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3 September 2021

By Email Only :
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URGENT LEGAL CORRESPONDENCE

RESPONSE REQUESTED BY 16:00 ON 17 SEPTEMBER 2021

Dear Sirs/Madams

LETTER BEFORE CLAIM PURSUANT TO THE PRE-ACTION PROTOCOL FOR JUDICIAL REVIEW

OUR CLIENT: KELLOGG MARKETING AND SALES COMPANY (UK) LIMITED

1. We are instructed by Kellogg Marketing and Sales Company (UK) Limited (the "**Claimant**").

2. This is a letter before claim sent pursuant to the Pre-Action Protocol for Judicial Review under the Civil Procedure Rules. Sub-headings are references to paragraph numbers in Annex A of the Protocol.

3. This letter before claim concerns the decision by the Secretary of State for Health and Social Care (the "**Secretary of State**") to approve the draft Food (Promotion and Placement) (England) Regulations 2021 (the "**Draft Regulations**"), which were laid before Parliament on 22 July 2021 (the "**Decision**").

4. The Claimant contends that the Draft Regulations are *ultra vires* and that their application to breakfast cereals is also contrary to the Claimant's rights under the Human Rights Act 1998 (the "**HRA 1998**") and at common law. The Claimant considers that the Secretary of State cannot properly achieve the wide-ranging reform that he seeks to introduce by delegated legislation and that the matter must be considered by the UK Parliament pursued by primary legislation.

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INVESTOR IN PEOPLE

5. The Claimant has long recognised that consumers wish to make healthy choices when purchasing and consuming food. The Claimant strongly supports the Government's key policy objectives. To this end, the Claimant has for some time been an active partner, including with the Government, in promoting healthy and sustainable diets. However, as set out in this pre-action letter, the Claimant has serious concerns about the lawfulness of the Government's policy and proposed approach to the regulation of promotions of products classified as high in fat, sugar and salt ("**HFSS**") as reflected in the Draft Regulations. The Claimant is strongly of the view (which is informed by current market evidence and expert analysis) that the Government's proposals, as applicable to breakfast cereals, will have unintended negative consequences on consumers, which will undermine the Government's stated objectives in combatting obesity and promoting a healthy diet, and will place an excessive and unfair burden on breakfast cereal manufacturers (including the Claimant), and those operating in related industries, including following what is likely to be permanent social and working pattern changes caused by the COVID-19 pandemic.

6. For these reasons, the Claimant's sincere hope is that the Government, after considering the contents of this letter, will withdraw the Draft Regulations and modify its policy in relation to the promotion of HFSS products as that policy applies to breakfast cereals. If the Government fails to take this approach, then the Claimant will, with regret, be compelled to issue a claim for judicial review in the Administrative Court, and will prosecute those proceedings robustly.

7. Notwithstanding the Claimant's contention that the Government has acted unlawfully, and that the Claimant is therefore *prima facie* entitled to redress, the Claimant continues to hope that a solution can be reached in respect of the matters raised in this pre-action letter without the need to issue proceedings.

The prospective Claimant

8. The prospective Claimant is a UK incorporated affiliate of Kellogg Company, a multinational food manufacturing company headquartered in Battle Creek, Michigan, and incorporated in Delaware, United States of America ("**the Kellogg Company**").

9. The Kellogg Company produces a wide range of products including cereals. Its products are manufactured in 21 countries and marketed in more than 180 countries across the world.

10. The Claimant has been operating from the United Kingdom since 1922. In the UK, it is headquartered in Salford, Greater Manchester, and

employs across the UK approximately 1500 people. A further 2000 people are supported indirectly by the Claimant's UK operations. According to several surveys by the Reputation Institute, the Claimant is amongst the most trusted food and drink companies in the UK.

The prospective Defendant

11. The prospective Defendant is the Secretary of State who is the Minister of the Crown with responsibility for the Department for Health and Social Care ("**DHSC**").

The prospective Claimant's legal advisers

12. The prospective Claimant is represented by DLA Piper UK LLP ("**DLA Piper**"). Our contact details, including our reference number, appear in the letterhead on the first page of this letter.

13. Tom Hickman QC of Blackstone Chambers and Christopher Knight of 11KBW are instructed as Counsel for the prospective Claimant.

14. When corresponding by email about this matter, we should be grateful if you would ensure that correspondence is sent to each of the solicitors copied to the covering email to this letter. We are willing to accept service by email on this basis.

[5] The details of the matter being challenged

15. See above and grounds of judicial review at paragraph 45 below.

[6] The details of any interested parties

16. We do not propose to list any interested parties. If you consider that any entities should be named as interested parties, please make this clear in your response to this letter.

[7] The issues

Factual background

Childhood Obesity Plan

17. DHSC's policy concerning its proposed restrictions on promotions of HFSS products is said to be in furtherance of Chapter 2 of the Childhood Obesity Plan published in June 2018 (the "**2018 Plan**").[1] In particular,

[1] Government Guidance: "Childhood obesity: a plan for action, chapter 2", (DHSC, published 25 June 2018): https://www.gov.uk/government/publications/childhood-obesity-a-plan-for-action-chapter-2.

the Government's intention to restrict the promotion of HFSS products by location and by price was set out in section 3 of the 2018 Plan.

