The social and community value of football - Are there any regulatory requirements for football clubs to report against social and environment impacts?

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The Social and Community Value of Football

Are there any regulatory requirements for football clubs to report against social and environment impacts?

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1. Introduction

It is often claimed that because professional football clubs are at the centre of, integral to and essential for the communities in which they are based, the pattern of regulation affecting them should be different from that which is imposed on other businesses of a similar size. Such claims are used to justify the need for the differential treatment of football clubs in many different contexts from planning and licensing applications, to calls for the more effective regulation of football clubs from supporter groups, to the rule providing for the primacy of football creditors.[2] Despite this claim of difference, however, neither the football authorities, domestic UK law nor EU law require football clubs to submit to any social accounting procedures. The result of this lack of a framework for measuring the social and community impact of a football club is that there is very little evidence that can be relied on by either the governing bodies of football, their constituent member clubs or their fans to justify the differential treatment that is often sought. Further, this lack of evidence makes it almost impossible to justify to clubs why it could be beneficial for them to engage with their communities more proactively than might otherwise be the case.

2. Regulation by the football authorities

All professional football clubs based in the UK must be members of the domestic football association of the country in which they are based or of which they have received special dispensation to be a member; for example, in England, all clubs must be members of the Football Association and comply with its rules and regulations. Further requirements can be imposed on clubs by the organiser of the league or other competition in which they wish to take part, including for example the Premier League, the Football League or the Football Conference. Finally, any club which qualifies to compete in either the UEFA Champions League or the UEFA Europa League must have fulfilled the requirements of the UEFA Club Licence.

The FA requires an annual return be made to it by a club seeking to renew its membership.[3] The return, made on Form 'A' to provide evidence of compliance with Rule I, must contain a copy of the club's most recent annual accounts and evidence of its legal status and security of tenure in respect of its home ground. Form 'A' also requires that a meeting of the club's board or committee has resolved to commit to the long term health and stability of the club in the community of which it has traditionally been a part. However, nothing more than a

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[1] www.supporters-direct.org.uk ; www.substance.coop

[2] Rules of the Football Association, Rule A3(g).

[3] FA Handbook Season 2009-2010, http://www.thefa.com/TheFA/RulesandRegulations/~/media/Files/PDF/TheFA/FA%20Handbook%2009%2010/FA_Handbook_Full_Proof_NO_CROP.ashx/FA_Handbook_Full_Proof_NO_CROP.pdf.

resolution to such effect appears to be necessary; no criteria are provided against which a club's performance must be judged. Thus, there is a basic expectation that a football club will engage with its local community but no apparent means of assessing the regularity or quality of that engagement.

The only additional requirement imposed on Premier League clubs is that they have in place a customer charter, as defined in Rule J of the Premier League Handbook.[4] The charter must contain the club's policies on its relationships with its main stakeholders, who are defined as being its supporters, season ticket holders, shareholders, sponsors, the local authority in which it is based and others having an interest in the activities of the club. Rule J.17 requires that the club's policies with regard to its stakeholders should provide for consultation with them on a regular basis through forums, questionnaires and focus groups and by the publication of current policies on major issues in an easily digestible format. Further, the policies should promote supporter and community liaison and provide for the establishment of liaison structures.

Rule J.3 requires an annual report to be submitted that describes how each of these policies has been implemented and the extent to which the goals of each have been achieved, however, this falls far short of a requirement that any form of social accounting be undertaken or that the clubs themselves, as opposed to their community foundations, have a positive impact on their communities. Clubs set their own goals and assess themselves when determining whether or not these have been adequately achieved; there are no objective criteria against which their conduct is judged and there is no external scrutiny of the quality of their community engagement. Outside of the Premier League, there is also no social accounting requirement for Football League clubs,[5] though an annual review of the customer services and community activities engaged in by member clubs is conducted through its 'Goal Report'.[6]

Where international competition is concerned, clubs that have qualified to compete in either of the two UEFA club championships must be in possession of a UEFA Club Licence.[7] Applications are processed by the national association to which a club is affiliated, in England the FA, in accordance with the five criteria identified in the UEFA Club Licensing Manual: sporting issues; physical infrastructure; appropriate personnel and administration; legal and financial requirements. These criteria are, for the main part, requirements of good governance and an attempt to ensure that the qualifying clubs are properly administered and have facilities that are of an appropriate standard for participation in European competitions. There is no requirement in the detailed explanations of these criteria that a club assess either its social or community impact. This situation is replicated at the world level where despite FIFA's claim that its proposed '6+5 Rule' will maintain the link between a club and its immediate locality, there are no requirements that a club undertake any community activities and no framework within which such activity be recorded.[8] Thus, none of the governing

