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THE HEALTH AND CARE BILL

SUBMISSION BY KELLOGG TO THE DELEGATED POWERS AND REGULATORY REFORM COMMITTEE

This submission addresses aspects of the Health and Care Bill (“the Bill”) dealing only with “Food and Drink”: namely, clause 144 in Part 6 and Schedule 17 to the Bill.

Introduction

1. Kellogg is grateful to the Delegated Powers and Regulatory Reform Committee (“the Committee”) for the opportunity to comment on the above aspects of the Bill.
2. In doing so, Kellogg is mindful of the Committee’s remit to examine whether the delegations in a Bill are appropriate, rather than the merits of the overall policy of the Bill.

The policy effect of the relevant provisions

3. Clause 144 in Part 6 and Schedule 17 to the Bill are intended to:
 - a. reduce children’s exposure to the advertising of less healthy food and drink products on TV and online;
 - b. at the end of 2022, introduce a p.m. watershed for less healthy food or drink advertising on TV;
 - c. at the end of 2022, introduce a prohibition on paid-for less healthy food or drink advertising online.
4. These are new and far-reaching restrictions.

The legislative mechanism for identifying less healthy food and drink

5. Schedule 17 proposes to amend sections 321 and 368 of the Communications Act 2003. Under the proposed amendments, the determination of whether a food or drink is less healthy is delegated to regulations, and also to guidance. The relevant scheme is set out in paragraphs 1, 2 and 3 of Schedule 17. For the purposes of brevity, we only set out the relevant proposed amendments to section 321A(3) –(7) of the Communications Act 2003 as set out paragraph 1 of Schedule 17:

After section 321 of the Communications Act 2003 insert— [...]

3) For the purposes of this section—

c) a food or drink product is “less healthy” if—

- I. *it falls within a description specified in regulations made by the Secretary of State, and*
- II. *it is “less healthy” in accordance with the relevant guidance;*

d) *“the relevant guidance” is the guidance entitled “Nutrient Profiling Technical Guidance” published by the Department of Health on 1 January 2011;*

[...]

- 5) *The Secretary of State may by regulations amend this section to change the meaning of “the relevant guidance”.*
 - 6) *Before making regulations under subsection (2)(b) or (6), the Secretary of State must consult such persons as the Secretary of State considers appropriate.¹*
 - 7) *A statutory instrument containing regulations under subsection (5) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.*
6. The Regulations referred to in section 321(A)(3)(c)i of the Communications Act 2003 are the Food (Promotion and Placement) (England) Regulations 2021 (SI 2021/1368), made on 2 December 2021 and coming into force on 1 October 2022.²

Kellogg’s concern

7. Kellogg’s concern is that, under paragraph 1 to 3 of Schedule 17 to the Bill, the determination of whether a food or drink is unhealthy is not set out in the Schedule itself, in other words in primary legislation, but is delegated both to regulations and to guidance.
8. It should be noted that this determination is central to how food and drink advertising is to be regulated under Schedule 17. If food or drink is assessed as unhealthy by reference to the regulations and guidance referred to in proposed section 321(A)(3)(c) and (d) of the Communications Act 2003 above, it is subject to severe advertising restrictions, and enforcement powers and financial penalties arise. If it is not assessed as unhealthy, no restrictions or enforcement powers or financial penalties arise. Put another way, it is the rules within the regulations and guidance that actually apply the restrictions in the primary legislation.
9. In light of the above, and based on core constitutional principles (in particular the supremacy of Parliament) and relevant case law³, our view is that the rules for determining whether a food or drink is unhealthy should be contained in primary legislation, so that they can be effectively scrutinised by Parliament and, through the democratic process, by us a business who is affected by those rules (see further at paragraph 13 below). It is constitutionally inappropriate that this central aspect of the proposed legislative scheme introduced by Schedule 17 is delegated both to secondary legislation and to guidance, thereby bypassing the far more intrusive scrutiny which comes with the passage of primary legislation through Parliament.

¹ We think this should be a reference to (5), not (6).

² Kellogg has brought a claim for judicial review of the Food (Promotions and Placement) (England) Regulations 2021. The rules governing *sub judice* do not apply to bills (paragraph 4.71 of the Companion to the Standing Orders and guide to the Proceedings of the House of Lords).

³ See in particular *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33.

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10. In this context, we also note that the “relevant guidance” can be further changed by the Government. We suggest that this approach is legally unsound, for the reasons given by the Supreme Court in *Alvi*.
11. Additionally, we note that our concerns coincide with those stated in the Committee’s recent report: *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*⁴ in relation to “skeleton legislation” and “disguised legislation”. We consider that paragraphs 1 to 3 of Schedule 17 introduce both skeleton legislation, and legislation disguised by guidance. We note in this regard the Committee’s conclusions on skeleton legislation:
- a. *The appropriate threshold between primary and secondary legislation should not be dependent on the exigencies of timing but should be founded on the overarching principle that the principal aspects of policy should be on the face of a bill and only its detailed implementation left to delegated legislation.*
 - b. *Skeleton legislation signifies an exceptional shift in power from Parliament to the executive and entails the Government, in effect, asking Parliament to pass primary legislation which is so insubstantial that it leaves the real operation of the legislation to be decided by ministers. As such, it will rarely be justifiable.*⁵

We further note the Committee’s conclusions on guidance:

- a. *We share the view of the Leader of the House “that guidance should not be used to circumvent the usual way of regulating a matter”. Mandatory guidance is such a circumvention. The very concept is a contradiction in terms and a power to make mandatory guidance will never be appropriate. Requirements which have legislative effect should always be expressed in legislative language, either in primary or secondary legislation, and subject to parliamentary oversight.*⁶
12. We also note that the Committee’s concerns are shared by other House of Lords committees, including for example the Constitution Committee: see its report *The Legislative Process: The Delegation of Powers* and note in particular Chapter 3.

Why this matters to Kellogg

13. It matters to Kellogg whether the rules on determining whether food is healthy or less healthy (for advertising purposes) are made within the Bill, because we would like to exercise our right, as a business affected by these rules, to address our concerns to the legislators responsible for scrutinising the Bill. We cannot do that if the rules are contained in secondary legislation and guidance.
14. To be clear, whilst conscious not to address the Committee on questions of policy, Kellogg supports the government’s National Obesity Strategy. Our concern is a very focussed one, and that is whether the healthiness of cereals should be assessed as it is sold in the packet, as required by the relevant guidance, or as it is consumed with milk or yoghurt. It is on this issue that we would like to address legislators.

Conclusion

15. We would be very grateful for the Committee’s consideration of the concerns raised in this submission; and, if the Committee finds them valid, for those concerns to be reported to the House.

⁴ 12th Report of Session 2021–22, HL Paper 106

⁵ Paragraphs 65 and 66

⁶ Paragraph 94