potential to be realised, further analysis is needed of the political and legal case for a supporters' right to buy, the current provisions and potential changes to those provisions.

#### ii) 'Right to Buy' – The Case for Football as an 'Asset of Community Value'

Introducing the ability to nominate and list football club grounds as ACVs and give supporters' trusts the 'right to buy' them – in the case of disposal, administration or bankruptcy – can be justified on a number of grounds. The most obvious is that the Coalition has promised to find ways of encouraging the 'co-operative ownership of football clubs by supporters'. Whilst the *Programme for Government* makes specific reference to the governance of football, in many ways the Localism Bill offers a more realistic and easy route to that end.

In order for this to be rationalised, we need to consider reasons why football should be considered alongside post offices, shops, pubs and libraries as vital community institutions.

**Football is the national sport and engages more people as players, spectators, consumers and professionals than any other.**

Firstly, football is *the* national sport and engages more people as players, spectators, consumers and professionals than any other. It has been a central part of the cultural life of the UK since the late 19th century

and has roots that spread into every corner of the country. Indeed, there are many more places without a library, shop or post office than there are without a football club.

Secondly, football clubs are important historical institutions within their locality. Born as community organisations (mostly in the late 19th century) they came from churches, workplaces and factories to play a central role in the formation of local community identity. They are also *sporting* institutions

as much as financial ones. This is something that used to be enshrined within the Football Association Rule 34 (which prevented payment of directors and distribution of profit to private shareholders<sup>13</sup>) but the rule was abolished in the 1990s.

Thirdly, there is a huge volume of research which suggests that football clubs continue to act as a focal point for a number of different community formations, including local residents, businesses and supporters<sup>14</sup> as well as local authorities. Indeed, the benefits of close collaboration between local authorities and supporter community owned football clubs has been highlighted in Supporters Direct's research into football's social value:

'Although generally relationships with local authorities were described as positive, there was a sense of greater shared agendas and partnerships in the supporter community owned clubs than in others... This suggests a role for local authorities to further develop relationships with clubs and, where opportunities arise, derive value from assisting or encouraging supporter ownership. There are important advantages here for local authorities working with supporter community owned clubs to realise their own agendas.'<sup>15</sup>

Fourthly, football clubs can deliver significant social value to their communities in both *instrumental* and *intrinsic* ways.

- Instrumentally, football has developed an extensive range of community trusts and charities, programmes and projects that seek to influence or change the lives of local people through education, sport development, crime reduction and health work.<sup>16</sup>
- Intrinsically, the core business of football clubs can deliver social value to local communities through its day-to-day operation: as local employers and companies that deliver local economic benefit; to supporters as a source of local pride and identification; and as strategically important local institutions that develop new facilities or act as the hub for a range of institutional relationships.<sup>17</sup>

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13 Conn, D. (1997) *The Football Business*; Brown, A. (2000) 'Taken to task: The Football Task Force, government and the regulation of the people's game' in Greenfield, S. and Osborn, G. (eds.) *Law and Sport in Contemporary Society*, London: Frank Cass

14 Brown, A. Crabbe, T. and Mellor, G. (2006) *Football and its Communities*, London: Football Foundation

15 Brown A. et al (2010) op cit, London: Supporters Direct: 53

16 Football Foundation (2009) *Kickz Progress Report: Monitoring and Evaluation 2009*, London: Football Foundation. Premier League (2009) *Creating Chances Report*; Premier League (2006) The F.A. *Premier League Community Report 2005/06*.

17 Brown et al (2010) op cit: 56

Finally, football clubs are important community organisations for individuals, playing a structuring part in supporters' lives as the site for the development of family relations, wide-ranging friendships, leisure activity and cultural identity. The survey of supporters conducted for Supporters Direct's social value research concluded that:

'The value fans derive from clubs are therefore all specifically social aspects in terms of the benefits fans feel they receive from them. This indicates that the way fans value their clubs is in terms of the social benefits they get from them – a togetherness, belonging and sense of being part of something tight knit. These are all aspects we associate with the positive notions of community and it suggests that for these stakeholders, clubs need to be understood as predominantly social institutions, not as business ones.'<sup>18</sup>

In short, it is difficult to think of another social or cultural sector that has as wide a reach, as comprehensive coverage of the nation, as deep historical roots or as great a potential to deliver local social value than football.

**The co-operative ownership of football clubs via supporter trusts thus offers huge benefits not only to the way that the game is run, but also to local communities.**

Of course, football can also play a negative role in communities – at times as a source of crime and anti-social behaviour – but also as a source of disillusionment and disenfranchisement. The development of clubs as large commercially-driven

organisations, the accelerated nature of that commercialisation in the 1990s and 21st century, and the concomitant and reciprocal struggles of many smaller clubs to survive also mean that the 'social value' that can be derived from football is limited, curtailed and under threat. 81 clubs which have played in the top five division of English football have sought protection from creditors since the current insolvency regime was created in 1986.