The 2019 Consultation

18. DHSC subsequently consulted (between 12 January 2019 and 6 April 2019) in respect of its policy intention (the "**2019 Consultation**").[2] DHSC's stated aim for undertaking the 2019 Consultation was:

> "*... to reduce excessive eating and drinking of HFSS products that can lead to children becoming overweight and obese. We also want businesses to promote healthier food and drink to help people make healthier choices.*"

19. The 2019 Consultation referred to the application of the 2004/2005 Nutrient Profiling Model (the "**NPM**").

20. In its response to the 2019 Consultation, DHSC confirmed the Government's intention to use powers in the Food Safety Act 1990 (the "**FSA 1990**") to lay secondary legislation before Parliament by mid-2021 to provide for restrictions on the promotions of HFSS products. A summary of DHSC's response is as follows:

    20.1 Micro and small businesses (below 50 employees) would not be in scope of the price and location restrictions due to the likely disproportionate burden on them resulting from this policy;

    20.2 Stores that are below 185.8 sq. m (2,000 sq. ft) and all specialist retailers (for example sweet shops) would not be in scope of the location restrictions due to the likely practical implementation challenges resulting from this policy;

    20.3 The price and location restrictions would only apply to a specified list of product categories that are significant contributors to children's sugar and calorie intakes and are heavily promoted. The list includes: soft drinks, cakes, chocolate confectionery, sugar confectionery, ice cream, morning goods (for example pastries), puddings, sweet biscuits, breakfast cereals, yoghurts, sweetened milk-based drinks, sweetened juices, pizza, ready meals and meal centres, including breaded and battered products (for example curries, chicken nuggets,

[2] Consultation Document: "Consultation on restricting promotions of products high in fat, sugar and salt by location and by price", (DHSC, published 12 January 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770704/consultation-on-restricting-price-promotions-of-HFSS-products.pdf.

breaded chicken/fish), crisps and savoury snacks, chips and similar potato products;

20.4 The NPM would be used to define HFSS products within the specified list of product categories in scope to determine whether they can or cannot be promoted. The responses were evenly split on desirability of the use of the NPM (40%/39%) in general;

20.5 The price restrictions would only apply to volume promotions ('multibuys' and 'extra free');

20.6 The location restrictions would apply to checkouts, ends of aisles and store entrances;

20.7 There would be at least a 6-month implementation period for businesses to prepare and plan for the new requirements;

20.8 Enforcement powers would be given to local authorities who would be responsible for enforcing the policy. The Government would consult on how the restrictions should be enforced in due course; and

20.9 The Government would review and evaluate the policy within 5 years post implementation.

21. DHSC's response to the 2019 Consultation also set out its feedback in relation to certain but not all of the exemptions requested for specific product categories or types of businesses. No such exemptions were considered by DHSC in respect of "*breakfast cereals*", which were defined in Annex 3 as including "*all breakfast cereals, for example ready to eat cereals, granola, muesli, porridge oats, instant porridge, and other hot oat cereals*".

22. Notably, and without explanation or other justification, the 2019 Consultation resulted in processed meat (which includes sausages, bacon and black pudding), bread, egg products, and sweet spreads all being exempted from the policy. The result is that products that have the potential to contribute to a breakfast that is either or both materially higher in HFSS or is materially less nutritionally beneficial (e.g. a slice of bread and chocolate spread) have been exempted, whereas breakfast cereals have not. The logic for this approach remains entirely unclear and we comment further below.

Tackling obesity policy paper

23. On 27 July 2020, DHSC published a further policy paper ("*Tackling obesity: empowering adults and children to live healthier lives*") setting out its intention to *inter alia* address the prevalence of obesity among children and adults.[3] The policy paper also proposed that the Government would legislate to end the promotion of HFSS products by volume and location both online and in store in England, subject to further consultation.

The 2020 Consultation

24. DHSC further consulted between 28 December 2020 and 22 February 2021 (the "**2020 Consultation**").[4] In its 2020 Consultation, DHSC sought views on how compliance with the proposed restrictions on HFSS promotions should be investigated and achieved, as well as seeking views on penalties that could be administered in instances of non-compliance. A draft of the proposed regulations was shared as an Annex to the 2020 Consultation. The draft of the regulations referred to and indicated that the Regulations would give effect to the NPM.

25. The Claimant responded to the 2020 Consultation by way of correspondence dated 22 February 2021. In its response, the Claimant argued, in summary, that:

    25.1 Breakfast cereals should, as a category, be excluded from the scope of the proposed regulations. In support of this, the Claimant cited *inter alia* the scientific evidence that supports cereal with milk as a nutritious food choice. In this context, the Claimant also noted that breakfast cereals are not a major source of calories in an average diet but are instead an important contributor of essential positive nutrients like fibre and vitamin D.

    25.2 The proposed policy and related regulations would amount to a disproportionate burden on businesses such as the Claimant's.

    25.3 The Government's HFSS promotions policy did not reflect the changes in consumer purchasing and eating habits arising from the COVID-19 pandemic. In particular, the Claimant noted the

[3] Policy Paper: "Tackling obesity: empowering adults and children to live healthier lives", (DHSC, published 27 July 2020): https://www.gov.uk/government/publications/tackling-obesity-government-strategy/tackling-obesity-empowering-adults-and-children-to-live-healthier-lives.

