

Maternal, infant and young child nutrition

DRAFT guidance on regulatory measures aimed at restricting digital marketing of breast-milk substitutes

Draft for public comment

PURPOSE

1. The purpose of this guidance is to provide support to Member States for developing and applying regulatory measures aimed at restricting digital marketing of products that fall within the scope of International Code of Marketing of Breast-milk Substitutes and other subsequent relevant resolutions of the Health Assembly (hereafter collectively referred to as “the Code”) by applying the Code to digital environments in response to a request from the 77th World Health Assembly (1).

BACKGROUND

2. 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 International Code of Marketing of Breast-milk Substitutes to prohibit all forms of promotion of breast-milk substitutes.
3. The United Nations Commission on the Rights of the Child recognises that governments have an obligation to implement and enforce the Code, *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* (3). Manufacturers and distributors also have an obligation to *comply with the International Code of Marketing of Breast-milk Substitutes and the relevant subsequent World Health Assembly resolutions* (4). The Convention on the Elimination of All forms of Discrimination Against Women recognises 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* (5).
4. Yet, few countries have adopted legal measures aligned with the provisions of the Code and enforcement of legal measures that have been adopted remains weak. Regulatory measures aimed at restricting digital marketing of breast-milk substitutes will be most effective in the context of comprehensive implementation of the Code.
5. A comprehensive review of evidence that describes 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 (6).

SCOPE

6. This guidance applies to digital marketing of products within the scope of the Code as well as foods for infants and young children that are not breast-milk substitutes (2,7,8). Products within the scope of the Code include breast-milk substitutes including infant formula and other milks or products that could be used to replace milk, such as fortified plant-based milks, in either liquid or powdered form that are 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 breastmilk, whether or not suitable for that purpose, including bottle-fed complementary foods; and feeding bottles and teats. 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 6 months up to 36 months of age.
7. 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 (ISPs), supply side platforms, demand side platforms, agency holding companies, social media platform providers, search engine providers, online retailers, streaming services, app owners and gaming service providers.
8. Digital marketing practices are diverse and constantly evolving. Therefore, examples of digital marketing practices given in this document should not be considered an exhaustive list of practices that should be subject to regulation.
9. This guidance recognises that national regulatory environments vary, and effective implementation mechanisms will adapt to country contexts and regulatory frameworks.

TERMINOLOGY

10. For the purposes of this guidance the following terms as are used as they are in the Code.
 - a. **breast-milk substitutes** are any food being marketed or otherwise represented to be suitable for use as a partial or total replacement of breastmilk, 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) (2,7,8).
 - b. **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 with promotion of a related product. This can include packaging, branding and labelling of a product to closely resemble that of another (brand extension). 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 (7,8).
 - c. **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 a product (9).
 - d. **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 6 months up to 36 months of age.

- e. **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 (7,8,9).
- f. **Health worker** means a person working in a component of such a health care system, whether professional or non-professional, including voluntary unpaid workers (9).
- g. **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 (9).
- h. **Marketing** means promotion, distribution, selling, advertising, product public relations, and information services (9).
- i. **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 (7,8).

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

- a. **Digital environments** are the operational or information technology systems, networks, any 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 providers, peer commerce and smartphone applications.
- b. **Digital marketing** means *marketing* that is conducted or disseminated in digital environments and/or facilitated by digital technologies.
- c. **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, content publishers, content hosts, content navigators and access providers (10).
- d. **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 (11).
- e. **Sponsorship** includes any form of contribution made with the aim, effect or likely effect of increasing recognition, recommendations, 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 (12).

RECOMMENDATIONS

12. **RECOMMENDATION 1: Member States should ensure that regulatory measures effectively prohibit the promotion of products within the scope of the Code across all channels and media, including digital media.**
13. **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:
 - a. 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 ads, banner ads, pop-up ads, search engine advertising, dark posts influencer marketing, affiliate marketing, email marketing and other events hosted online or facilitated by digital technologies;
 - b. 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;
 - c. 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;
 - d. providing or promoting software applications (apps), entertainment services, or games aimed at pregnant women, parents, children or health workers;
 - e. 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;
 - f. encouraging or enabling consumers to share, react or comment on marketing content;
 - g. 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;
 - h. any other digital marketing practices, including cross-promotions, used to promote products within the scope of the Code or establish relationships between consumers and manufacturers or distributors of products within the scope of the Code or their brands.
14. **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 the Guidance on Ending Inappropriate Promotion of Foods for Infants and Young Children) in any information, educational materials, materials, or any other content in the digital environment.
15. **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.
16. **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 as required to provide 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 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. Manufacturers and distributors of products within the scope of the Code should not be prevented from providing scientific and factual product information to consumers as required by law.