The co-operative ownership of football clubs via supporters' trusts thus offers huge benefits not only to the way that the game is run, but also to local communities. Indeed, this as much has been recognised by the special status and focus placed upon supporter community ownership in the *Coalition Programme*. Such ownership also has distinct business advantages including sustainability, something set out in Supporters Direct's *Briefing Paper No.4 – The Business Advantages for Supporter Community Ownership*.

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18 Ibid: 32

### iii) Right to Buy – The Legal Context

In order for football supporters to be given a ‘right to buy’ their clubs, there are a number of relevant legal arguments which need highlighting. In August 2010, Cobbetts LLP outlined these in their paper *A Fan’s Right to Buy – Making it Happen*.

#### *Company Law*

In their paper Cobbetts presented the basis on which clubs are owned at present:

‘There is an underlying assumption that there is a public interest in allowing owners of property freedom to exploit and develop that property. This has been the thrust of legislation since at least the industrial revolution and state interference with private property rights has been extremely limited and always to serve a clear public interest. Furthermore, where property has been taken out of private hands it has almost invariably been transferred to public ownership, by way of example under the compulsory purchase of land regime. It is this legal and sociological structure which makes the concept of a supporters’ right to buy in football controversial.’

Cobbetts outlined two overarching legal requirements that need to be met for a supporters’ right to buy to be enacted, given the provisions of the Human Rights Act 1998, Article 1, namely that:

- Any interference with the rights of owners of clubs to peaceful enjoyment of their possessions will have to be in pursuit of a clearly identified public interest and ‘subject to the conditions provided for by law’;
- Any laws aimed at controlling the use of property will have to be ‘in accordance with the general interest’.

#### *Supporters’ trusts*

The paper goes on to argue that football meets these tests in two principal ways:

- That football ‘brings communities together’, a point that relates closely to the wider arguments made above;
- That supporters’ trusts using the model rules developed for Supporters Direct embody the delivery of a wider community benefit (or general interest) in their corporate form of community benefit society, as they are ‘required by statute to operate for the benefit of the community and not for the benefit of its members’.

### ***Legal Framework***

Cobbetts use the example of the Land Reform (Scotland) Act 2003 as a precedent for how such legislation might be developed. This is because it allows:

- The registration of a ‘community interest’ in land with the consequence that the land cannot be sold except through the procedure set out in the Act;
- The community to have the right to buy the land provided the community has voted to do so;
- The purchase price to be agreed between the landowner and the community or fixed by an independent valuation.

A number of parallels are outlined with a potential supporters’ right to buy:

- The need for a constituted community body that cannot distribute surplus funds and assets to private individuals (members) but must use it for community benefit (which can be provided through a statutory asset lock in supporters’ trusts);
- That the community body must deliver sustainable development (provided for in trust Objects);
- That a significant number of the individuals have a direct ‘substantial connection’ to the asset in questions (that trusts embody through supporters’ connections to clubs)
- That the control on use of private property is based on a ‘general interest’ (as referred to above);
- That the conditions for this to take place are based in law and these are consistent with other (including European) law.

### ***Capacity and Delivery***

Finally, Cobbetts argued that any ‘right to buy’ for supporters would have to entail a number of conditions for supporters’ trusts if they were to be the vehicle:

- The capacity to meet legislative requirements (such as raising finance);
- That they are open to all members of the community;
- That they can develop a sustainable community benefit strategy;
- That they can measure and report the social and economic benefits they deliver (such as through robust monitoring and evaluation and social auditing).

### 3.1.3 The Localism Bill and a Supporters' 'Right to Buy'?

#### i) Provisions

The Localism Bill Part 4 Chapter 4 contains the principal elements of the community 'right to buy' proposals. It provides for land to be identified as 'land of community value' and Clause 71 gives the Secretary of State the power to determine regulations specifying criteria for this. The Bill as presently drafted does not impose any restriction on the powers of the Secretary of State in defining 'land of community value'.

**The Parliamentary research paper relating to the Bill gives examples of communities being able to take over failing facilities that are otherwise likely to close.**

The Parliamentary research paper relating to the Bill gives examples of communities being able to take over failing facilities that are otherwise likely to close, or land and buildings that are already unused or derelict and which could be put to better use

by the communities in which they are based.<sup>19</sup>

The scheme will enable a 'community nomination' to be made by parish councils, local residents or community organisations to apply to local authorities to have land and/or buildings registered as 'Assets of Community Value' (ACV). Where property is entered onto the list of ACVs, the owner will not be allowed to dispose of that land or building without first notifying the local authority of their intention to do so. At this stage, a community interest group can make a written request to be treated as a potential bidder for the ACV.

