

Guidance on regulatory measures aimed at restricting digital marketing of breast-milk substitutes



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Terminology

For the purposes of this guidance, the following terms are used as in the Code.

Breast-milk substitutes are any food being marketed or otherwise represented to be suitable for use as a partial or total replacement of breast milk, whether or not suitable for that purpose, including any milks (or products that could be used to replace milk, such as plant-based milks), in either liquid or powdered form, that are specifically marketed for feeding infants and young children up to the age of 3 years (including follow-up formula and growing-up milks) (2,10,11).

Cross-promotion (also called “brand crossover promotion”, “line extension” or “brand stretching”) is a form of marketing promotion where customers of one product or service are targeted by the promotion of a related product. This can include packaging, branding and labelling of a product to closely resemble that of another (also known as “brand extension”, “line extension” or “brand family”). In this context, it can also refer to use of particular promotional activities for one product and/or promotion of that product in particular settings to promote another product (10,11).

Distributors are persons, corporations or any other entities in the public or private sector engaged in the business of *marketing* at the wholesale or retail level of a product within the scope of the Code (13).

Foods for infants and young children means all commercially produced food or beverage products (including complementary foods) that are specifically marketed as suitable for feeding infants and children from six months up to 36 months of age.

Health care system means governmental, non-governmental or private institutions or organizations engaged, directly or indirectly, in health care for mothers, infants and pregnant women and nurseries or child-care institutions. It also includes health workers in private practice. For the purposes of the Code, the health care system does not include pharmacies or other established sales outlets (10,11,13).

Health worker means a person working in a component of such a health care system, whether professional or non-professional, including voluntary unpaid workers (13).

Manufacturers means corporations or any other entities in the public or private sector engaged in the business or function (whether directly or through an agent or through an entity controlled by or under contract with it) of manufacturing a product (13).

Marketing means promotion, distribution, selling, advertising, public relations and information services (13).

Promotion includes the communication of messages that are

designed to persuade or encourage the purchase or consumption of a product or raise awareness of a brand. Promotional messages may be communicated through traditional mass communication channels, the internet and other marketing media using a variety of promotional methods. In addition to promotion techniques aimed directly at consumers, measures to promote products to health workers or to consumers through other intermediaries are included. There does not have to be a reference to a brand name of a product for the activity to be considered as advertising or promotion (10,11).

In addition, the terms listed below are used as described for the purpose of this guidance.

Digital environments are the operational or information technology systems, networks, internet-enabled *applications*, devices and/or data contained within such systems and networks and any other related digital system. These include, but are not limited to, social media, websites, email services, text or voice or image or video messaging services, streaming services, search engines, eCommerce platforms, peer commerce and smartphone applications.

Digital marketing means *marketing* conducted or disseminated in digital environments and/or facilitated by digital technologies.

Digital marketing value chain means the full range of activities involved in producing and distributing digital marketing content. Actors involved in these activities typically include content producers, publishers, hosts, navigators and access providers (14).

Regulatory measures are actions taken by governments, as appropriate to their legislative frameworks, including laws (legislation), decrees, rules and regulations, compliance with which is mandatory and enforceable by an authority or agent empowered to do so. Voluntary measures are not regulatory measures and are not suitable for restricting marketing of breast-milk substitutes (15, 16).

Sponsorship includes any form of contribution made with the aim, effect or likely effect of increasing the recognition, recommendation or appeal of commercial foods or drinks for infants and young children, including formula milks for children up to 36 months, or their consumption, either directly or indirectly (17).

Background

Recognizing the vulnerability of infants in the early months of life, the health risks introduced by the unnecessary and improper use of breast-milk substitutes, and the impact of the promotion of breast-milk substitutes on breastfeeding practices, Member States agreed that the marketing of breast-milk substitutes requires special treatment, which makes usual marketing practices unsuitable for these products (2). In 1981, the World Health Assembly adopted the Code to prohibit all forms of promotion of breast-milk substitutes.