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[4] Premier League Handbook Season 2009-10, http://www.premierleague.com/staticFiles/bb/3b/0,,12306~146363,00.pdf

[5] Application for membership of the Football League, http://www.football-league.co.uk/staticFiles/b/3d/0,,10794~146699,00.pdf

[6] Goals Report 2008-09, http://www.football-league.co.uk/publications/goals-report-200809-20090511_2246592_1654351

[7] UEFA Club Licensing System Manual Version 2.0, http://www.uefa.com/newsfiles/358508.pdf. The requirements of the UEFA Club License are currently under review and could provide an opportunity for discussing whether social accounting should be introduced as an additional criterion.

[8] See further, http://inea-online.com/download/regel/gutachten_eng.pdf

bodies of football with influence over the regulation of English clubs require any level of social accounting, or other social value assessment, to be undertaken.[9]

3. Regulation under UK law

Football clubs, like any other businesses, are subject to UK law. At present, however, there is no specific requirement that any UK company undertake social accounting in respect of its impact on a specific community or the locality in which it is based. Under section 415 Companies Act 2006, the directors of all companies must prepare an annual report that covers each financial year. This directors' report must include, amongst many other requirements, a business review that provides the company's members with sufficient information to enable them to assess whether the directors have performed their various duties. Thus, if the company has social or community benefit as one of its objectives, then it will have to report on whether that objective has been achieved and if so, how. Further, quoted companies must provide information about any policies that have been implemented in respect of social and community issues to the extent that they are necessary for an understanding of the development or performance of the company's business.[10] Thus, if engagement with a particular community or communities is necessary or integral to the performance of the business, then the company would be expected to report on its operations in this area.

This leaves the position under UK law being that as there is no evidence that there is a need for a football club to engage positively with its communities in order for it to be successful, because 'success' is defined narrowly in terms of its financial and football performance, there is no specific requirement to report on the quality of the impact that it does in fact have on those communities. In coming to this conclusion, it must be remembered that there is no legal requirement that a company actually engages with its community, just that it reports on any engagement that it does undertake.

4. Regulation under EU law

Football clubs are also subject to EU law both when acting individually or as a constituent member of a league, such as the Premier League, or governing body, such as the Football Association. The social significance of sport to the EU and its citizens has been referred to on many occasions by its political and legal institutions. However, this must be distinguished from the social impact of a club on its community, a distinction that is not always made clear in discussions of law and policy in this area. This lack of clarity is often replicated within football, where both the governing bodies and the clubs claim on the one hand to be 'ordinary businesses' in no need of specific regulation, as was seen by their response to the recommendations of the Football Task Force,[11] and on the other their demands for exemptions from the operation of EU law for sports-specific practices, such as the transfer system.[12]

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[9] Some governing bodies in other EU Member States may have such rules; for example, the German Bundesliga has limited private investment in sporting clubs to ensure that they retain their public character. EU Conference on Licensing Systems for Club Competitions, September 17-18 20009, Brussels, Final Report p. 2 available at http://ec.europa.eu/sport/library/doc/c7/licensing_conf_final_report.pdf

[10] Section 417(5)(b)(iii) Companies Act 2006.

[11] 'Football: Commercial Issues' A Report by the Football Task Force to the Minister of Sport, available at: http://www.culture.gov.uk/images/publications/footballtaskforcereport.pdf

[12] *Union Royale Belge des Societes de Football Association ASBL* v *Bosman* (Case C-415/93) [1995] ECR I-4921

Historically, the EU had no direct legislative competence to regulate sport. As a result, EU intervention in sport generally took one of two forms; documents that were not legally binding such as opinions or recommendations and legally binding rules that, whilst not specifically addressed to sport, in practice do govern sporting activity as they would all other activities. When the Lisbon Treaty entered into force on 1 December 2009, a specific mention of sport was inserted for the first time in the new Article 165 Treaty on the Functioning of the European Union (TFEU).[13] The EU's new powers in respect of sport relate to incentive measures and non-binding instruments. Any direct regulatory powers to harmonise sports-related legislation in Member States are expressly excluded. Thus, although the Lisbon Treaty provides for the possibility of direct EU funding for sporting initiatives, the EU law most relevant to sport will continue to be that which regulates sporting activities that can also be categorised as economic activity. These include Directives on the freedom of movement of citizens,[14] the freedom to provide services[15] and the mutual recognition of qualifications[16] and the competition law provisions in Articles 101 and 102 TFEU.

