

EXPLANATORY MEMORANDUM TO
THE COMPETITION ACT 1998 (FOOTBALL BROADCASTING RIGHTS)
(PUBLIC POLICY EXCLUSION) ORDER 2021

2021 No. 1148

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order excludes from the prohibitions contained in Chapter I and Chapter II of the Competition Act 1998 (“the Act”) specified agreements, decisions relating to the extension of existing agreements to exploit the Football Association Premier League Limited’s (“the Premier League”) domestic broadcasting rights on substantially the same terms without the Premier League carrying out a competitive tender process for those rights.

2.2 The purpose of the Order is to support the Premier League in providing financial stability to professional and non-professional English and Welsh football clubs and community and charitable organisations (referred to collectively for ease as “the English football pyramid”) following the severe financial disruption caused by the spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2, “coronavirus”). The revenue generated by the sale of the Premier League’s broadcasting rights provides significant funding to the English football pyramid. Holding a competitive tender in 2021 for the sale of the Premier League’s domestic broadcasting rights could compound the financial consequences of coronavirus for the English football pyramid. The Order allows the Premier League to renew its domestic broadcasting rights agreements on substantially the same terms without carrying out a competitive tender process. This will enable the Premier League to guarantee until the end of the 2024 to 2025 Premier League football season the level of funding it provides to the English football pyramid and unlock additional funding for parts of the pyramid that have been left particularly vulnerable due to coronavirus.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the entirety of the United Kingdom.

4.2 The territorial application of this instrument is the entirety of the United Kingdom.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 Paragraphs 7(1) and (2) of Schedule 3 to the Act provide that the Secretary of State may, if satisfied that there are exceptional and compelling reasons of public policy, by Order, exclude agreements from the Chapter I prohibition. In accordance with section 2(5) of the Act, the references in paragraph 7 of Schedule 3 to an agreement are to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).
- 6.2 Paragraph 7(3) of Schedule 3 of the Act provides that the Order may deem the Chapter I prohibition never to have applied in relation to the excluded agreements.
- 6.3 Paragraph 7(4) of Schedule 3 to the Act provides that the Secretary of State may, if satisfied that there are exceptional and compelling reasons of public policy, by Order, exclude conduct from the Chapter II prohibition.
- 6.4 Paragraph 7(5) of Schedule 3 of the Act provides that the Order may deem the Chapter II prohibition never to have applied in relation to the excluded conduct.
- 6.5 Six Orders were made in 2020 under the powers in paragraph 7 of Schedule 3 to the Act in relation to sectors affected by the spread of coronavirus. Those Orders were:
- The Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/368) (“the Health Services for Patients in England Order”);
 - The Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/369) (“the Groceries Order”);
 - The Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/370) (“the Solent Crossings Order”);
 - The Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/435) (“the Health Services for Patients in Wales Order”);
 - The Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/481) (“the Dairy Produce Order”); and
 - The Competition Act 1998 (Groceries) (Public Policy Exclusion) Order 2020 (S.I. 2020/1568) (“the Groceries No.2 Order”).
- 6.6 The Groceries Order and the Dairy Produce Order were revoked by the Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Amendment and Revocation) Order 2020 (S.I. 2020/933). The remaining four Orders were revoked by the Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Revocations) Order 2021 (S.I. 2021/773).

7. Policy background

Relevant background

- 7.1 Section 2 of the Act prohibits agreements, decisions or concerted practices which may affect trade within the United Kingdom and which prevent, restrict or distort competition within the United Kingdom. This is known as the “Chapter I prohibition”. Section 18 of the Act prohibits conduct that amounts to the abuse of a dominant position in a market if it may affect trade within the United Kingdom. This is known as the “Chapter II prohibition”.