[4] Consultation Document: "Restricting promotions of products high in fat, sugar and salt: consultation response on policy enforcement", (DHSC, published 28 December 2020): https://www.gov.uk/government/consultations/restricting-promotions-of-products-high-in-fat-sugar-and-salt-enforcement/outcome/restricting-promotions-of-products-high-in-fat-sugar-and-salt-consultation-response-on-policy-enforcement.

significant shift towards the online ordering of HFSS foods and changed eating habits as a result of greater time at home.

26. In its response, the Claimant also commented on the proposed regulations and noted its concerns about the potential adverse effects on competition in relevant markets.

The Claimant's further engagement with DHSC

27. Pending DHSC's response to the 2020 Consultation (which is considered below), the Claimant continued to engage with DHSC concerning its HFSS policy as that policy applies to cereals. In particular, the Claimant corresponded with DHSC's Permanent Secretary, Sir Christopher Wormald KCB, regarding its concerns.

28. The Claimant wrote to Sir Christopher on 24 June 2021 setting out its concerns relating to DHSC's policy. A meeting subsequently took place between the Claimant, DHSC and Public Health England officials on 29 June 2021. DHSC (through Sir Christopher) provided a written response on 5 July 2021. This response failed to address the substance of the Claimant's concerns. The Claimant therefore wrote again on 9 July 2021 setting out its concerns in further detail. The Claimant's 9 July 2021 letter provides the following information:

    28.1 Noting that the overwhelming majority of products subject to the then draft regulations would be assessed under the NPM at the point of consumption, whereas the DHSC's stance has historically been that that breakfast cereals must be assessed for these purposes on an "*as sold*" basis, even though in reality the percentage of people who regularly consume breakfast cereals without milk is inconsequential – this is not a policy derived from the NPM itself but rather from guidance issued by DHSC in 2011. The Claimant identified the potential for irrationality and unfairness in this approach generally.

    28.2 Identifying direct inconsistency with the November 2016 "*Guide to creating a front of pack nutrition label for pre-packed products sold through retail outlets*" produced by DHSC and the Food Standards Agency and other relevant agencies, which is agnostic as to whether or not the information to be provided on packaging is given on an "*as sold*" or "*as consumed*" basis.

    28.3 Identifying that the overwhelming bulk of breakfast cereal is consumed on a daily basis at breakfast time, and that any sensible analysis of the impact of constraints intended to restrict or reduce the consumption of breakfast cereals must be considered in the

context of the alternative breakfast options that may be consumed if consumers are deterred from consuming breakfast cereal that are targeted by the HFSS restrictions. In this context, the letter references data presented by the Claimant at the meeting on 29 June 2021 which clearly demonstrated that during the COVID-19 pandemic breakfast cereals as a product category have materially lost ground to cooked breakfast products such as bacon, sausages etc, and that these changed eating habits are likely to continue as behaviour changes following the pandemic become engrained.

28.4 Identifying that the position of breakfast cereals is materially different from other pre-packaged products that are clearly intended and marketed as discretionary additional purchases for consumption outside mealtimes, where arguably a reduction in sales of those products will likely contribute substantially to a reduction in an individual's overall calorie intake. Noting the validity of this distinction has clearly been recognised in Scotland (by the Scottish Government), and yet no explanation or justification has been given by DHSC to justify why a different conflicting approach is considered appropriate in England.

29. The Claimant's letter concluded by inviting DHSC to either reconsider its proposed approach or to provide the Claimant with a properly reasoned and justified response that fully addresses the concerns raised in its letter. No further response to the Claimant's 9 July 2021 letter has been forthcoming from DHSC as at the date of this pre-action protocol letter.

21 July 2021 Response

30. DHSC responded to the 2020 Consultation by way of a response published on 21 July 2021 (the "**21 July 2021 Response**").

31. In its 21 July 2021 Response, DHSC confirmed that it intended to legislate to provide for restrictions on promotions of HFSS products using powers in the FSA 1990. DHSC also confirmed that the secondary legislation providing for this – i.e. the Draft Regulations – would be laid by "*July 2021*") and would come into force in October 2022.

32. The 21 July 2021 Response did not (as with the Government's response to the 2019 Consultation) specifically or generally address the concerns raised by the Claimant or other breakfast cereal manufacturers in its consultation response or otherwise cogently explain how its approach to products consumed at breakfast would in fact contribute and not detract

from its overall strategy for HFSS and its wider policies on healthy eating.

The Draft Regulations

33. DHSC's Draft Regulations were laid – on behalf of the Secretary of State – by Jo Churchill MP, Parliamentary Under-Secretary of State for Prevention, Public Health and Primary Care, before Parliament on 21 July 2021 under section 62(3) of the Regulatory Enforcement and Sanctions Act 2008 (the "**2008 Act**"), for approval (pursuant to the affirmative resolution procedure) by resolution of each House of Parliament.

34. The Draft Regulations are proposed to come into force on 1 October 2022 and are purportedly to be made in exercise of the powers conferred on the Secretary of State by:

34.1 sections 6(4), 16(1)(e) and (f), 26(3) and 48(1) of the FSA 1990;

34.2 sections 36, 39, 52, 54, 55, 62(2), 63 and 65 of the 2008 Act; and

34.3 section 105 of the Deregulation Act 2015 (the "**2015 Act**").

35. The Draft Regulations would extend to England and Wales but apply in relation to England only.

36. The Draft Regulations do not impose prohibitions on manufacturers, such as the Claimant, but rather to businesses which sell their products (either in-store or online). However, the Draft Regulations do apply directly to the products of manufacturers such as the Claimant: indeed the intended effect of the Draft Regulations is to restrict the sale of food items manufactured by such manufacturers. The principal economic impact of the measure will be imposed on manufacturers: retailers can substitute other products for those caught by the restrictions.