The United Nations Commission on the Rights of the Child recognizes that governments have a duty to safeguard children's right to the enjoyment of the highest attainable standard of health (3), and that this duty confers upon them an obligation to implement and enforce the Code, noting, "States are required to introduce into domestic law, implement and enforce internationally agreed standards concerning children's right to health including the international Code of Marketing of Breast-milk Substitutes and the relevant subsequent World Health Assembly resolutions" (4). This instrument also recognizes that manufacturers and distributors also have an obligation to comply with the International Code of Marketing of Breast-milk Substitutes and its subsequent World Health Assembly resolutions (5).

The Convention on the Elimination of All forms of Discrimination Against Women (6) recognizes that governments have a duty to safeguard women's right to health, including by ensuring effective regulation of the marketing of breast-milk

substitutes and the implementation and monitoring of the International Code of Marketing of Breast-milk Substitutes (7).

Most WHO Member States have taken steps to implement the Code by adopting legal measures to implement at least some of its provisions. Yet, few countries have adopted legal measures closely aligned with the provisions of the Code and enforcement of legal measures that have been adopted remains weak (8). Regulatory measures aimed at restricting digital marketing of breast-milk substitutes will be most effective in the context of comprehensive implementation of the Code (Mathiessen J, Vasic M, Zhu, N, University of Sydney Health Law Centre for the Pacific Community (SPC) Public Health Division, unpublished report, 2022). Comprehensive implementation of the Code means enacting and enforcing legal measures closely aligned with its scope and provisions, including its subsequent resolutions.

A comprehensive review of evidence describing the scope and impact of the promotion of breast-milk substitutes in digital environments was provided to the Seventy-fifth World Health Assembly. The WHO report on the scope and impact of digital marketing strategies for promoting breast-milk substitutes noted that digital environments are fast becoming the predominant source of exposure to promotion of breast-milk substitutes globally, digital marketing amplifies the reach and power of advertising and other forms of promotion in digital environments, and exposure to digital marketing increases the purchase and use of breast-milk substitutes (9).

Scope

This guidance applies to the digital marketing of products within the scope of the Code and to foods for infants and young children that are not breast-milk substitutes (2,10,11). Products within the scope of the Code include breast-milk substitutes, including infant formula and other types of milks or products that could be used to replace milk, such as fortified plant-based milks. These can be in either a liquid or powder form specifically marketed for feeding infants and young children up to the age of three years, including follow-up formula and growing-up milks, any foods that are marketed or otherwise represented as being suitable for infants less than six months or as a partial or total replacement for breast milk (whether or not suitable for that purpose), including bottle-fed complementary foods, feeding bottles and teats. Foods for infants and young children are defined as all commercially produced food or beverage products (including complementary foods) that are specifically marketed as suitable for feeding infants and children from six months up to 36 months of age.

Digital marketing involves a broader range of actors than those involved in traditional marketing practices. Applying the Code to digital environments requires the development of specific implementation mechanisms, coordination across a broader set of

government bodies, and the establishment of specific legal duties on the range of entities involved in the digital marketing value chain. These entities may include, but are not limited to, data management platforms, content creators (including influencers), internet service providers (known as ISPs), supply side platforms, demand side platforms, agency holding companies, social media platform providers, search engine providers, online retailers, streaming services, application owners and gaming service providers.

Humanitarian emergencies amplify health risks associated with inappropriate infant and young child feeding. Yet, the marketing of infant feeding products typically increases during these crises. The recommendations presented in this guidance apply to digital marketing during humanitarian and emergency contexts (12).

Digital marketing practices are diverse and constantly evolving. Therefore, examples given in this document should not be considered to be an exhaustive list of practices that should be subject to regulation.

This guidance recognizes that national regulatory environments vary and effective implementation mechanisms will adapt to country contexts and regulatory frameworks

Purpose

The purpose of this guidance is to provide support to World Health Organization (WHO) Member States for developing and applying regulatory measures aimed at restricting digital marketing of products that fall within the scope of the International Code of Marketing of Breast-milk Substitutes and other

subsequent relevant resolutions of the World Health Assembly (hereafter collectively referred to as “the Code”) by applying the Code to digital environments in response to a request from the Seventy-fifth World Health Assembly in 2022 (1).