It should be noted that at present:

- ACVs can be designated land or buildings, but not services or businesses (although these may also be acquired or may be integral);
- The nomination is to be made by a community interest group (CIG) via the local authority, who will have some discretion as to what they accept – or not – as an ACV
- Clause 79 of the Bill provides that a CIG means 'a person specified, or of a description specified, in regulations made by [the Secretary of State]'. The Bill imposes no restrictions on the power of definition, which is likely to be determined in secondary legislation.

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19 House of Commons Library, *Localism Bill: Local government and community empowerment [Bill No. 126 of 2010-11] Research Paper 11/02*, p48, available at: <http://www.parliament.uk/briefingpapers/commons/lib/research/rp2011/RP11-002.pdf>.

The process is outlined in the Bill as follows:

- i) A CIG (with an appropriate amount of local support) will nominate an asset to its local authority;
- ii) If the local authority accepts it as an ACV, then it must list it as such for a period of five years, as well as publish it and inform the owner that it has been listed;
- iii) An owner may appeal (although this process and the basis on which appeals are made are not clear);
- iv) A owner who wishes to sell is then prevented from doing so in the normal way but must submit it to a procedure to give the CIG a ‘window of opportunity’ – once an asset comes up for sale – to organise and fundraise so they can bid for the asset;
- v) The procedure will involve:
  - The owner notifying the local authority of their intention to sell;
  - An interim ‘window of opportunity’ being provided for CIGs to express an interest in the asset;
  - If no expression is received the owner can sell as normal;
  - If an expression is received a ‘full window of opportunity’ is granted to the CIG to prepare a bid;
  - Compensation will be due to the owner.

**This opens a way for social enterprises, co-operatives and other ‘civil society’ organisations to manage local community assets, which could include supporters’ trusts.**

This opens a way for social enterprises, co-operatives and other ‘civil society’ organisations to manage local community assets, which could include supporters’ trusts. It also seems to create a framework in which football grounds could be listed as community

assets and so where supporters’ trusts could deliver new forms of local community ownership in football. It could enable trusts to make football grounds sustainable community hubs, delivering wider social value to the area and accessing new forms of finance, such as community shares.

## **ii) Limitations of the Bill – A right to Bid, Not Buy?**

### ***Current Lack of Definition***

The primary legislation is, however, lacking in detail in a number of respects.

First, there are no overall criteria to define ‘community asset’. If this is not provided in the Regulations (secondary legislation) it will be self-determined

within each ‘community’ or local authority area. Whilst this may be broad enough to encompass, for example, football grounds, it means that different local authorities (and indeed different local communities) may define ACVs differently, resulting in different outcomes from area to area.

This factor is likely to be critical in determining whether football grounds could be deemed to be an ACV or not. In addition, the current draft of the Bill states that only the land and ground occupied by the club – rather than the club itself – could be considered an ACV. However, there is no doubt that the club’s connection to a particular ground is an important element in its value to the community. As such, if the community benefit potential is to be realised provision needs to be made for supporters’ trusts to acquire the club as well as ground.

Secondly, there is no clear definition of the local community in any given circumstance – which could be very different for a post office and a football club. As yet there is no definition of what will constitute a CIG and what criteria one will have to meet – such as potentially being a formally constituted or incorporated body, having community benefit objects, having an asset lock or being open to all members of the community.

Within a football club’s support there may be different ‘communities’ of fans and within a locality there may be rival bidders. As such, in the case of football, only properly constituted supporters’ trusts which follow the Supporters Direct model – with open membership, democratic structures and asset locks – should be eligible as CIGs.

It is suggested in the guidance to the Bill that a CIG will have to be either a parish council or a group with local connections which satisfies two or more of the requirements they:

- Are incorporated;
- Have charitable status;
- Have an asset lock in a legal form;
- Include in their constitution they are non-profit distributing.

However, there will need to be clearer definitions of both CIGs and ACVs if community groups in general, and supporters in particular, are to be able to take advantage of the legislation.

### ***Scottish Land Reform Act***

This lack of detail is something that Supporters Direct feels needs addressing, and the Land Reform (Scotland) Act 2003 may offer a way forward. The features of the framework defining a community body may be significant:

- Any surplus funds and assets of a community body have to be applied for the benefit of the community and cannot be returned to members (an asset lock of the kind provided for in the legislation for community benefit societies in England and Wales);
- There needs to be ministerial confirmation that ‘the main purpose of the body is consistent with furthering the achievement of sustainable development’ (consistent with the objects of football supporters’ trusts);
- There must be evidence that ‘a significant number of the members of [the community represented by the community body] have a substantial connection with the land’ or ‘the land is sufficiently near to land with which those members of that community have a substantial connection and that its acquisition by the community body is compatible with furthering the achievement of sustainable development’. This makes the concept of membership in the supporters’ trust model potentially significant.

