

## **Amnesty International UK**

### **Proposed change to the Premier League Rules Owners' and Directors' Test to address international human rights and discrimination**

#### **Legal commentary of David Chivers QC and Seamus Woods of Erskine Chambers**

##### **Introduction**

1. In common with many organisations the Premier League's Rules restrict the persons who may be associated with it. A restriction of this sort is sometimes called the "fit and proper" test, on the basis that a person must be fit and proper to be involved with the organisation.

2. Such an expression can be misleading. In the case of the Premier League for example there is no general requirement that a person be "fit and proper" either to run or to control a football club which is a member of the League. The circumstances in which a person (or rather a club) can be refused membership on the ground of such an association are closely defined and limited.

3. Any organisation considering a "fit and proper" test will be concerned to ensure that the test is applied by reference to the particular requirements of the organisation. The question of whether a person is fit and proper to be a senior manager of a financial institution is different from whether a person is fit and proper to own a major media outlet, and so on.

4. However, the requirements of an organisation will change over time. Conduct which was regarded as acceptable thirty years ago may not be so regarded today. More to the point, the standards to which an organisation will hold itself, and be held by others, will evolve in accordance with broader concepts of governance and accountability. Organisations which do not evolve to meet the needs of their stakeholders and society at large risk serious reputational and financial damage, the scope for which has been significantly enhanced by social and technological change.

##### **Corporate Governance in the Modern World**

5. It is not our task to write a general treatise on corporate governance. Nonetheless it is useful to set out some key obligations, both legal and normative, to which major corporations are now subject.

6. Prior to 2006 the obligations of directors of UK companies were broadly left to the common law. Increasing concern as to poor corporate behaviour and short termism prompted Parliament to codify directors' duties and set out specific matters to which directors were to have regard in carrying out their obligations. Amongst the matters to which Directors must now have regard are, for example, the "impact of the company's operations on the community" and

“the desirability of ... maintaining a reputation for high standards of business conduct”: s 172 of the Companies Act 2006.<sup>1</sup>

7. This approach aligns with parallel common law developments recognising both a wider purview for directors when considering the stakeholders potentially impacted by their decisions and that directors’ duties evolve over time to keep pace with changing commercial circumstances.<sup>2</sup>

8. Notwithstanding the new Act, a spate of high profile corporate failures demonstrated that paying lip service to the legislation does not provide the enlightened shareholder value hoped for in 2006. This was recognised by Government with a consultation green paper released in November 2016 and a paper responding to the consultation released in August 2017.<sup>3</sup> Since 1 January 2019, larger companies subject to the duty to prepare strategic reports are required to report on how they have complied with their s 172 obligations (s 414CZA of the Companies Act 2006). The corporate world has been given a last chance to demonstrate proper social responsibility if it is to avoid direct legislative intervention.

9. In line with this theme, the 2018 UK Corporate Governance Code recognises that companies “do not exist in isolation” and, to succeed in the long term, must “maintain successful relationships with a wide range of stakeholders”.<sup>4</sup> These relationships, it adds, will be successful and enduring if they are based on “respect, trust and mutual benefit”. The Code includes a specific principle that directors of the companies to which the Code applies must act with integrity and promote the desired company culture. It encourages companies to foster corporate cultures that promote integrity and openness and value diversity.

10. To very similar effect are the 2018 Wates Corporate Governance Principles for Large Private Companies (which, like the Corporate Governance Code, were published by the Financial Reporting Council).<sup>5</sup> These are stated to offer all companies, even those not subject to a formal corporate governance code, something to aspire to in order to demonstrate good practice and achieve long term success.

11. On a broader scale, in 2019, the US Business Roundtable released its Statement on the Purpose of a Corporation.<sup>6</sup> While individual companies serve their own corporate purposes, they also share a “fundamental commitment to all of our stakeholders”. This was substantiated by commitments including to “foster diversity and inclusion, dignity and respect” in relation to employees and “[s]upporting the communities in which we work” on that basis that “[w]e respect the people in our communities”. The Statement was signed by the CEOs of 181 major corporations, including Apple, Amazon and BP.

12. The World Economic Forum’s Davos Manifesto 2020 included the following statements:<sup>7</sup>

*The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees,*

*customers, suppliers, local communities and society at large.*

...