Methodology

To develop this report WHO assembled a steering committee from across WHO departments to decide upon scope, methodology and process. WHO solicited subject matter experts in public health law and regulation, digital marketing social science, epidemiology, marketing, global health, nutrition, psychology and consumer behaviour, human rights law, Code monitoring and implementation policy to serve on a technical advisory group (TAG). TAG members were drawn from all WHO regions. All members were required to complete the WHO declaration of interest. The WHO secretariat assessed declarations and excluded experts with material conflicts. Following an initial consultation meeting, at which the TAG advised on proposed scope and, the TAG met every three weeks for nine months to develop the overall approach, identify potential sources of evidence, discuss priority

country actions, and review draft recommendations.

The TAG examined several sources of evidence, including the WHO report on Scope and impact of digital marketing strategies for promoting breast-milk substitutes, a review of relevant previous WHO recommendations, a comparative legal review on restricting digital marketing of unhealthy products, and qualitative research on technical and legal considerations for regulating the digital marketing of breast-milk substitutes.

WHO received comments through an online public consultation. A total of 65 submissions were carefully considered and the document amended where appropriate.

Recommendations

Recommendation 1

Member States should ensure that regulatory measures effectively prohibit the promotion of products within the scope of the Code, including brand promotion, across all channels and media, including digital media.

Recommendation 1.1. Regulatory measures should prohibit the use of digital marketing tools for the promotion of products within the scope of the Code, including, but not limited to, the following activities:

- i. providing or disseminating any promotional content including advertising on social media platforms, streaming platforms, video-sharing platforms, gaming platforms or search engine platforms; in games, podcasts or video content; through websites, display advertisements, banner advertisements, pop-up advertisements, search engine advertising, dark posts, influencer marketing, affiliate marketing, email marketing, and other events hosted online or facilitated by digital technologies;
- ii. establishing or participating in online social or support groups or communities, including baby clubs, parents' clubs, social or support groups for pregnant women or parents, whether these are visible to non-participants or not;
- iii. offering or providing gifts, discounts or product samples directly or by providing a link or code that can be used to obtain a gift, discount or sample;
- iv. providing or promoting software applications (apps), entertainment services or games aimed at pregnant women, parents, children or health workers;
- v. soliciting (including by offering material or other incentives or inviting consumers to enter a competition or prize draw), publishing, sharing, commenting on or boosting user-generated content including product testimonials or reviews, static images, text or audio-visual content;
- vi. encouraging or enabling consumers to share, react or comment on marketing content;
- vii. product placements, including shoppable content (that consumers can click to make a purchase) in social media, audio or video-sharing platforms, games, gaming platforms, apps or other digital media;
- viii. any other digital marketing practices, including cross-promotions, used to promote products within the scope of the Code, or to establish relationships between consumers and manufacturers or distributors of products within the scope of the Code or their brands.

Recommendation 1.2. Regulatory measures should prohibit the display of any images of a product label that does not satisfy the relevant provisions of the Code (particularly Article 9 of the International Code of Marketing of Breast-milk Substitutes, WHA58.32, WHA61.20, WHA63.23 and WHA69.9) in any information, educational materials, materials, or any other content in the digital environment.

Recommendation 1.3. Regulatory measures should prohibit manufacturers and distributors of products within the scope of the Code from contacting or seeking or soliciting direct or indirect contact with pregnant women, parents or caregivers of infants and young children in digital environments.

Recommendation 1.4. Regulatory measures should prohibit manufacturers of products within the scope of the Code or any entities acting on their behalf, acting directly or indirectly, from offering or providing advice, information (other than product information that is required to be provided by law) or education about infant and young child care, nutrition and feeding, maternal nutrition, pregnancy, child development, health and wellbeing or parenting, as static, dynamic or interactive content in digital environments, including, but not limited to, through e-learning courses, chat and messaging services, commenting on content posted on webinars, chatbots or other tools powered by artificial intelligence. This should include prohibiting offering or providing financial or other incentives to other entities for these purposes. Note that nothing in this paragraph should prevent manufacturers and distributors from providing product information that is required to be provided by law.