- 7.2 Paragraph 7 of Schedule 3 to the Act gives the Secretary of State the power to exclude certain agreements or conduct from the application of the Chapter I and II prohibitions where he is satisfied that there are exceptional and compelling reasons of public policy why they ought not to apply. The exclusions may apply only in specified circumstances and may be retrospective.
- 7.3 The Premier League has been investigated in the past by the European Commission and the UK Office of Communications (“Ofcom”) for the way it sells its domestic broadcasting rights. The European Commission’s investigation concluded in 2006 with the Premier League giving binding commitments relating to how it structures the sale of its broadcasting rights. The commitments included that the Premier League would divide the broadcasting rights into balanced packages, which would be tendered competitively every three years and that no single company could possess the rights to all packages.
- 7.4 Although the commitments given to the European Commission expired in 2013, the Premier League has remained consistent with, and strengthened, those commitments voluntarily. The last tender for the Premier League’s domestic broadcasting rights was carried out in 2018 and rights to broadcast Premier League football matches and show highlights of those matches in the UK were awarded to four companies: Sky UK Limited, British Telecommunications Public Limited Company, Amazon Media EU S.A.R.L. and the British Broadcasting Corporation (referred to collectively as “the current broadcasting rights holders”).
- 7.5 Absent coronavirus, the Premier League would normally have tendered its domestic broadcasting rights in early 2021 at the midpoint of the current three-year cycle and concluded sales by mid-2021. However, based on trends in other European football leagues, coronavirus has had a deflationary effect on the value of broadcasting rights for football across Europe and it is considered likely that the value of the Premier League’s domestic rights for the next three-year cycle (covering the 2022 to 2025 football seasons) could fall significantly were the normal tender process to be carried out now.

What is being done and why?

- 7.6 The Premier League and its clubs experienced financial losses of approximately £1 billion in the 2019/20 football season due to the effects of coronavirus on, for example, matchday revenues. Heavy financial losses are expected to have continued in the 2020/21 football season, which was severely affected by coronavirus. The wider football pyramid, extending from the English Football League to grassroots football, has also suffered severe financial losses due to coronavirus. The English football pyramid receives a significant portion of its funding indirectly from the revenue generated by the Premier League’s sale of its domestic broadcasting rights. The detrimental impact of coronavirus on the financial condition of organisations across the English football pyramid would be further compounded if the value of the Premier League’s domestic broadcasting rights was to fall significantly through the normal tender process.
- 7.7 To provide financial stability for the English football pyramid, the Premier League requested that the Government make an Order under paragraph 7 of Schedule 3 to the Act allowing it to renew the current domestic broadcasting rights agreements for an additional three years, on the same commercial and license terms, with current UK broadcasting partners, without conducting a tender process. Such a renewal would

enable the Premier League to guarantee until the end of the 2024 to 2025 Premier League football season the level of financial support it currently provides to the English football pyramid and release at least £100 million of new funding for particularly vulnerable areas of the sport.

7.8 On 13 May 2021, the Minister for Sport and Tourism issued a written statement to Parliament¹ to confirm that the Secretary of State for Business, Energy and Industrial Strategy was ‘minded to’ make the Order requested for the following reasons:

- Football clubs are a central part of local communities across the country. They provide a focal point, but also huge social and health impacts via outreach and wellbeing programmes and fundamentally provide economic value to local areas through jobs, income and tourism. There is therefore public policy value in preserving football clubs for their fans as consumers and local residents.
- There is inherent value in the football league pyramid. As our national game, football holds a unique cultural position, and the preservation of a meritocratic fair system through the football pyramid has a public policy benefit in its own right.
- There is public policy value in having a healthy football system. It is a source of international reputation, attracts fans globally and is a major source of exports for the United Kingdom. The strength of the Premier League is one of the UK’s soft power levers for the United Kingdom to attract investment so having a financially stable system enables that.
- As the football pyramid receives most of its funding from the Premier League, a reduction in the value of domestic broadcasting rights would negatively affect the ability of the Premier League and its clubs to continue to directly and indirectly support the English football pyramid in the current climate. This would compound the impact of the wider financial losses each level of the pyramid has experienced due to coronavirus, with a real prospect that some clubs and facilities could cease to exist.
- An Order allowing the continuation of previously competitively tendered rights for another three years would support all of football following coronavirus. It would help to promote the domestic game after heavily disrupted seasons due to coronavirus by enabling the Premier League to commit to its solidarity payments (direct financial support payments from the Premier League to clubs in the Championship, League One, and League Two football competitions), parachute payments (payments to clubs that have been relegated from the Premier League to support them as they adapt to lower revenues outside the Premier League), and funding for grassroots football at existing levels, worth a minimum of £1.5 billion to the football pyramid over three years.
- An Order would also enable the Premier League to release at least £100 million of new funding for particularly vulnerable areas of the sport. This would make a significant financial contribution, including doubling the support for the non-league system, and providing crucial financial support for the women’s game.