*A company treats its people with dignity and respect. It honours diversity and strives for continuous improvements in working conditions and employee well-being.*

...

*A company is more than an economic unit generating wealth. It fulfils human and societal aspirations as part of the broader social system. Performance must be measured not only on the return to shareholders, but also on how it achieves its environmental, social and good governance objectives.*

13. The Investment Association's Shareholder Priorities for 2020 specifically highlighted four areas of focus.<sup>8</sup> One of these was "stakeholder engagement" and one was "diversity" in corporate governance. The publication explained:

*... stakeholder engagement is essential to navigating an increasingly complex business environment; helping companies to adapt to the needs of their customers, workforce and the society they operate in. ... The relationship between a company and its key stakeholders (such as its employees, customers, suppliers, and the environment and communities it impacts) is an important determinant of its long-term value. Companies that manage these relationships well, identifying and engaging with their key stakeholders and understanding their impact on communities and the environment, will be able to use this knowledge to build a more robust strategy and make more informed business decisions.*

...

*Companies that fully embrace diversity will be better equipped to foresee and act on risks and opportunities, make better long-term decisions, nurture talent and command the trust of the consumers they serve. These companies will ultimately deliver better long-term returns for investors and savers.*

14. In 2015, provisions were inserted into the Companies Act<sup>9</sup> requiring certain companies to gather and publish information about persons with significant control over them. The Government's expressed purposes included to increase transparency around who ultimately owns and controls UK companies in order to "promote good corporate behaviour" and tackle the misuse of companies.<sup>10</sup>

15. In different fields, companies are now held accountable not only for their own conduct, but for the conduct of their agents and suppliers. The Bribery Act 2010 imposes stringent requirements on companies to exercise diligence over persons with whom they deal.<sup>11</sup> Section 54 of the Modern Slavery Act 2015

requires organisations to report on their slavery and human trafficking policies, to ensure that these are not taking place in their own business or in supply chains.<sup>12</sup> Money laundering regulations make clear that money is not untainted by its source.<sup>13</sup>

### **The Fit and Proper Test**

16. Any test as to the suitability of a person to be associated with an organisation must reflect the legal obligations and normative expectations to which that organisation is subject. Necessarily the test, or any application of it, will vary as between organisations and the different fields within which they operate. In this context it is useful to consider the content and scope of equivalent tests across a range of organisations. We set out some examples below.

17. The Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) carry out fit and proper person checks on people undertaking various regulated and/or senior management activities in industries like finance and insurance. The FCA Handbook and PRA Rulebook and Supervisory Statements specify that a key focus is a person's honesty, integrity and reputation.<sup>14</sup> This can include conduct beyond financial impropriety. This was recently confirmed in a September 2018 letter from the FCA to a Parliamentary Committee.<sup>15</sup> The letter confirmed that non-financial conduct had been determinative in some cases.

18. Ofcom may only grant broadcasting licences to those it is satisfied are fit and proper persons to hold them: s 3(3) of each of the Broadcasting Act 1990 and the Broadcasting Act 1996.<sup>16</sup>

19. In the sporting context, the Ownership Guidance Notes of the British Horseracing Authority impose a fit and proper persons test on owners under their remit.<sup>17</sup> The Notes explain that relevant considerations include an applicant's "honesty and integrity", reminiscent of the FCA and PRA approach set out above. Unlike the Premier League's Owners' and Directors' Test, they deliberately steer clear of a "definitive list of all matters that would be relevant to a particular application" on the basis that this would not be possible, opting instead for an indicative guide. The Notes add that:

*A person whose conduct, behaviour or character is not in accordance with that which, in the opinion of the Authority, should be expected of a registered person, may not be considered suitable and therefore may be refused registration.*

20. Sport England and UK Sport have produced *A Code for Sports Governance* which applies to organisations to whom those bodies provide grant funding.<sup>18</sup> This provides, as Requirement 2.10, that "[n]o individual shall be appointed as a director until he or she has provided to the organisation a declaration of good character".