Supporters’ trusts as incorporated bodies with an asset lock would qualify under these criteria. Some technical issues arise around the relationship between the funding of community benefit societies through share capital and the asset lock provisions; but these are capable of being resolved.

### ***A Right to Bid?***

There is no explanation of the benefit, or otherwise, of expressing an interest in purchasing an ACV. In particular, with respect to the *right* to buy, there is no indication that a CIG:

- Is to be treated as a preferential bidder for the ACV;
- Will get first refusal on the option to purchase it; or
- Will simply be given notice of the owner’s intention to sell and therefore the opportunity to bid for the Asset in an open process (i.e. preventing a private, unadvertised sale).

Thus, at present the ‘right to buy’ in the Localism Bill is really a ‘right to bid’ and little more.

Also, there is no clarity on the appeals process for either a CIG denied a listing by a local authority or an owner notified of a listing. Nor is there clarity on the level of discretion to be given to local authorities, although it appears that this may be considerable – something which could result in an uneven application of the legislation.

There is no confirmation on the length of time CIGs will be given in either the interim window of opportunity or a full window of opportunity, although the DCLG Consultation Paper suggests that this will be either 3 months or 6 months. Nor is there clarity on how the situation is to be resolved should there be either more than one community organisation bidding or a rival, private sector, bid for an ACV. In the context of the ‘right to provide’ public services there is an established right to take into account ‘social’ factors in the commissioning process;<sup>20</sup> and the Localism Bill contains the provision that local authorities must consider the relevant (and proportionate) social, economic and environmental value of expressions of interest.

**Thus, at present the ‘right to buy’ in the Localism Bill is really a ‘right to bid’ and little more.**

Supporters Direct supports the application of this principle to the right to buy. Indeed, this approach is advocated in *The Social and Community Value of Football* report, which called

for public authorities to require football clubs they, worked with, or gave preferential treatment to, to demonstrate the public value of that work. Amendments to the Bill tabled in February which call for Clause 68 to ‘improve equality for people who work, study or live in the authority’s area’<sup>21</sup> are also supported, as these are concurrent with the aims of supporters’ trusts.

The Regulations are also likely to be crucial in determining exemptions that could occur where assets are:

- Returned to previous owners under Crichel Down Rules;
- Exercise of a pre-existing option, nomination right, pre-emption right or right of first refusal;
- Transfer where assets and resources that are tied to ongoing service delivery are shifted.

Specific provision may have to be made for insolvency or the exercise of lender’s rights, although it seems clear that the right to buy is intended to be capable of applying in these cases. Also uncertain are issues related to the level of compensation to existing owners. Taking the Scottish land reform legislation as an exemplar, this could be organised through an independently-determined value based on current market value.

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20 See *Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement*, <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=978&furtherNews=yes>

21 <http://www.publications.parliament.uk/pa/cm201011/cmbills/126/amend/pbc1261002m.89-95.html>

Another critical issue common in football is the securing of mortgage or other loans on the value of the land or stadium. This poses three problems even if a football ground is designated as an ACV. Firstly, any debt secured against it will become a liability for the community beyond taking ownership. Indeed, it is highly likely that any lenders might make satisfaction of loans necessary as part of the transfer.

Secondly, the value of the loan may be much more than the current value of the asset. This could be because the charge holder uses the value of the site under alternative usage (usually retail or residential). Alternatively, the loan may not be from a commercial lender but instead be a related party, who has loaned money to the club and secured it against the ground owned by the club they themselves also own. As a result of owning both the club and its assets, they might have been much more sanguine about the mismatch between the amount loaned and the asset value as a working sports ground than a commercial lender might.

However, in the all too common instances of asset stripping in football, this scenario is often deployed deliberately in order to gain control of the land as a working sports ground (where it has less value) in order to develop it for alternative residential and commercial uses (where it has much more value), rather than arising as a consequence of poor financial controls.

A final related point is that under the current Bill provisions, a sale in the event of a mortgage default would not be one where the CIG can make a bid. There have been a great many instances in recent football history where individuals have taken ownership of the ground in lieu of monies lent to the club whilst they owned it. In some cases, this has been by way of recovering funds that have been imprudently lent, but in some cases, where individuals have used ownership of clubs to get at the land asset currently worth little as a football stadium used by an impoverished club, but worth significantly more through alternative usage. In both cases, the lending of the ground is not 'normal' commercial lending as part of business growth, but either knowingly imprudent or as part of an attempt to strip assets. Under the provisions of the Bill, both of these could continue without impediment.

As such Supporters Direct believes that once an ACV is listed by a local authority, restrictions are placed on the ability of existing owners to secure debt on it.

Finally, given that the purpose of the legislation is to create new, local forms of community ownership – in order to deliver wider social benefits – there is little on how this is to be measured should a community purchase

take place, who is to measure it, or what sanctions can be imposed if the community group fails to deliver that benefit.