¹ <https://www.gov.uk/government/speeches/written-ministerial-statement-from-the-minister-for-sport-and-tourism-on-premier-league-broadcasting-rights>

- 7.9 The Secretary of State invited representations on his ‘minded to’ decision before a final decision was taken. As set out in letters sent by the Minister for Sport and Tourism to the chairs of the Digital, Culture, Media and Sport (‘DCMS’) Committee and the Business, Energy and Industrial Strategy (‘BEIS’) Committee on 2 August 2021², the Government received 15 representations. Having carefully considered the representations made, the Secretary of State concluded that there are exceptional and compelling reasons of public policy to make the Order requested (see section 10).

Effect of the Order

- 7.10 The Order relates to actions taken by the Premier League, Premier League clubs and the current broadcasting rights holders (“the parties”).
- 7.11 The intended effect of the Order is to allow the parties to renew the Premier League’s current domestic broadcasting rights agreements on materially the same terms without the normal competitive tender process being carried out and without fear of facing legal challenge under UK competition law.
- 7.12 Past investigations by competition authorities into how the Premier League sells its broadcasting rights have focused solely on the concern that certain aspects of the horizontal joint selling of rights by Premier League clubs (where the 20 Premier League clubs collectively sell their broadcast rights instead of selling them individually) could infringe the Chapter I prohibition (and the equivalent provision under European Union competition law). Given the importance of providing maximum legal certainty to the parties, the Government considers it necessary to provide protection against claims that raise wider competition concerns than those that were the subject of past investigations, even if in some cases it is not certain that a claim is likely, or would be likely to succeed.
- 7.13 Article 3 of the Order is intended, in particular, to protect against a claim that the renewal of the Premier League’s domestic broadcasting rights without a competitive tender or auction constitutes anticompetitive joint selling arrangements, which was the focus of past competition investigations, and a claim that the renewal of the Premier League’s domestic broadcasting rights agreements without a tender creates long-term exclusivity by preventing other broadcasters from entering the market.
- 7.14 Article 3 therefore excludes from the application of the Chapter I prohibition an agreement between the Premier League clubs, the Premier League and the current broadcasting rights holders, or a decision adopted by the Premier League, to renew any of the existing domestic broadcasting rights agreement so that it applies on substantially the same terms to broadcasting rights for one or more of the 2022 to 2025 Premier League football seasons, without a competitive tender process being carried out. Non-material changes to the current agreements may need to be made, for example to account for differences in fixture dates between seasons.
- 7.15 Article 4 is intended to protect against any possibility of a claim that the renewal of the Premier League’s domestic broadcasting rights agreements without a competitive tender or auction constitutes abuse of a dominant position in a market.
- 7.16 Article 4 therefore excludes from the application of the Chapter II prohibition the renewal of any of the existing agreements between the Premier League and a current broadcasting rights holder relating to football broadcasting rights so that it applies on

² <https://www.gov.uk/government/publications/premier-league-broadcast-rights-potential-exclusion-order>

substantially the same terms to broadcasting rights for the 2022 to 2025 Premier League football seasons, without a competitive tender process being carried out.

- 7.17 Following the statement of 13 May 2021 regarding the Secretary of State's decision that he was minded to make the Order, described in paragraph 7.8, the Government believes that the Premier League, Premier League clubs and the current broadcasting rights holders may have needed to engage in activities covered by the Order before it comes into force. Therefore, article 3 and article 4 apply their respective exclusions retrospectively to any such agreements or decisions which were made or adopted, or conduct which was engaged in, between 13 May 2021 and the date of the Order.

Coming into force and expiry

- 7.18 The Order will come into force on 7 November 2021. Article 5 provides that the Order expires at the earlier of the end of the period of 14 days after the last match played in the 2024 to 2025 Premier League football season or the end of 31 July 2025.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 This is the first Order made under the powers in paragraph 7 of Schedule 3 to the Act that deals with the subject of football broadcasting rights. As a result, the need for consolidation does not arise.

10. Consultation outcome

- 10.1 As explained in paragraph 7.9, the Secretary of State invited representations from interested parties on his decision that he was 'minded to' make the Order requested by the Premier League. The Government received 15 representations. Most were supportive of the Order because of the financial stability it would provide to the English football pyramid. Three representations raised substantive concerns or questions to do with the proposed Order. The letters sent by the Minister for Sport and Tourism to the chairs of the DCMS Committee and BEIS Committee on 2 August 2021 explained these concerns, the Government's response to them and the Secretary of State's final decision³.
- 10.2 Following the careful consideration of the representations made, the Secretary of State concluded that there are exceptional and compelling reasons of public policy to make the Order.