21. There are numerous more general instances of modern corporate governance norms being reflected in the world of sport. What follows is not

intended to be a comprehensive review, but a selective focus specifically on human rights and non-discrimination in governance:

- Liverpool FC has recognised the importance of s 54 of the Modern Slavery Act (referred to above) and its wider human rights context. This came in an “Anti-Slavery and Human Trafficking Statement” released on 7 January 2020.<sup>19</sup> In this announcement, the Club stated that it recognised “that the respect for human rights is an integral part of its social responsibility as a responsible Premier League football club”.
- Article 3 of the FIFA Statutes says that FIFA is “committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights”.<sup>20</sup> Note that Rule B.15 of the Premier League’s Rules requires it and all its clubs to comply with the statutes and regulations of FIFA.
- The UEFA Statutes include in the objectives of that organisation promoting football “without any discrimination” and “protecting ethical standards in good governance”.<sup>21</sup> They require member associations to “implement an effective policy aimed at eradicating racism and any other forms of discrimination from football”.<sup>22</sup>
- UEFA has an active Football and Social Responsibility unit. The unit’s 2017/18 Report noted that a then-recent “innovation developed in cooperation with the Sport and Rights Alliance, was the inclusion of human rights criteria in UEFA’s social responsibility bidding chapter for UEFA EURO 2024 and the UEFA club competition finals from 2020”.<sup>23</sup>
- Similar commitments to humanitarian and non-discrimination values can be found, for instance, in the Oceania Football Confederation (OFC) Statutes.<sup>24</sup> These also provide that persons cannot hold various senior offices if they have been suspended, or subject to sanctions, on account of breaching the FIFA or OFC Codes of Ethics.<sup>25</sup>
- The Commonwealth Games Federation’s October 2017 Human Rights Policy Statement is headlined by a “Pledge” to respect “all international human rights standards” enshrined within the various relevant UN instruments.<sup>26</sup> This is supported by a commitment to uphold even higher standards than those strictly required by law where this can lawfully be done.
- The International Olympic Committee Paris 2024 Host City Contract Principles include, as a core requirement, that the organising bodies shall “prohibit any form of discrimination” and “protect and respect human rights and ensure any violation of human rights is remedied” (§13.2).<sup>27</sup>

22. In light of the above we conclude that, to comply with the norms expected of a sporting organisation which has regulatory oversight of its member clubs, the incorporation of a “fit and proper” test must respond to the wider

expectations to which that organisation is subject. The test cannot be divorced from broader corporate governance considerations nor from the general standards of conduct which that organisation espouses. By way of example, Liverpool FC's modern slavery statement would be worthless were its owners to be complicit in human trafficking. Yet the current "fit and proper" test in the Premier League's Rules do not permit the League to exclude a club on that basis.

23. There is no "one size fits all" approach to a "fit and proper" test. The question of whether a test should be so broad as to give the organisation a very wide discretion as to the matters to be taken into account or should set out specific considerations relevant to the organisation admits to no right or wrong answer. What is clear is that the test must be broad enough to ensure that it is fit for the particular purpose for which it is intended – to protect the good governance and reputation of the organisation and to align the ownership and control of the organisation's membership with the organisation's core values.

### **The Premier League**

24. The Premier League Rules<sup>i</sup> set out at part F an "Owners' and Directors' Test". The scheme of this rule is to identify specific events which disqualify a person from being a director (which includes owner or controller) of a League club. A person falling within the rules is banned, which provides clarity. But the Premier League has no general discretion to ban a person who does not come within the specific prohibitions, regardless of how egregious their conduct may have been, or how harmful their involvement will be to the reputation of the Premier League itself.

25. The specific events of disqualification do not identify any grounds on which a person will be barred from involvement in a Premier League club by reason of human rights abuses. So, for example, involvement in torture, slavery, human trafficking and war crimes are not included. A conviction (whether in the UK or abroad) resulting in a period of imprisonment of not less than 12 months will be a disqualifying event, but subject to that the rules focus on issues of dishonesty, insolvency, professional misconduct in other fields, a sexual offence (in the UK) or specific football related issues.

26. In our view the inability of the Premier League to regulate its membership by reference to serious human rights abuses is a departure from current norms. A change to the Owners' and Directors' Test to incorporate a reference to human rights would not make the Premier League some sort of outlier. Rather, it would see the Premier League brought into line with modern expectations of corporate governance and responsibility. Relevantly too, in our view the proposed change would not introduce any sort of radical new extension to the existing "Disqualifying Events". And it would mirror similar tests employed by other organisations, including sporting bodies.