### iii) Encouraging Supporter Ownership in Football?

In its current form, the Bill does not overtly assist supporters' groups that are hoping to take over the running of their clubs, although much will depend on the precise guidelines and the way local authorities interpret them. Groups such as supporters' trusts appear to be able to apply to have their club's home ground listed as an ACV, but there is no accompanying 'right to buy' for either the club or the ground when it next comes up for sale; only a notification of any impending intention of the owners to sell and to be given some time to develop a bid.

**In its current form, the Bill does not greatly assist supporters' groups that are hoping to take over the running of their clubs.**

The purpose of this part of the Bill appears to be to enable the ACV to continue to be of use to its community when there is a possibility that it might otherwise be closed down. If that is the case, then a supporters' group would

only be in a position to exploit the power proposed in the Bill where their club was in severe financial difficulties and there were no other prospective purchasers, leaving the club as an ACV likely to close permanently. Alternatively, these powers might, perhaps, be able to be used to prevent the sale and redevelopment of a ground, but not the relocation of the club to new premises. Either way, in its current proposed form, this is not the 'right to buy' that many were hoping for.

### iv) Supporters Direct Recommendations

In order for the legislation to properly encourage co-operative ownership in football, Supporters Direct calls on the government to make a number of changes and clarify other elements, whether as part of the Bill or in the setting of Regulations.

- a) Supporters Direct supports the recommendations made by the Plunkett Foundation that there should be:
  - An appeals process for CIGs in the instance when local authorities turn down requests from communities to add an asset to the list;
  - An obligation for the asset owner to speak to an interested community group during the window of opportunity;
  - A minimum of a 6-week full window of opportunity;

- A recognition of time required for a charity/incorporated community organisation to register within the 6-week interim window.
- b) With specific reference to community ownership in football, Supporters Direct would like to go further and recommend that:
- Whilst proposals currently are drafted broadly enough to embrace supporters' trusts (based on the Supporters Direct model) as bona fide CIGs who can nominate ACVs, it leaves this decision in the hands of local authorities, which could lead to inconsistency. Supporters Direct believes that it would be better to specify some that supporters' trusts are defined as being CIG within guidance (with a statement of what constitutes a bona fide trust) and furthermore, where there is a bona fide supporters' trust, they have exclusive rights to bid during the window of opportunity;
  - Likewise, although criteria for ACVs are currently structured so they can include football grounds, it is preferable they are specified as such;
  - CIGs, including supporters' trusts, are given a genuine *first refusal* to ensure that there is a *right to buy* and not just an *opportunity to bid*;
  - CIGs are given the right to purchase the football club (business) as well as the ground as an ACV, recognising the integral relationship between the two and to their local social value;
  - Supporters' trusts should have first refusal on buying majority stakes of clubs that come up for sale;
  - The moratorium period should be a minimum of 6 months, given the complexities of some football club finances and the need to perform due diligence to properly construct a business case to purchase football grounds (and clubs);
  - Supporters Direct is assisted in pressuring the football authorities to grant an exemption to clubs in administration and facing points reduction penalties when that club's ground is listed as an ACV; and the CIG is preparing a bid under the interim and 'full window of opportunity';
  - Supporters Direct is assisted in pressuring the Football League and Premier League to amend their articles of association to allow a mutual form of ownership (currently clubs are required to be limited companies and this may restrict community ownership opportunities);
  - Supporters' trusts are given the right to appeal in order to maintain the listing of their football ground/club as an ACV beyond 5 years;

- Supporters' trusts are required to properly demonstrate the community and social value they are delivering;
- Support is given to supporters' trusts to prepare them for the specific challenges of listing and buying football grounds/clubs.

#### v) **Beyond the Legislation**

Even if the above were to be adopted, there are a number of other areas that Supporters Direct is now addressing so that trusts can be in the best possible situation to take advantage of the legislation:

- A paper outlining ways to raise finance, including community shares;
- Model constitutions and rules to allow community share issues;
- A model asset lock;
- An outline of the implications for football governance – such as giving exemption from points penalties if a club in administration is subject to a community right to buy;
- An outline of an evaluation framework for supporter community owned clubs to demonstrate that social, economic and well-being outcomes, as well as wider social value, are delivered.

## 3.2 **The Big Society Bank**

### 3.2.1 **Context**

The Coalition Programme for Government stated:

‘We will use funds from dormant bank accounts to establish a ‘Big Society Bank’, which will provide new finance for neighbourhood groups, charities, social enterprises and other non-governmental bodies.’

### 3.2.2 **Proposals**

Following the implementation of Project Merlin,<sup>22</sup> the major high street banks (Barclays, HSBC, Lloyds, and RBS and to a limited extent the Spanish bank Santander) have agreed to provide £190bn in credit to small and medium-sized enterprises in order to boost the economy. What has not been announced is whether these new lines of credit will attract preferential lending terms or will be at the banks' normal commercial rates. It is possible

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<sup>22</sup> See [http://www.hm-treasury.gov.uk/d/bank\\_agreement\\_090211.pdf](http://www.hm-treasury.gov.uk/d/bank_agreement_090211.pdf).

that these funds could be made available to supporters' groups seeking to take over football clubs.