37. Moreover, manufacturers enter agreements with major retailers for the promotion of items in prominent positions in retail outlets and on websites and in relation to special offers and the Draft Regulations will prohibit such activities, which are currently an important part of the Claimant's business.

38. The Draft Regulations do not directly apply the NPM itself. Instead, the definition of an HFSS product is set, in regulation 3(4), by reference to "*the Nutrient Profiling Technical Guidance*", which is defined in regulation 2(1) as meaning "*the guidelines published by the Secretary of State on 14th January 2011 about the application of the 2004-2005*

Nutrient Profiling Model". We refer to the NPM Technical Guidance in this pre-action letter as the "**Technical Guidance**".

39. By reference to the Technical Guidance, the Draft Regulations – pursuant to proposed regulations 5 ('Restrictions on the price promotion of specified food'), 7 ('Restrictions on the placement of specified food – in store'), 8 ('Restrictions on the promotion of specified food – online' – would limit the promotion of 'Breakfast cereals' which, as outlined above and defined in proposed Schedule 1 to the Draft Regulations, would include "*ready-to-eat cereals, granola, muesli, porridge oats and other oat-based cereals*."

40. The reference to the Technical Guidance confirms that the draft Regulations will apply to breakfast cereals on an as sold as opposed to an as consumed basis, since as explained above this is a product of the guidance on the NPM rather than the NPM itself.

The Implementation Guidance

41. Accompanying the Draft Regulations is draft guidance entitled '*Restricting promotions of products high in fat, sugar or salt by location and by price: Implementation Guidance*' (the "**Implementation Guidance**").

42. In relation to breakfast cereals, the Implementation Guidance sets out that:

> "*If a product contains a combination of breakfast cereal and yogurt then it will be considered under category 3 if it contains > 50% breakfast cereal.*
>
> *NPM scoring for breakfast cereals should be calculated on 100g of the product as sold, on a dry weight basis i.e. without milk/yogurt/juice unless the product is sold with yogurt/milk/juice as part of the product, then the NPM score would need to be calculated for the product as sold i.e. for the breakfast cereal and yogurt combined.*"

43. Accordingly, the Implementation Guidance recognises that the nutritional scoring of a breakfast cereal product should be completed by reference to milk or yoghurt with which it is to be consumed, but restricts this to where the cereal is sold with the milk or yoghurt.

44. The Claimant's rights in relation to the Implementation Guidance are reserved.

Grounds for judicial review

45. In summary, the Claimant contends that the Decision and Draft Regulations are unlawful on the following grounds:

45.1 **Ground 1**: The Decision is disproportionate and unlawfully interferes with the Claimant's rights under Article 1 of the First Protocol ("**A1P1**"), under Article 10 of the European Convention on Human Rights (as those rights are incorporated into domestic law pursuant to the HRA 1998), and/or is irrational because: (1) it takes no account of the fact that if cereals are not eaten for breakfast they are likely to be substituted for alternatives that have worse and certainly no better nutritional value; and (2) by incorporating the Technical Guidance on the application of the NPM, the Draft Regulations require the nutritional value of breakfast cereal to be assessed without reference to the fact that it is consumed with milk (or in the case of mueslis, sometimes yoghurt).

45.2 **Ground 2**: The Draft Regulations, in regulations 9, 10 and 11, purport to enforce prohibitions on promotional offers, product placement and online advertising by creating a regime of improvement notices, breach of which is a criminal offence. However, the power to create such a regime contained in section 10 of the FSA 1990 expressly excludes regulations made under section 16 from that power.

45.3 **Ground 3**: The Draft Regulations if enacted would be *ultra vires* because the rules they purportedly enact are substantially and materially contained in documentation that does not form part of the Draft Regulations. This is contrary to s.16 of the Food Standards Act 1990 ("**FSA 1990**") read with the Statutory Instruments Act 1946 (the "**SIA 1946**") or at least frustrates the intended purpose and operation of those provisions. Entities should not have to look to different, external, documents in order to find rules that form part of criminal law backed prohibitions on their business.

45.4 **Ground 4**: The Draft Regulations are *ultra vires* section 16 of the FSA 1990 because they lack legal certainly and/or are unfair or unreasonable because in order to apply the Technical Guidance, it would be necessary for retailers to have detailed information about the nutrient profile of products, which is information that is not within their knowledge, and engage in a process of nutrient assessment for hundreds and potentially thousands of products, which most retailers are not equipped to

do. There is no obligation on manufacturers to publish such information and no defence for retailers relying on assessments conducted by manufacturers. This lack of clarity is likely to have a chilling effect and result in over-application of the Draft Regulations, such as by retailers applying the prohibitions to all or most breakfast cereals for fear of contravening the regulations.

Ground 1: Disproportionality / irrationality

46. The Decision and the Draft Regulations are unlawfully disproportionate and irrational. Under this ground, the Claimant relies on its rights under the HRA 1998 and also on ordinary principles of administrative law.

47. DHSC's executive summary in its response to its 2019 Consultation states as follows regarding the purported aim of the HFSS policy:

> "*The aim of this policy is to restrict the promotion of foods high in fat, sugar and salt in favour of healthier options to help improve people's diets and reduce children's sugar intakes*."