References to the social significance of sport in many EU instruments can be explained as being rhetorical. EU acts which, whilst not primarily aimed at sport, do not always expressly refer to how sporting practices should be treated. For example, the rules contained in the TFEU that prohibit nationality discrimination clearly affect sport but those rules contain no express reference to that effect. In some of the sports cases where these legal rules have been at issue, sport is assumed to have a social significance and, as a consequence of that assumption, sporting practices are claimed to require different treatment to similar practices that are operated in other contexts and which are clearly subject to EU law. For example, direct nationality discrimination has in other fields been justifiable only by reference to express exceptions listed in the Treaty such as public policy, public health, or public security.[17] However, the ECJ has accepted that sports structured on the basis of nationality may require directly discriminatory rules that, for instance, restrict the membership of representative teams to nationals or appropriately qualified individuals of one specific country.[18]

EU law requires that where a practice hinders freedom of movement for workers or services or the freedom of establishment (Articles 45, 49 and 56 TFEU), it must be justified and proportionate. EU law also prohibits unjustified restrictions of competition (Article 101 TFEU) and abuses of a dominant position (Article 102 TFEU). Despite the wide-ranging nature of the regulatory framework within which sport must operate, there are no rules of EU law which would require a sporting body to undertake social accounting. However, sports-related justifications can help to determine whether a practice that might restrict freedom of movement or competition is contrary to EU law. The social significance of sport has appeared in such justifications and has been invoked to justify some sports-related practices. However, in the case law of the European Court of Justice (ECJ), the social functions of sport appear primarily as rhetorical tools which introduce justifications accepted as valid by the Court. For example, the ECJ refers to the social function of sport in *Bosman*

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[13] The formal title of the Treat of Lisbon is the Treaty on the Functioning of the European Union.
[14] Directive 2004/38/EC.
[15] Directive 2006/123/EC.
[16] Directive 2005/36/EC.
[17] See for example *Bond van Adverteerers and others* v *The Netherlands State* (Case 352/85) [1988] ECR 2085 paragraphs 32 and 33.
[18] *B.N.O. Walrave and L.J.N. Koch* v *Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* (Case 36/74) [1974] ECR 1405 paragraphs 8 and 9, *Gaetano Donà* v *Mario Mantero* (Case 13/76) [1976] ECR 1333 paragraphs 14 and 15. That link must exist on the facts: *Union Royale Belge des Societes de Football Association ASBL* v *Bosman* (Case C-415/93) [1995] ECR I-4921 paragraphs 131-133.

when introducing the justifications that are linked to reinforcing those social functions and observes at paragraph 106 that,

> 'In view of the considerable social importance of sporting activities and in particular football in the [European Union], the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate'.[19]

In contexts where the social function of sport is used simply as a rhetorical tool to introduce other justifications, it is often accepted without further investigation.[20] For example, in the *Deliege* and *Bosman* cases, the judgments of the Court first observed that sport has a considerable social function[21] but did not appear to base this on evidence other than, in the *Deliege* case, the political 'Declaration 29' annexed to the Treaty of Amsterdam. Conversely, these judgments then proceeded to rely on the social functions of sport as a reason for other justifications for the legality of the disputed sporting practices. These secondary justifications, which included the need to maintain competitive balance between clubs or encouraging the training of young players[22] and the necessity of selection procedures for elite-level competitions,[23] were then examined in more detail. However, when societal benefits are themselves claimed to constitute justifications for differential treatment, the ECJ has carefully examined the veracity of such claims.

Thus, when discussing nationality quotas in *Bosman*, the ECJ observed that even if, hypothetically, the connections between club teams and their countries were social aspects of sport that might justify discriminatory practices, no such connections could be demonstrated by the football authorities to exist.[24] Most modern ECJ judgments do not rely on or even mention the social importance of sport as a factor used to decide the cases coming before it. The non-binding advisory opinions of Advocate Generals to the Court have extensively discussed some social functions of sport, however, even in these the social importance of sport is rhetorical and there is no discernible trend for this to affect legal outcomes.[25] Whilst the social functions of sport may receive recognition in case law, this recognition does not in itself translate into legal concessions. Sport may be sufficiently different from other activities to warrant careful examination under the law, but that careful examination has not allowed it to operate outside the reach of the law purely on the basis of its social significance.