**The four major British High Street banks have agreed to provide a further £200m to the BSB that will be used to invest in operations that provide funding to social causes.**

At present, the details about the Big Society Bank (BSB) have not been fully explained to the public, although the government's strategy for growing the social investment market was launched on 14 February 2011.<sup>23</sup> The four major British high street banks

have agreed to provide a further £200m to the BSB to be used to invest in operations that provide funding to social causes.

Thus it would appear that CIGs, possibly including supporters' groups, will not be eligible to apply directly to the BSB in order to access these funds. Instead, they will have to apply to third parties, who have themselves developed funding for social projects, and who have an interest in supporting initiatives that can produce measureable social and community value.

However, there are also ways in which the BSB proposals offer opportunities for the Coalition to promote supporter community ownership in football.

### **3.2.3 The BSB and Supporter Community Ownership in Football**

#### **i) Community Shares**

The most obvious way for the Big Society Bank to help the government deliver its promise of encouraging supporter community ownership in football is for it to enable supporters' trusts to put together the required finance to buy their club as a community asset. One way they could do this is in relation to the issuing of 'community shares'.

Community shares is a term used to describe non-voting capital fund shares issued by a community benefit society as defined under Industrial and Provident Society legislation. It is an increasingly popular way for co-operatives to raise capital and would be a major contributor to the ability of supporters' trusts to purchase clubs or related assets under right to buy legislation. Community Shares are discussed in more detail in Supporters Direct's *Briefing Paper No.3: Financing Supporter Community Ownership in Football*.

The Development Trusts Association, Co-operatives UK and Baker Brown Associates have recommended a series of ways in which community shares could be encouraged through use of Big Society Bank funds.

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<sup>23</sup> The document is available at: [http://www.cabinetoffice.gov.uk/sites/default/files/resources/404970\\_SocialInvestmentMarket\\_acc.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/404970_SocialInvestmentMarket_acc.pdf).

These are to establish:

- *A Pioneer Fund* providing match funding for initial pioneer investment enabling them to become investment-ready;
- *An Underwriting Fund* to provide support for time-bound community share offers;
- *A Subscription Fund* to provide short-term finance to bridge gaps for subscription-investment offers.

These would also be supported by a *Reinvestment Fund* (which could be specific to trade activities such as football) to get support from ethical investors to channel additional resources to societies through the above funds.

Supporters Direct calls on the government to support these recommendations.

## ii) Supporters Direct Ownership Fund

**Supporters Direct requests that the Big Society Bank provides matched funding to that coming from football in order to help deliver this ambition.**

Supporters Direct is also requesting that Big Society Bank funds are made available to support its own scheme to assist trusts in launching community share schemes. This comes alongside Supporters Direct's proposal that it should receive around 1% of revenue

from current television deals (which would currently yield around £12m).

This would be used to finance the organisation to assist it in fulfilling the coalition aim of supporting co-operative forms of supporter ownership in football. It will also help establish a Supporters Direct fund to facilitate the creation of community shares schemes amongst supporters' trusts. This will:

- Provide financial support to trusts initiating community share schemes;
- Encourage professional management at supporters' trusts launching community shares schemes;
- Only be available to supporters' trusts meeting the Supporters Direct 'fitness to fund' criteria;
- Encourage funding from other parties (such as social investors and high net-worth individuals).
- Supporters Direct requests that the Big Society Bank provides matched funding to that coming from football in order to help deliver this ambition.

### **iii) Capacity Building**

Such funding would also allow Supporters Direct to play a key role in building the capacity of supporters' trusts to be 'right to buy-ready'. This could include:

- Once enacted, training for supporters' trusts about the opportunities of the Localism Act;
- Development of 'how to' guides for supporters' trusts on the opportunities of 'right to buy' and 'right to provide';
- Providing small grants for supporters' trusts to develop finance packages including community shares;
- Funding legal help for supporters' trusts with regard to asset locks in rules and community shares offers.

## **3.3 The Tax Regimes**

### **3.3.1 Preferential Treatment for Supporter Community Ownership**

One means of the Government actively encouraging supporter community ownership of football clubs would be through the tax regime. For present purposes, tax incentives are provided in two policy situations:

- Charities which serve a public interest and are regulated by the Charity Commission do not pay tax and have the advantage that gifts to them can be treated as their income and not the income of the donor for tax purposes under the Gift Aid scheme;
- New enterprises have a range of tax incentives to encourage investment. The most relevant for present purposes is the Enterprise Investment Scheme (EIS) which, subject to detailed conditions, permits an investor to set 30% of the cost of their investment against income tax with further reliefs from capital gains tax.