11. Guidance

- 11.1 This Order does not require the publication of any guidance.

12. Impact

- 12.1 The direct impact on businesses, charities or voluntary bodies is small. On an equivalent annual basis, businesses will avoid paying costs in the order of hundreds of thousands of pounds to administer and take part in a tender for the Premier League's UK

³ <https://www.gov.uk/government/publications/premier-league-broadcast-rights-potential-exclusion-order>

broadcasting rights. Over the course of the three football seasons covered by the Order, this amounts to an administrative saving of around £1 million.

- The indirect impact of the Order is also explored in the analytical assessment. The assessment concludes that any additional wider impact on businesses, the vibrancy of competition in the relevant markets and on consumers is small. The following summarises the conclusions of the analytical assessment.
- The current broadcasting rights holders may pay a higher price for the Premier League's UK broadcasting rights by agreeing to renew the existing rights agreements on substantially the same terms compared to the counterfactual of bidding for the rights as part of a competitive tender process. This is considered as a voluntary decision by businesses and is out of scope of the Business Impact Target.
- Market engagement has not shown evidence that the market composition would be different, or that the number of competitors for the broadcasting rights would be reduced, following the renewal of the Premier League's UK broadcasting rights compared to the counterfactual scenario. Therefore, it is considered unlikely that the Order will reduce competition in the relevant broadcasting markets.
- Market engagement, external and internal analysis indicates that consumers of TV sports subscriptions are unlikely to pay higher prices as a result of the Order. Similarly, the absence of a competitive tender is unlikely to preserve prices paid by consumers relative to a counterfactual scenario where the tender had taken place. This is because there is not a causal relationship between the price paid by broadcasters for the Premier League's broadcasting rights and the price paid by consumers for TV sports subscriptions. This is due to the presence of competitive pressures on broadcasters, and consumers' willingness to pay for subscriptions. Sports subscriptions are also only one portion of the broadcasters' portfolio of consumer products.
- By enabling the Premier League to guarantee until the end of the 2024 to 2025 Premier League football season the level of funding it provides to the English football pyramid and unlock additional funding for vulnerable parts of the pyramid, the Order will provide indirect benefits to local communities. These are wider indirect impacts associated with the Order and are out of scope of the Business Impact Target.
- The Order will help to provide financial certainty to incumbent broadcasters in the short term and will help to indirectly stabilise their product in the longer term by supporting the English football pyramid. These are wider indirect impacts associated with the Order and are out of scope of the Business Impact Target.

12.2 Considering these conclusions and that the total direct business impact is less than the ±£5 million Equivalent Annual Net Direct Cost to Business threshold, a full Impact Assessment is not required under the Better Regulation Framework's guidance. Instead, a De Minimis Self-Certification assessment has been prepared.

12.3 There is no significant impact on the public sector or significant direct impact on small businesses because the Order only has a direct impact on five large businesses. Following public engagement, no representations were received indicating that a small business would wish to bid for Premier League broadcast rights if a competitive tender were to take place.

12.4 The Order will expire at the earlier of the end of the period of 14 days after the last match played in the 2024/25 Premier League football season or 31 July 2025. This will ensure that any detrimental effects that are caused by the Order are kept to a minimum.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses. There is no evidence that the legislation substantially restricts activities undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is for the relevant government Departments to keep under review before each of the 2022 to 2025 Premier League football seasons whether the legislation is still needed. For example, the legislation might not be needed if the Premier League decides to carry out a competitive tender process for the domestic broadcasting rights to the 2024/25 Premier League football season. If it is not revoked earlier, the legislation will expire at the earlier of the end of the period of 14 days after the last match played in the 2024/25 Premier League football season or 31 July 2025.

14.2 This regulation does not include a statutory review clause because it will cease to have effect before the end of the period of 5 years.

15. Contact

15.1 Felix Lee at the Department for Business, Energy and Industrial Strategy email: felix.lee2@beis.gov.uk can be contacted with any queries regarding the instrument.

15.2 Alesha De Freitas, Deputy Director for Competition Policy, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 Parliamentary Under Secretary of State Paul Scully at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.