48. The stated purpose of DHSC's HFSS policy is therefore to improve people's diets, reduce children's sugar intakes, and to do so by encouraging the consumption of healthier options.

49. The decision to include breakfast cereals within the Draft Regulations fails to achieve this aim, and indeed positively undermines it, such that the Decision is irrational and/or disproportionate.

50. In particular, the Decision irrationally and disproportionately fails to reflect the fact that whereas snacks and other products to which the Draft Regulations apply are substitutable with healthier options, the likely substitutes for breakfast cereal have comparable or less healthy nutritional value. There is, moreover, no evidence to support the position that reducing consumption of breakfast cereals caught by the Draft Regulations will have beneficial effects, or even that this has been considered.

51. The Draft Regulations, in their adoption of the Technical Guidance, irrationally adopt an assessment of the nutritional content of breakfast cereal that disregards how such products are consumed, namely, with milk. An assessment which took account of how cereal is actually consumed would materially impact the extent to which breakfast cereals are caught by the Draft Regulations.

Interference with the Convention rights

52. The Decision interferes with the Convention rights of the manufacturers such as the Claimant as well as with the Convention rights of retailers subject to the prohibitions. This gives rise to the requirements that (i) there is a legitimate aim which can justify the restriction of the protected right (ii) the measure adopted is rationally connected to that aim (iii) the aim could have been achieved by a less intrusive measure and (iv) on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the protected right.

53. The application of the Convention rights is relevant to at least grounds 3 and 4 summarised above and discussed in detail below. The Secretary of State is requested to accept that the measures impact on the Claimant's Convention rights.

54. In terms of A1P1, there are two bases on which the Draft Regulations impact on the Claimant's protected rights.

54.1 First, because they control the use of its commercial property, namely the foodstuffs that it wishes to sell. The effect of the prohibition is that it cannot market and sell those products in the manner that it wishes to do. Whilst the prohibitions in the Draft Regulations are directed to retailers, they prevent manufacturers agreeing promotions with retailers that would contravene the regulations and they are likely significantly to restrict the sales of its products.

54.2 Second, the Draft Regulations will have a substantial impact on the goodwill of the Claimant's business. The following principles (as summarised by Morris J in *R (Electronic Collar Manufacturers Association) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin) at §212[5]) are relevant to the application of A1P1 in this latter respect:

54.2.1 The goodwill of a business with a present marketable value may constitute a possession. That present day value may reflect a capacity to earn profits in the future, which in turn is derived from the reputation that the business enjoys as a result of its past efforts: *Breyer Group plc v Department of Energy and Climate Change* [2014] EWHC 2257 (QB); [2015] 2 All ER 44 (Coulson J) at §75; and [2015] EWCA Civ 408; [2015] 1 WLR 4559 at §§23, 43-45. If the interference causes a loss of

[5] On appeal, the Court of Appeal did not depart from the summary of principles set out by Morris J: [2021] EWCA Civ 666.

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marketable goodwill at the time of the interference and it can be capitalised, it is protected by A1P1.

54.2.2 A1P1 can be engaged by measures which are not yet effective. A proposal outlined in consultation which, as a matter of fact and in practice, has an immediate and serious adverse impact on business will amount to an interference: *Breyer* (CA) §§71-73.

55. [redacted]

56. [redacted]

57. To similar effect, it is well established that advertising and point of sale controls on lawfully sold products constitute an interference with the manufacturer's Article 10 right to commercial expression: e.g. *R (BAT) v Secretary of State for Health* [2004] EWHC 2493 (Admin).

58. The Government's policy is to reduce the impulse purchase of surplus HFSS foodstuffs outside the requirements of a balanced daily diet in order that fewer calories will be consumed overall. The assumption that the DHSC's proposed policy as currently formulated will have a blanket uniformly beneficial impact on diet and calorie intake is however materially flawed.

59. In particular, there appears to have been no proper consideration of the effect of the policy in the context of specific meals at specific times of day and products designed / marketed to be consumed at such meals even though logically this must be relevant if consumers are to be encouraged to make healthier choices in the context of normal consumption patterns at each stage of the day.

60. Breakfast cereals are in this respect unlike snack products otherwise targeted by the Draft Regulations because if cereals are not consumed for breakfast something else will be; and the Government has not identified breakfast alternatives that are more healthy which it reasonably considers will be substituted for cereals.

61. Breakfast cereals represent a nutrient dense breakfast option compared to other alternatives, especially for school children, as was recognised

expressly by DHSC's "*Eat Well*" strategy. Their nutritional value is enhanced when eaten with milk, as they overwhelmingly are.

62. Yet so far as the Claimant can discern, DHSC has not completed any analysis of what will happen in respect of eating habits if people are encouraged to switch to alternative products for their breakfast. The assumption that the policy on HFSS promotions and restrictions will lead to people opting for less calorific foodstuffs is unsupported.

63. Indeed, recent market research has been put by the Claimant to DHSC which shows that during the pandemic, levels of consumption of cooked breakfasts including bacon, sausage and fried eggs has grown materially relative to breakfast cereals, as people working at home have more time for a cooked breakfast. Processed meats such as sausages and bacon are not recommended by the aforementioned '*Eat Well*' strategy and characteristically have a NPM score of between 15 and 21 but are explicitly not targeted by the Draft Regulations. It is irrational that vitamin rich breakfast cereals should be subject to marketing restrictions but not, for example, sausages or bacon.