27. We note that the words "human rights" do not appear anywhere in the

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<sup>i</sup> Made pursuant to Article 16 of the Premier League's Articles of Association.

body of the Premier League Rules or its Articles of Association. They only appear in the Premier League's prescribed ethnicity monitoring forms, and only then by way of reference to the Equality and Human Rights Commission in an explainer about the use of data. This is despite the Premier League's own Rules already requiring it and all its clubs to comply with the statutes and regulations of FIFA. As mentioned above, these include a commitment to respect, and promote the protection of, international human rights.

28. It is for the Premier League itself to determine the importance of maintaining a good reputation amongst its stakeholders. Recent events continue to demonstrate the impact of an organisation dragging its heels with regard to societal expectations, whether in relation to modern slavery (Boohoo) or race (Washington Redskins). In framing a "fit and proper" test with regard to control of a Premier League football club it seems impossible to suppose that human rights abuses should be ignored. As matters stand, a ticket tout is disqualified from being involved in a Premier League club<sup>ii</sup> but a person complicit in torture is not.

29. So far as stakeholders are concerned, the Premier League impacts upon society far beyond the individuals involved in the member clubs themselves. The Premier League itself requires the highest standards of behaviour both in relation to non-discrimination and specifically with a view to avoiding bringing itself or the member clubs into disrepute.<sup>iii</sup> We have drafted an amendment to the Rules, set out in the Appendix, which will strengthen the League's ability to maintain its own existing standards as well as enhanced standards of human rights.

## **Procedure**

30. The Premier League is run by a company called the Football Association Premier League Ltd. The Premier League Rules – which include the Owners' and Directors' Test – are set by the company pursuant to art 16 of its Articles of Association.

31. The company can amend the Rules provided that two-thirds of its shareholders vote in favour of the change: arts 27 and 33. The company's shareholders are the football clubs that, for the time being, are in the Premier League as well as the Football Association (although this cannot vote).

32. The proposed amendment does not cut across any other aspect of the Premier League Rules. It is capable of being integrated into the existing text and indeed uses concepts and wording already in the existing Rules. It is complementary to the existing Test and a natural, measured extension of it. It would also enable the League to catch up with those of its members who have already acknowledged their duty to society to promote human rights.

33. We see no other impediment, as a matter of company law, to the

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<sup>ii</sup> Premier League Rules, rule F.1.5.3 and Appendix 1.

<sup>iii</sup> Premier League Rules, rule B.17.

proposed change being made. It is for the Premier League as a company, and the clubs that constitute its shareholders from time to time, to decide what is important to the League in setting the “Disqualifying Events” for the purpose of the Owners’ and Directors’ Test. Our immediate focus in this paper has been on human rights, but the League and its member clubs are not so limited and our proposed amendment provides for some broader considerations to be taken into account, not least in relation to Inclusion and Anti-Discrimination. Good governance and good reputation may require broader grounds of potential disqualification and the League, and each club, is obliged to give the issue careful consideration.