The reality is that money raised to fund the purchase of a football club does not fit into either of these policy situations, with the result that the available tax reliefs do not readily provide assistance.

Whilst elements of some supporters' trusts' activities could properly be regarded as charitable, the basic activity of a football club is not charitable. This severely restricts the extent to which Gift Aid is helpful in the context of supporters' trusts buying football clubs. Whilst there are some extensions of Gift Aid to activities which are not strictly charitable (such as Community

Amateur Sports Clubs) it would be a strain conceptually to regard tax relief in connection with supporter community ownership of football clubs as an extension of support for charitable giving.

**One means of the Government actively encouraging supporter community ownership of football clubs would be through the tax regime.**

Similar difficulties exist with EIS relief. As the name suggests, the relief is intended to promote enterprise and investment, whereas the situation under consideration in this paper is one in which an existing business is being taken over and the money intended

to be used is not an investment in the normal sense of the word. There have been a number of cases, including some in sport, in which purchasers of shares in a community benefit society or co-operative have benefited from EIS relief but some of the limitations in the scheme (such as the prohibition of an exit route or a right of redemption) make it difficult to use in practice. Again, given the underlying purpose of the relief, it would be difficult conceptually to view tax incentives for supporters' trusts raising money to buy football clubs as an extension of EIS relief.

Therefore if anything of general benefit for supporter community ownership is to be provided, the creation of a specific new form of relief would be required. This would necessarily be a long-term project and involve consultation and considerations of European law and in particular the regime affecting State Aid. Subject to that, the following observations might be made:

- EIS relief provides a model for the kind of relief that would be appropriate if the Government was encouraging people to use their money in a particular way;
- A supporters' trust which meets the following criteria would on the face of it be a proper vehicle through which a tax relief might be given:
  - It is registered as a community benefit society;
  - It has objects focused on using a football club as means of delivering community benefit;
  - It is raising money for a purpose directly related to its objects (such as the acquisition of supporter shares of the kind described in the separate paper on Regulation);
  - It has a statutory asset lock.
- A relief of this kind would inevitably be considered in a broader context. This would bring in other candidates for similar relief in sport and

elsewhere, including any exercise of a community right to buy. This would be a legitimate exercise as part of the Big Society initiative but it is not likely to be a swift process.

### 3.3.2 Group Taxation Issues

Supporters Direct believes that the present tax regime for group companies encourages business ownership of football clubs and therefore discourages supporter ownership. The basic rule is that where companies are in common ownership or in a subsidiary/parent relationship (defined as the ownership of at least 75% of a company's shares), losses in one company can be offset against profits in another.

The effect of this in a football context is that someone who owns a successful trading business and a football club can use the losses in the football club to reduce tax on the profits in the successful business. This can encourage or allow those running football clubs to do so in a way which is not sustainable were that club to be independent of any group because they can spend more than they earn. Indeed, it turns clubs which might otherwise seem unprofitable and unsustainable enterprises into useful vehicles for the purpose of tax-efficiency within a group of companies.

**Supporters Direct believes that the present tax regime for group companies encourages business ownership of football clubs and therefore discourages supporter ownership.**

A related consequence of this is that corporate governance in clubs suffers as the strategic and operational decisions become concentrated in the hands of a limited number of beneficial owners and trusted executives, and innovation in these clubs becomes secondary to securing

regular ongoing subsidies from parent entities. These losses, though, remain on the club's balance sheet, and the potential for sudden withdrawal remains a key source of instability for clubs, and we say much more about this in *Briefing Paper No.2: Developing Football Regulation to Encourage Supporter Ownership Community in Football*.

Furthermore, this encouragement to run up operating losses is a critical contributor to the systemic levels of instability in football's finances, and presents a significant challenge for community-owned enterprises; as they have no parent body to provide equivalent support when it comes to trading losses, and so find that their avowed aim of sustainable operations leaves them out-spent in the race for talent and likely to be poorer performing on the pitch however well they do off it.

Stopping club owners being able to get tax relief on their losses would level the playing field for supporter community ownership and ensure the taxpayer was not subsidising poor governance and financial performance in football.

Such a proposal might be viewed as controversial by those currently benefiting from it, who could argue that the result of legislation along these lines would be to take money out of football and place clubs at risk. However, these clubs are only imperilled in the first instance by the particular approach to financial sustainability that group ownership taxation encourages. Priority must be given to ending any incentivising. Furthermore, if the tax foregone were redeployed to incentivise community ownership, football would still receive reliefs, but that the route for these into football would be more closely aligned with wider government policy than they are at present.

From a legal and policy perspective, justification would need to be made as to why football should be given exemption to such rules, and difficulties of principle and definition in the drafting of statutory provisions would need to be resolved. However, short of significant reform in the regulation of football, with the right political will and advice, addressing this issue would be one way in which the government could fulfil its promise to encourage community supporter ownership in the game.