There is also a tendency in some modern EU legislation to make a special case for sport as opposed to other activities that fall within the scope of ordinary EU regulation. Preambles to such legislation may make reference to the social importance or functions of sport and claim that sport ought therefore to be entitled to differential treatment.[26] Whilst it is possible for legislation to state that a particular sector such as sport is not within its scope, the modern clauses which purport to exempt sport are often not clearly drafted or are in conflict with

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[19] *Union Royale Belge des Societes de Football Association ASBL* v *Bosman* (Case C-415/93) [1995] ECR I-4921. See also *Lehtonen and Castors Canada Dry Namur Braine* v *Fédération Royale Belge des Sociétés de Basket-ball* (Case C-176/96) [2000] ECR I-2681 paragraphs 32-36.
[20] *Lehtonen* paras 32 and 33**,** *Deliège* v *Ligue Francophone de Judo et Disciplines Associées ASBL, Ligue Belge de Judo ASBL, Union Européenne de Judo* (C-51/96) and *François Pacquée* (C-191/97) [2000] ECR I-2549 paras 41-44.
[21] *Bosman* paragraph 106, *Deliege* paragraph 42.
[22] *Bosman* paragraph 106.
[23] *Deliege* paragraphs 64 and 69.
[24] *Bosman* paragraphs 123, 131-133.
[25] See for example Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE)* [2008] ECR I-4863, Opinion of AG Kokott points 24 and 25.
[26] See for example Directive 2006/123 on services in the internal market, recital 35.

other legal sources. For example, whilst the main text of the Directive on Services in the Internal Market seems to treat sport in the same way as any other economic activity, Recital 35 states that,

> 'Non-profit making amateur sporting activities are of considerable social importance. They often pursue wholly social or recreational objectives. Thus, they might not constitute economic activities within the meaning of [EU] law and should fall outside the scope of this Directive.'

The lack of consistency between the above Recital and the legally binding main body of the Directive leaves it unclear as to whether non-profit making amateur sport is actually exempted from its operation.[27] If the law is interpreted to be as it appears in the Recital, on the basis that the non-profit nature of these activities means that they are not 'economic', then this leads to conflicts with how recent case law has developed, leading to uncertainty in the application of the Directive to sport. Further, if such activities were exempted from the scope of the Directive, it would be unclear whether such an exemption would be extended to other similar rules under the Treaty. Although there is currently no case law on the effect of such claims, historically, the ECJ has interpreted exclusions from the scope of EU instruments in a restrictive way. It also seems unlikely that the Court would accept that secondary legislation of this kind could limit primary Treaty obligations such as the prohibitions on nationality discrimination and anti-competitive commercial practices. Nevertheless, statements such as those in Recital 35 which are at odds with the main text of the instrument and with judgments of the ECJ considerably increase the level of uncertainty over the extent to which sport is afforded special treatment under EU law.

The final environment inhabited by the 'social significance' argument is the collection of non-binding political instruments adopted by the institutions of the EU. These political declarations do at times go further than merely observing the alleged significance of sport (itself of no direct legal importance), and propose that the EU should positively reinforce certain social functions of sport. When those political declarations have led to EU action beyond its constitutional powers, the ECJ has declared such action unlawful, including *UK v Commission* where the legality of sports-related funding and the Commission's approval, prior to *Bosman*, of nationality discrimination in sport was contested.[28]

Social impact could, in principle, be recognised as a legitimate feature of sport and could be invoked to justify restrictive practices that aim to secure community involvement. However, when the social functions of sport have been invoked before the ECJ to justify restrictions of the freedom of movement provisions or anti-competitive conduct, the rules which pursue allegedly social benefits must be proven to be proportionate. This means that they must be suitable for achieving their aims and that they must be the least restrictive measures which are suitable for achieving those aims. Thus, where a societal dimension of sport is raised as a justification for a restriction of freedom of movement or competition, that dimension must have an appropriate evidential basis. Since EU law does not directly regulate sport, it lays down no specific social obligations for sports governing bodies or their constituent member clubs, therefore, that evidential basis remains elusive. Although some Member States of the EU, such as France through its Loi du Sport, have a much more interventionist approach to the regulation of sport than does the UK, there is still no requirement that evidence of this nature be collected and audited.

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[27] See Articles 1 and 2 of the Directive, both of which specify exemptions or expressly include sectors within their scope.

[28] *UK* v *European Commission* (Case C-106/96) [1998] ECR I-2729.

Some cases where the social functions of sport have been invoked as justifications for their legality have been popularly interpreted as being decided on the basis of the social significance of sport. This does not always reflect the actual interpretation of the law applied in the case and can be explained by publicity material, such as press releases, failing to represent accurately the legal reasoning involved. The press releases announcing the closure of the European Commission's investigations into the legality of transfer systems and the sale of sports media rights afford two prominent examples.[29] Whilst these referred in various ways to the Commission's attempt to take into account sporting issues or the social functions of sport, there is no evidence that its formal legal decisions were based on these issues.[30] Instead, conventional economic arguments led to a conventional application of EU competition law.