64. It is also obvious that consumers of breakfast cereal, of all kinds, eat that cereal with milk. Breakfast cereals are overwhelmingly eaten in this manner. The effect of the Decision is that the nutritional assessment of breakfast cereal is completed on the artificial basis of considering the dry cereal product alone, without reference to how it is overwhelmingly consumed. Given that the purpose of the restrictions is to improve people's consumption of HFSS products, it is irrational not to assess products by reference to their nutritional consumption values.

65. This is because DHSC, through the proposed Draft Regulations, is proposing to rely on the Technical Guidance as the basis for imposing (or not imposing) the restrictions in the Draft Regulations. The Technical Guidance, in respect of breakfast cereals, mandates that: "*The nutrient profile score for breakfast cereals should be calculated on 100g of the product as sold, on a dry weight basis.*"

66. Calculating the nutrient profile score of breakfast cereal in this artificial way creates artificial results. For example, the present assessment of the Claimant is that under the Draft Regulations some 63% of its breakfast cereal products would qualify as HFSS. If the same nutritional assessment scoring approach were to be adopted to its products as actually consumed, which is, in reality, with semi-skimmed milk, only 8% would qualify as HFSS. The consumption of milk by children as part of their breakfast is itself an important source of nutrition. Not only does the Decision attack breakfast cereals, which are in fact an important

contribution to a healthy meal, but it also reduces the likelihood that children will consume milk as part of their breakfast.

67. In respect of other products, the Technical Guidance adopts an approach of analysing the nutritional score by reference to the product "*as consumed*". In particular, products which would ordinarily be consumed on a reconstituted basis – such as milk or custard powders – are assessed by reference to their nutritional values when reconstituted. To adopt an "as sold" basis for assessment the context of the policy of reducing consumption of less healthy foods and as a basis for imposing substantial marketing restrictions is irrational and disproportionate.

68. No explanation is provided as to why an equivalent, realistic, approach is not adopted for breakfast cereals as in substance there is no distinction between a product that that is reconstituted and one that is combined with others prior to consumption. The failure to adopt a consistent approach is an important indicator of irrationality and disproportionality: *R (Gallaher Group Limited) v Competition and Markets Authority* [2018] UKSC 25; [2019] AC 96.

69. The Implementation Guidance reinforces the irrationality of the Decision. It states that where a cereal product is sold with an accompaniment (such as yogurt), the product is to be assessed as a whole. Therefore, were the Claimant (or more likely a retailer) to sell packets of breakfast cereal with a carton of yoghurt or milk, the nutritional assessment would be calculated in a realistic way. It makes no sense for the restrictions to apply where dairy products are sold with cereal that the nutritional assessment is combined, but not where they are sold separately, given the known facts that people will eat them together whether they are sold together or not.

70. Despite this point having been repeatedly drawn to the attention of DHSC by the Claimant, there has been no attempt to provide a rational explanation for the approach adopted or to disclose any modelling or analysis relied on by Government that would in any sense justify its approach to affected parties. The Government has suggested only that the approach was originally adopted by the FSA because of the need to specify a portion size which could vary. However this is not a good reason for the policy. In order to apply the NPM on an as consumed basis, which is by reference to 100g of product, all that is necessary is that a milk/cereal ratio specified for the purposes of the calculation. Rather than specifying such a ratio, which would be a rational approach, the Government has been unwilling to engage in any assessment or consideration, instead simply adopting the "as sold' approach taken by the DHSC in 2011.

71. For these reasons, even if the Draft Regulations are otherwise lawful (contrary to grounds 2-4 below), the inclusion of breakfast cereals within Schedule 1 to the Draft Regulations, when combined with the effect given to the Technical Guidance, is disproportionate and irrational.

Ground 2: The enforcement mechanism set out in Draft Regulations is *ultra vires*

72. Regulation 10 of the Draft Regulations purports to authorise a "*food authority*" to issue "*improvement notices*" on retailers where the regulator has reasonable grounds to believe that there has been a failure to comply with regulations 5, 6 (price promotions), 7 (product placement) or 8 (online marketplaces). An enforcement notice may:

> "*(c) specify the measures which, in the authority's opinion, the person must take in order to secure compliance; and*
>
> *(d) require the person to take those measures, or measures that are at least equivalent to them, within such period as may be specified in the notice*."

73. Regulation 11 provides that it is an offence for a person to "*fail to comply with an improvement notice served under regulation 10*."

74. The effect of these provisions is to confer considerable power on a food authority (a county or district council or London borough council). Where such an authority considers that the regulations have not been complied with then they are conferred a discretion to specify measures that must be taken by a retailer to remedy the breach. Three points are particularly significant.

74.1 First, the exercise of the power does not require that there is in fact a breach of the prohibition in the Draft Regulations, only that a food authority has reasonable grounds for believing that there has been a breach. Clearly, this could include circumstances in which there has not in fact been a breach.

74.2 Secondly, the offence that the Draft Regulations purports to create is not for a failure to comply with the Draft Regulations but a failure to comply with whatever is specified to be done by the authority, which is specified to be a matter within the authority's discretion.

74.3 Thirdly a food authority is authorised to (a) prosecute any breach of a requirement specified by them in their improvement notice, and (b) issue a fixed penalty notice in lieu of any prosecution.