DAVID CHIVERS QC  
SEAMUS WOODS  
Erskine Chambers  
22 July 2020

## Endnotes – bibliography of resources

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- <sup>1</sup> Companies Act 2006, s 172.
- <sup>2</sup> For example *BCE Inc v 1976 Debentureholders* 2008 SCC 69, [2008] 3 SCR 560; *Eastford Ltd v Gillespie* [2010] CSOH 132, 2011 SLT 434 at [13]; and *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] ICR 450.
- <sup>3</sup> Department for Business, Energy and Industrial Strategy *Corporate Governance Reform: Green Paper* (November 2016); Department for Business, Energy and Industrial Strategy *Corporate Governance Reform: The Government response to the green paper consultation* (August 2017).
- <sup>4</sup> Financial Reporting Council *The UK Corporate Governance Code* (July 2018).
- <sup>5</sup> Financial Reporting Council *The Wates Corporate Governance Principles for Large Private Companies* (December 2018).
- <sup>6</sup> United States Business Roundtable *Statement on the Purpose of a Corporation* (August 2019).
- <sup>7</sup> World Economic Forum *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution* (2 December 2019).
- <sup>8</sup> The Investment Association *Shareholder Priorities for 2020 – Supporting Long Term Value in UK Listed Companies* (January 2020).
- <sup>9</sup> Companies Act, pt 21A.
- <sup>10</sup> Department for Business, Innovation and Skills *Factsheet – Small Business, Enterprise and Employment Act: Companies: Transparency* (BIS/15/266, 2015) at 2; Department for Business, Innovation and Skills *Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business – Government Response* (April 2014) at 18–19.
- <sup>11</sup> Bribery Act 2010.
- <sup>12</sup> Modern Slavery Act 2015, s 54.
- <sup>13</sup> Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.
- <sup>14</sup> FCA Handbook, FIT 1.3.1B G; PRA Rulebook, “Fitness and Propriety” sections of the rules pertaining to the various types of regulated firms; supplemented by, for example: Prudential Regulation Authority *Supervisory Statement: Strengthening individual accountability in banking* (SS28/15, February 2020) at [4.4] and Prudential Regulation Authority *Supervisory Statement: Strengthening individual accountability in insurance* (SS35/15, February 2020) at [4.3].
- <sup>15</sup> Letter from Megan Butler (FCA Executive Director Supervision – Investment, Wholesale and Specialists Division) to Rt Hon Maria Miller MP (Chair of the Women and Equalities Committee) regarding the Report on Sexual Harassment in the Workplace (28 September 2018).
- <sup>16</sup> Broadcasting Act 1990, s 3(3); Broadcasting Act 1996, s 3(3).

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- <sup>17</sup> British Horseracing Authority *Ownership Guidance Notes: Requests for Registration as an Owner*.
- <sup>18</sup> Sport England and UK Sport *A Code for Sports Governance* (2016).
- <sup>19</sup> Liverpool Football Club and Athletic Grounds Limited “Anti-Slavery and Human Trafficking Statement” (7 January 2020).
- <sup>20</sup> FIFA *FIFA Statutes* (June 2019), art 3.
- <sup>21</sup> UEFA *UEFA Statutes* (February 2018), art 2.
- <sup>22</sup> Article 7 bis.
- <sup>23</sup> UEFA *Respect: UEFA Football and Social Responsibility Report 2017/18* (February 2019) at 25.
- <sup>24</sup> Oceania Football Confederation Inc *OFC Statutes* (June 2019), arts 2 and 5.
- <sup>25</sup> Article 59.
- <sup>26</sup> Commonwealth Games Foundation “Human Rights Policy Statement” (5 October 2017) at 1.
- <sup>27</sup> International Olympic Committee *Host City Contract – Principles: Games of the XXXIII Olympiad in 2024* (executed 13 September 2017).

## Appendix

### CURRENT RULE:

#### Disqualifying events

F.1. A Person shall be disqualified from acting as a Director and no Club shall be permitted to have any Person acting as a Director of that Club if:

*[This is followed by a list of “Disqualifying Events”, for example:]*

F.1.6. in the reasonable opinion of the Board, he has engaged in conduct outside the United Kingdom that would constitute an offence of the sort described in Rules F.1.5.2 or F.1.5.3, if such conduct had taken place in the United Kingdom, whether or not such conduct resulted in a Conviction;

### PROPOSED CHANGE:

#### Disqualifying events

F.1. A Person shall be disqualified from acting as a Director and no Club shall be permitted to have any Person acting as a Director of that Club (including for the avoidance of doubt by virtue of being a shadow director or having Control of the Club) if:

...

F.1.16. in the reasonable opinion of the Board, he is not a fit and proper person to be a Director having regard, in particular, to:

F.1.16.1. whether he has been complicit in an egregious or consistent violation(s) of international human rights law;

F.1.16.2. whether he has engaged in conduct that constitutes a failure to observe, comply with or act in accordance with the Inclusion and Anti-Discrimination Policy set out in Appendix 2 to these Rules or that would constitute such a failure if it had taken place in a situation that required him to observe, comply with and act in accordance with that Policy;

F.1.16.3. whether he has engaged in any other conduct of a nature which, if he were to become a Director, risks bringing the League, the Club and/or the game into serious disrepute; or

F.1.16.4. whether the fitness or propriety of any Person, or of any government or organisation, with whom he is associated or connected in his personal, business or political dealings is of a nature which, if he were to become a Director, risks bringing the League, the Club and/or the game into serious disrepute.