Even after the entry into force of Article 165 TFEU, declarations on the social functions of sport remain non-binding instruments which cannot directly influence how sport is regulated under the ordinary provisions of EU law. The primary value of political declarations or other instruments which accord a special function to sport is to provide additional rhetorical support for why proportionate sporting practices should be justified even where they restrict freedom of movement or competition. Thus, if sports governing bodies imposed social accounting requirements which restricted freedom of movement or were anti-competitive, these might be justifiable in this way.

Where the social value of sport is argued as a justification for specific conduct, such claims will need to be based on cogent evidence. There could be a role for supporter ownership in such claims; if it is demonstrated that supporter ownership is beneficial to sport and a necessary feature of the organisation of sport, then measures encouraging supporter ownership might be justified even where they restrict economic freedoms. However, direct EU legislation on purely sporting issues is not constitutionally possible even after sport has been introduced as a supporting EU competence.

Since the publication of its 'White Paper on Sport',[31] the Commission has sought to facilitate the exchange of best practices relevant to sport. A handful of the areas in which best practices are exchanged, such as licensing conditions, may involve social or environmental reporting at domestic levels outside the UK. The exchange of best practices is voluntary in nature and is not based on compulsory reporting requirements. Likewise, the EU Eco-Management and Audit Scheme, whilst in principle open to sporting organisations, is voluntary in nature.[32]

A separate environmental impact assessment is an exception to the generally voluntary nature of EU-wide rules on reporting social and environmental impacts.[33] The Environmental Impact Assessment Directive requires many major infrastructure construction projects to undergo compulsory environmental assessment prior to construction. Motor racing tracks[34] and urban renewal projects,[35] which could include the construction of new sports stadia, are mentioned in this Directive but are listed in Annex II which merely requires EU Member States to determine whether an assessment ought be carried out. Therefore the regulation of environmental impacts such as these, as well as for other sports facilities not

[29] Press releases IP/02/806, IP/03/1748, IP/01/583, IP/02/824.
[30] Commission documents C(2006)868, C(2003)2627, C(2005)78.
[31] (COM (2007) 39 Final)
[32] Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001.
[33] Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directives 97/11/EC and 2003/35/EC.
[34] Annex II(11)(a).
[35] Annex II(10)(b).

expressly listed in the Directive, is subject to domestic law rather than binding EU-level regulations. A separate strategic environmental assessment requirement applies to statutory 'plans and programmes' prepared or adopted by an authority at national regional or local level'.[36] Neither the Environmental Impact Assessment Directive nor the strategic environmental impact assessment requirements have thus far been reported to significantly affect sports bodies, and neither imposes compulsory requirements for regular assessments.

5. Conclusions

Although it is clear that clubs, or at least their community foundations, engage in community-based projects, both on an individual basis and under the umbrella of the Premier League and the Football League, there are no regulatory provisions in place requiring English football clubs to analyse or assess the social or environmental impacts of the operation of the club as a whole in any detail or with any degree of formality. It is possible that an emergent EU sports policy may act as a driver in this area after the ratification of the Treaty of Lisbon, however, changes to the governance structures of football are unlikely to be demanded by the EU and may in fact be unlawful.

At the national level, it is possible for legislation to be implemented that requires clubs to undergo social accounting procedures, should that be considered to be either necessary or appropriate. Despite claims to the contrary by both the government and the football authorities, Parliament can, and has on a number of occasions, passed football-specific Acts.[37] The current lack of enthusiasm for legislation in this area is more a lack of political will than there being a constitutional barrier to action.

The most effective means of requiring football clubs to submit to social accounting would be for the international federations and/or national governing bodies of football to impose an appropriate auditing framework on their members. Such a requirement is likely to be found to be lawful under both UK and EU law and could also assist the football authorities in providing the evidence that is required by the courts, but rarely adduced before them, to justify the claims that sport in general and football in particular ought to be treated as a special case by the law. However, in order to convince the football authorities and the clubs of the benefits of social accounting and/or fan ownership, further empirical evidence is required. If cogent evidence can be collected and analysed on a regular basis from a statistically viable sample, then the justification for implementing social accounting moves from being good in theory to beneficial in fact. This pragmatic approach to convincing those in charge of football of the benefits of social accounting may prove to be more effective over a shorter period of time.

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[36] Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, Article 2.

[37] For example, the Safety at Sports Grounds Act 1975, the Football Spectators Act 1989 and the Football (Offences) Act 1990. See further M James, *Sports Law*, (Palgrave Macmillan 2010) chs 9 and 10.