75. Regulations 9 and 10 are *ultra vires*. The power to issue improvement notices, failure to comply with which is a criminal offence, is expressly limited under the FSA 1990 to regulations concerning the preparation or food or food hygiene practices. The FSA 1990 does not confer power on the Secretary of State to confer power on a regulatory body to issue improvement notices in other circumstances. Section 10 sets out the power to issue improvement notices. Section 10(3) expressly limits this power:

> *"(3) This section and section 11 below apply to any regulations under this Part which make provision— (a) for requiring, prohibiting or regulating the use of any process or treatment in the preparation of food; or (b) for securing the observance of hygienic conditions and practices in connection with the carrying out of commercial operations with respect to food or food sources.*"

76. Indeed, there is no power or authority conferred by the FSA 1990 that permits the creation of an offence of breaching an enforcement notice. The 2008 Act, which is also relied upon by the Secretary of State, materially relates to fixed penalty notices and also confers no such power or authority.

77. It is no doubt partly the fusion of the functions of law-maker and prosecutor that explains why Parliament expressly provided and limited in section 10 the power for the Secretary of State to permit food authorities to issue improvement notices backed by criminal sanctions. The Draft Regulations purport to circumvent that restriction.

Ground 3: Reliance on the Technical Guidance is *ultra vires*

78. Section 16 of the FSA 1990 permits the Secretary of State to make provision "*by regulations*" imposing *inter alia* prohibitions on the marketing and offering for sale of food.

79. The power to make regulations includes a power to apply any other enactment which deals with matters similar to those contained in the FSA 1990 (s.48(1)). Any power to make regulations shall be exercised by statutory instrument (s.48(2)). Any statutory instrument containing regulations under the Act is subject to annulment by either House of Parliament (s.48(3)).

80. The SIA 1946 provides that where any enactment confers on the Secretary of State power to make regulations by way of statutory instrument, "*any document by which that power is exercised shall be*

known as a "statutory instrument" and the provisions of this Act shall apply thereto accordingly." (s.1(1)).

81. Section 5(1) of the SIA 1946 provides that where any statutory instrument is required to be subject to annulment the statutory instrument shall be laid before Parliament.

82. This is not only to aid parliamentary scrutiny but it is an important aspect of the rule of law that the rules that apply to persons and bodies are duly promulgated as such and published in due form. Scott LJ in *Blackpool Corporation v Locker* [1948] 1 KB 349 at 369 explained that, "*The Rules Publication Act, 1893, and the Statutory Instruments Act, 1946, which repealed the former and reenacted an amended edition of it, had publicity as well as control by Parliament as a main object;…*".

83. It is clear from section 16 of the FSA 1990, read in the context of section 48 and the principles set out above, that the Draft Regulations improperly seek to make provision for restrictions on the sale and advertising of food products other than through provision made in regulations. Rather, they seek to make provision by adopting guidance promulgated separately by DHSC and purporting to make compliance with such guidance determinative of the application of criminal law rules.

84. The effect of section 1(1) and 5 of the SIA 1946, read together with section 16 of the FSA 1990, is that the Secretary of State cannot exercise a power under section 16 of the FSA 1990 by relying upon and separately publishing a document external to the regulations, which is not laid before Parliament and which purports not to be part of the statutory instrument.

85. The prohibitions in the Draft Regulations relate to "*specified foods*", which materially includes "*less healthy food*". Regulation 3(4) defines less healthy food as food which scores 4 or more points under the Technical Guidance. The Technical Guidance is therefore made central to the offence and regulatory regime sought to be introduced by the Draft Regulations. The Secretary of State is not thereby making provision for a prohibition on certain foods *by regulations*.

86. Further or alternatively, even if not strictly and literally prohibited by section 16, as a matter of legal principle, where a term contained in secondary legislation has a significant impact on the way in which that legislation is implemented or takes effect, then the meaning of such a term should be set out in the legislation itself rather than in extra-legislative documents: *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 WLR 2208 at §§57, 94, 97, 122

and 128. The intention of Parliament in affording the power to make regulations – especially where, as in the present context, the affirmative resolution procedure applies – encompasses its ability to directly consider the terms of any rules imposed as a result of that legislation.

87. Regulations that seek to create offences, the scope of which is dependent on rules set out in a separate document, frustrates the operation of those provisions read with SIA 1946 because the objective of that Act is that the rules created under powers to make regulations should be set out in an instrument formally published as such and laid before Parliament and subject to either annulment or approval procedure. As the majority of the Supreme Court stated in *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 at [51]: "*ministers cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation*."

88. For these reasons, the Draft Regulations are contrary to, or frustrate the purpose of, the SIA 1946 and/or section 16 of the FSA 1990.

89. If this ground of judicial review is not correct then the Claimant will maintain that, as matter of law, the Court should give especially anxious scrutiny to any external documentation referred to in regulations since these would not form part of the regulations themselves which Parliament is required either to annul or approve.

90. Moreover, the failure to include the central operative mechanism within the Draft Regulations themselves significantly contributes to the unlawful lack of legal certainty, addressed under Ground 4.

Ground 4: Lack of legal certainty

91. Related to Ground 3, subordinate legislation must be cast in terms which are sufficiently precise for the persons on whom rights and duties are conferred to be able to know the parameters of the rights and duties and the effects of infringement or non-compliance: *Craies on Legislation* (12th edn.) §3-4.3. A statutory instrument may be void if it is too vague: *McEldowney v Forde* [1971] AC 632. In the circumstances, the Draft Regulations are impermissibly vague on their face.