Recommendation 2

Regulatory measures should prohibit the promotion of products within the scope of the Code, or their brands, through health care systems and health professional associations using digital technologies.

Recommendation 2.1. Regulatory measures should prohibit the promotion of products within the scope of the Code or their brands in health care systems' digital presences (including websites, smartphone apps, online portals and social media accounts), websites and other digital presences.

Recommendation 2.2. Regulatory measures should prohibit manufacturers and distributors of products within the scope of the Code from offering or providing financial or material inducements to health workers to endorse a product or brand or provide professional advice or any other content to pregnant women, parents and caregivers of infants and young children in the digital environment.

Recommendation 2.3: Regulatory measures should prohibit the sponsorship of online meetings of health professionals and scientific meetings, including webinars, e-learning courses and information dissemination through online scientific communications, including advertising in digital medical journals and on e-learning platforms by manufacturers and distributors of products within the scope of the Code or foods for infants and young children (10,11).

Recommendation 3

Regulatory measures should prohibit the promotion of products within the scope of the Code and their brands at point-of-sale in digital environments, in alignment with the Code provisions on point-of-sale promotions, information and education and labelling.

Recommendation 3.1. Regulatory measures should prescribe the content, including product descriptions, permitted to be displayed for products within the scope of the Code at point-of-sale in digital environments. This should be limited to content required for a checkout process that facilitates purchase, a factual description of the product, labelling information consistent with provisions of the Code, including those articulated in Article 9 of the International Code of Marketing of Breast-milk Substitutes, resolution WHA61.20 and any other information required by food safety standards and national law.

Recommendation 3.2. Regulatory measures should prohibit the use of text and imagery at the point-of-sale in digital environments as described in Article 9.2 of the International Code of Marketing of Breast-milk Substitutes (WHA34.22), resolutions WHA58.32(2), WHA63.23(4), WHA69.9(2) and any other text that is not required to be provided by law. These prohibitions should apply to all point-of-sale promotions including, but not limited to, product recommendations, images or depictions of products or their labels, any other text or images, audio, video or pop-up content, in digital environments.

Recommendation 3.3. Regulatory measures should prohibit promotions described in Article 5 of the Code in digital point-of-sale environments.

Recommendation 4

Member States should prohibit inappropriate promotion of foods for infants and young children that are not breast-milk substitutes in digital environments (10).

Recommendation 4.1. Regulatory measures should prohibit promotion of foods for infants and young children in digital environments that:

- i. do not meet all the relevant national, regional and global standards for composition, safety, quality and nutrient levels and are in line with national dietary guidelines in digital environments.
- ii. are marketed as suitable for infants less than six months of age;

Recommendation 4.2. Regulatory measures should prohibit any promotions of a food for infants and young children in digital environments that:

- i. include any image, text or other representation that is likely to undermine or discourage breastfeeding, that makes a comparison to breast milk, or that suggests the product is nearly equivalent or superior to breast milk;
- ii. recommend or promote bottle-feeding;
- iii. conveys an endorsement or anything that may be construed as an endorsement by a professional or other body, unless this has been specifically approved by the relevant national, regional or international regulatory authority;
- iv. include an image, text or other representation that might suggest use

for infants less than six months of age, including references to milestones and stages;

- v. is presented in packaging that is similar to those used for breast-milk substitutes, including, but not limited to, using similar colour schemes, designs, names, slogans and mascots other than the company name and logo.

Recommendation 4.3. Regulatory measures should require that any promotion of a food for infants and young children in digital environments includes statements on the importance of continued breastfeeding for up to 2 years or beyond and of not introducing complementary feeding before six months of age.

Recommendation 5

Member States should confer legal duties of compliance to monitor and take immediate action to prevent or remedy prohibited marketing on entities along the digital marketing value chain.

Recommendation 5.1. Regulatory measures should identify actors involved in the digital marketing value chain and assign specific duties that are proportionate to those entities' control over the creation, publication, distribution or removal of non-compliant content and as appropriate in the country context. Duties may include identifying, monitoring and reporting prohibited marketing, content moderation, removing, filtering or blocking prohibited content. Each of these duties may be conferred upon more than one entity in the digital marketing value chain and each

of those actors should be sanctioned for failing to comply with duties conferred to them.