### **3.4 Regulation of 'Investment' in Community Benefit Societies**

Supporters' trusts are formed as community benefit societies under industrial and provident societies<sup>24</sup> and as such the regulation of them, and in particular of how they can raise finance to support community ownership of football clubs, needs to be understood and refined. FC United of Manchester have pioneered raising finance through investment in community shares to undertake its own ground development. This has raised £1.3m to date but has also highlighted some issues with regard to the regulation of investment in community benefit societies.

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<sup>24</sup> 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, we use this new term in anticipation of this change. Supporters Direct and all the supporters' trusts using its model rules are community benefit societies.

The regulatory framework for community benefit societies has remained largely unchanged for generations. This means that there are technical issues about the nature of shares in them which will need to be resolved if community ownership using the supporters' trust model is to be straightforward.

The problem is that shares in a community benefit society or co-operative are not the same as shares in a normal company. In a 'normal' company there is an obligation to maximise shareholder value and the primary aim of the company is to deliver this, but in community benefit societies and co-operatives, there are over-riding company objectives to benefit the community (in the former case) and co-operative members (in the latter case). Also, community benefit societies and co-operatives must be democratic. That means that the purchase of shares within them does not give entitlement beyond the one member one vote principle.

Issues also exist about consumer protection in the context of offers for shares in community benefit societies. Societies enjoy substantial exemption from financial regulation provided they are raising money for the community purpose for which they are registered; but recent developments in this area are likely to cause the FSA to review its approach. Current FSA guidance states that interest payable on shares in a co-operative or community benefit society must 'not be more than a reasonable rate necessary to obtain and retain enough capital to run the business'. It is unlikely that the Government or the FSA will allow community benefit societies to be an unregulated sector for 'investment' on the basis of attractive interest rates.

Cobbetts LLP and Co-operatives UK have produced papers in this area which suggest a way forward. Co-operatives UK has also produced some helpful guidance on how shares in community benefit societies and co-operatives should be marketed, along with a proposal for co-regulation. Finally, the Mutuo paper *Punk Finance – Capital: Made Mutual* contains an analysis of what is possible and what should be possible. In summary, regulation of the sector needs to ensure that:

- A society whose ability to deliver community benefit is restricted by its obligation to pay interest (or dividend) on those shares should not be entitled to immunity from regulation in the sale of shares;
- Interest should not exceed a 'savings account' rate of interest;
- Community benefit must be delivered before interest is paid;
- The governance of the enterprise must enshrine a voice for members to self-regulate the use of surpluses;

- If there is a right to interest on, or repayment of, shares, creditors should be protected in terms and conditions.

It should not be possible for a community benefit society to take on an obligation to pay interest which undermines its constitutional commitment to use surpluses to benefit the community. Within these parameters (and arguably because of them), the community benefit society and the supporters' trust represent a sound structure for the development of community ownership and sustainable football clubs.

In Supporters Direct's *Briefing Paper No.3: Financing Supporter Community Ownership* options for community benefit societies as examined, well as codes of conduct and mutual self-regulation are explored.

### 3.5 'Fanshare' Schemes

Arsenal Supporters' trust has developed another pioneering way of raising finance to assist supporter community ownership, the Fanshare scheme. This is discussed in full in *Briefing Paper No.3: Financing Supporter Community Ownership* but it is relevant here to highlight a regulatory concern which needs to be addressed.

The 'fanshare' idea allows supporters to invest in a fund that then buys up available shares in the relevant club, helping supporters' trusts build up a stake in that club. However, such schemes face two regulatory obstacles:

- i) They are not eligible for tax relief such as EIS because it is not an investment in 'new business' and returns to the taxpayer via capital gains tax are unlikely;
- ii) They face regulation as if they were a 'normal' vehicle for investing in shares – in which people invest in order to receive a financial return – when in fact such investment by football supporters is made chiefly for other reasons (such as emotional attachment).

With regard to the first of these, it is unlikely that something like EIS could be adapted to meet the 'fanshare' scenario. However, it should be possible to devise a form of personal tax relief, under strict conditions such as length of investment and minimal financial return, which encourages supporters to support such schemes.

With regard to the second, there are good reasons why regulation is in place – the protection of the investor in a particularly unsuccessful area of the economy for investment. However, regulation also needs to:

- Find a better way of identifying risk and mitigating against it,
- Identify the criteria under which exemption might be given;
- Recognise the investment is in a specific sector (in this case football), within a specific regime (in this case the supporters' trust) and is undertaken for specific reasons (concern for the long term interest of the football club);
- Identify what is, and what is not, 'by way of business'.

Supporters Direct calls on government to work with it, the FSA and HMRC to resolve these regulatory and taxation issues in order to encourage supporter community ownership of football clubs.

## 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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