92. The Draft Regulations are thus *ultra vires* section 16 of the FSA 1990 because they lack legal certainly and/or are unfair or unreasonable by making the application of the prohibition imposed on shops relating to the sale of less healthy products dependent on the application of the NPM contained in the Technical Guidance.

93. It is implicit in the conferral of power to make regulations that they should be capable of being comprehended and applied by reference to their terms. It is implicit in section 16 of the FSA 1990 that regulations made by the Secretary of State will be clear and capable of comprehension and application.

94. However, in order to apply the Technical Guidance, it will be necessary for retailers to have detailed information about the nutrient profile of products, which is information that is not within their knowledge, and engage in a process of nutrient assessment for hundreds and potentially thousands of products, which most retailers are not equipped to do.

95. Food and drink packaging does not set out the NPM score. There is no obligation on manufacturers to publish such information and no defence for retailers relying on assessments conducted by manufacturers.

96. This lack of clarity is likely to have a chilling effect and result in over-application of the Draft Regulations, such as by retailers applying the prohibitions to all or most breakfast cereals for fear of contravening the regulations.

The Target of the Claim

97. The Claimant is entitled to bring this claim against the Decision as contained in the Draft Regulations. It is neither necessary nor appropriate to require the Claimant to wait until the Draft Regulations are approved by Parliament and are formally made.

98. There are manifold examples of the courts entertaining challenges to a draft statutory instrument before it has been made or entered into force, including to legislation which is simply proposed: e.g. *R v Electricity Commissioners, ex p London Electricity Joint Committee Co. (1920) Ltd* [1924] 1 KB 171; *R v Her Majesty's Treasury, ex p Smedley* [1985] QB 657; *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39; [2016] AC 131.

99. In the present context, it is relevant that now that the Draft Regulations have been laid, the procedures of Parliament do not permit amendments: the Draft Regulations must be either affirmed or rejected in their present form. Such regulations are as a matter of fact almost always accepted by Parliament. There is thus no doubt as to the form the law will take, and until the formal Draft Regulations were published the Claimant could not be certain that a final decision as to the treatment of breakfast cereals had been taken. Waiting until the Draft Regulations are made, or come into force, would be senseless.

100. Moreover, there is an immediate impact on the Claimant and its business given the impact on its goodwill and the need to devote money and resources to the proposed change in the law. The same will be the case for retailers, who will need to change their business practices and have processes in place if they are to comply with the regulations. It therefore is in the public interest for the issues raised in this claim to be determined now.

101. The Draft Regulations provide a long period of time before they come into force precisely because it is recognised that businesses and manufacturers will require a considerable period of time to make adjustments to their operations and productions in order to address the terms of the new law.

[8] Remedies sought and details of the action that the Defendant is expected to take

102. Without prejudice to the Claimant's right to seek any and all appropriate relief, the Claimant currently intends to request declarations reflecting the grounds of illegality set out above.

103. Accordingly, the Defendant is requested to withdraw the Draft Regulations and accept that the reform if pursued must be pursued by primary legislation.

[9] ADR proposals

104. As stated above, the Claimant supports the Government's drive to promote a healthier diet especially for children. The Claimant has actively engaged in advance to seek to address its legitimate concerns in a way that would not impede progress in delivering the Government's agenda. Regrettably, that approach did not result in an effective dialogue. Nonetheless, the Claimant still believes that this matter can be resolved without the need for litigation but will issue proceedings for judicial review in default of a satisfactory response. As noted, the Claimant has sought to engage with DHSC in good faith. Our client would therefore be keen to discuss these issues in a Secretary of State/Claimant Senior Executive level meeting with a view to addressing or narrowing the issues set out. Any such meeting would need to take place as soon as possible. Our client otherwise remains open to any other proposals for ADR.

[10] The details of any information sought

105. The duty of candour is engaged at the pre-action stage.

106. Consistent with your duty of candour, the Claimant requires you to disclose information and documents relevant to the issues we have raised in this letter and in particular:

106.1 The Ministerial Submission that accompanied the Decision approving the Draft Regulations. This should set out the policy position, options and response to objections such as those raised by the Claimant; and

106.2 Any and all evidence considered by DHSC or other government department officials relating to the matters raised in this pre-action letter, and in particular the decision to include breakfast cereals in the Draft Regulations and to assess their nutritional value by reference to as sold values (disclosure initially by list).

[11] Details of any records that are considered relevant and necessary

107. As under sub-heading [10] above at paragraph 106.

[12] Address for reply and service of court documents

108. DLA Piper, address as above. However, in the circumstances, we request (as noted above) service of any correspondence or court documents by email or secure electronic file transfer.

[13] Proposed reply date

109. We require a response by **16:00 on 17 September 2021**.

Conclusion

110. In conclusion, the Claimant reiterates its concerns about the lawfulness of the Government's HFSS policy as that policy applies to breakfast cereals. The Claimant continues to hope that a solution can be found in respect of the matters raised in this letter without the need to issue proceedings in the Administrative Court. However, if the Claimant fails to receive a satisfactory response to this letter by the above date, the Claimant's current intention is that it will have no choice but to issue a claim for judicial review.

Yours faithfully

[redacted]

DLA PIPER UK LLP