Recommendation 6

Regulatory measures should identify government agencies responsible for implementation, monitoring and enforcement, including in digital environments, establish mechanisms for inter-agency collaboration, allocate adequate resources and establish powers necessary for discharging these duties.

Recommendation 6.1 Government agencies responsible for the Code and the Guidance on Ending Inappropriate Promotion of Foods for Infants and Young Children should be entirely independent of industry funding.

Recommendation 7

Member States should strengthen monitoring systems for detecting prohibited marketing in the digital environment, including by:

- i. requiring entities in the digital marketing value chain to monitor and report the actions they have taken to moderate, block, filter or immediately remove prohibited marketing and ensure compliance with regulatory measures to specified government agencies;
- ii. establishing notification mechanisms for individuals and civil society organizations and commercial entities to report non-compliant digital marketing to specified government agencies;
- iii. conferring on individuals and civil society organizations the right to bring complaints before the courts; and
- iv. using digital technologies, such as social media intelligence platforms, screen-capture software, traffic analysis or artificial intelligence tools to identify potentially non-compliant digital marketing for investigation and enforcement by specified government agencies

Recommendation 8

Member States should enforce their regulatory measures, including in digital environments, by applying effective, proportionate, dissuasive sanctions for non-compliance.

Recommendation 8.1. Regulatory measures should specify sanctions that

correspond with, and are proportionate to, the responsible actors' duties of compliance.

Recommendation 8.2. Regulatory measures should establish a range of sanctions that are sufficient to deter all types of violations, proportional to the nature and seriousness of the violation and increase for repeat violations. Sanctions refer to penalties under domestic law and may include criminal and administrative or statutory penalties, financial penalties and fines, non-financial penalties, such as restrictions on licensing, product recalls, and corrective actions such as counter-advertising campaigns to correct misleading claims, among others.

Recommendation 9

Member States should exercise their jurisdiction to ensure that regulatory measures can be enforced against manufacturers and distributors of products within the scope of the Code and foods for infants and young children, and other actors across the digital marketing value chain, for digital marketing that crosses into or out of their countries and does not comply with regulatory measures.

Recommendation 9.1. Manufacturers, distributors, and other entities acting across the digital marketing value chain should be held liable for prohibited content that enters Member States' territories including, for example, by:

- i. establishing licensing mechanisms that include requirements for compliance on entities that distribute or generate content that is made available within the jurisdiction;

- ii. establishing legal obligations on domestic distributors of products within the scope of the Code for verification of supplier compliance with marketing regulations and strict liability for failure;
- iii. requiring such entities that do business or provide services in their countries to maintain a domestic presence against which enforcement can be effected for breaches of regulatory measures.

Recommendation 9.2. Member States should prohibit their nationals and anyone acting within their territories from promoting products within the scope of the Code and foods for infants and young children, outside their borders across all channels and media, including digital marketing.

Recommendation 9.3. Member States should facilitate enforcement cooperation including, for example, through:

- i. domestic legislation that recognises and enforces foreign judgments;
- ii. domestic legislation that authorises local authorities to provide evidence to, and conduct investigations to assist, foreign enforcement agencies in order to prevent unlawful marketing being made available within their territories;
- iii. establishing or effecting memoranda of understanding aimed at strengthening

cooperation for protecting consumers from harmful or unlawful marketing;

- iv. establishing or effecting bilateral and/or multilateral agreements on trade and/or enforcement;
- v. establishing or engaging in regional networks for the purpose of enforcement cooperation (18).

Recommendation 10

All entities along the digital marketing value chain and in health care systems should ensure that their marketing practices conform to the Code in digital environments, irrespective of any regulatory measures implemented at national and subnational levels.

Recommendation 11

Member States should monitor developments in digital technologies and their impact on the marketing of products within the scope of the Code and foods for infants and young children, and adapt regulatory measures to capture new digital technologies, channels or marketing practices.

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