17. **RECOMMENDATION 2: Regulatory measures should prohibit promotion of products within the scope of the Code through health care systems using digital technologies.**
18. RECOMMENDATION 2.1: Regulatory measures should prohibit the promotion of products within the scope of the Code in health care systems' digital presences (including websites, smartphone apps, online portals and social media accounts), websites and other digital presences.
19. 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 provide professional advice or any other content to pregnant women, parents and caregivers of infants and young children in the digital environment.
20. RECOMMENDATION 2.3: Regulatory measures should prohibit sponsorship of online meetings of health professional and scientific meetings including webinars and 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 (7,8);
21. **RECOMMENDATION 3: Regulatory measures should prohibit promotion of products within the scope of the Code at point-of-sale in digital environments, in alignment with the Code provisions on point-of-sale promotions, information and education and labelling.**
22. RECOMMENDATION 3.1: Regulatory measures should prescribe the content that is 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 product, labelling information consistent with provisions of the Code including those articulated in Article 9, Article 4.2, WHA 61.20 and any other information required by food safety standards and national law.
23. RECOMMENDATION 3.2: Regulatory measures should prohibit promotional practices for products within the Scope of the Code as required in Article 9, WHA 58.2, 63.23 and 69.9 and any other text that is not prescribed by law at the point-of-sale in digital environments. These prohibitions apply to all elements at point-of-sale in digital environments, including but not limited to images or depictions of products or their labels, any other text or images, audio, video or pop-up content.
24. RECOMMENDATION 3.3: Regulatory measures should prohibit point-of-sale promotions described in Article 5.3 of the Code in digital environments.
25. **RECOMMENDATION 4: Member States should prohibit inappropriate promotion of foods for infants and young children that are not breast-milk substitutes in digital environments.**
26. **RECOMMENDATION 5: Member States should confer legal duties of compliance to monitor and take action to prevent or remedy prohibited marketing on entities along the digital marketing value chain.**
27. 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 violations, 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 may be held liable for complying with duties conferred to them.

28. **RECOMMENDATION 6: Regulatory measures should identify government agencies responsible for implementation, monitoring, and enforcement of the Code and the Guidance on Ending Inappropriate Promotion of Foods for Infants and Young Children, including in digital environments, establish mechanisms for inter-agency collaboration, allocate adequate resources and establish powers necessary for discharging these duties.**
29. **RECOMMENDATION 7: Member States should strengthen monitoring systems for capturing violations in the digital environment, including by:**
 - a. Requiring entities in the digital marketing value chain to monitor and report the actions they have taken to moderate, block, filter or remove prohibited digital marketing content or activity and ensure compliance with regulatory measures to specified government agencies;
 - b. Establishing notification mechanisms for individuals and civil society organisations and commercial entities to report non-compliant digital marketing content to specified government agencies;
 - c. Conferring on individuals and civil society organisations the right to bring complaints before the courts; and
 - d. Using digital technologies, such as social media intelligence platforms, screen-capture software, artificial intelligence tools to identify potentially non-compliant digital marketing content for further investigation by specified government agencies.
30. **RECOMMENDATION 8: Member States should enforce regulatory measures that implement the Code, including in digital environments, and apply effective, proportionate, dissuasive sanctions for non-compliance.**
31. **RECOMMENDATION 8.1:** Regulatory measures should specify sanctions that correspond with, and are proportionate to, the responsible actors' duties of compliance.
32. **RECOMMENDATION 8.2:** Regulatory measures should establish a range of sanctions that are sufficient to deter all types of violations; are proportional to the nature and seriousness of the violation and increase for repeat violations. Sanctions 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.
33. **RECOMMENDATION 9: Member States should exercise jurisdiction to ensure manufacturers and distributors of products within the scope of the Code and foods for infants and young children can be held liable for digital marketing practices that cross into or out of their countries and do not comply with regulatory measures that implement the Code.**
34. **RECOMMENDATION 9.1:** Locally domiciled manufacturers and distributors of products within the scope of the Code and foods for infants and young children and other entities acting across the digital marketing value chain should be held liable for prohibited content that enters Member States' territories.
35. **RECOMMENDATION 9.2:** Member States should require multi-national companies, such as social media platforms, that do business or provides services in their countries to maintain nationally domiciled legal entities that can be held liable for breaches of regulatory measures intended to implement the Code. Licensing mechanisms should include requirements for Code compliance for entities whose content is made available in that jurisdiction.

36. RECOMMENDATION 9.3: Member States should prohibit manufacturers and distributors of products within the scope of the Code and foods for infants and young children from promoting products within the scope of the Code outside their borders across all channels and media, including digital marketing.
37. **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 (including the Guidance on Ending Inappropriate Promotion of Foods for Infants and Young Children) in digital environments, irrespective of any regulatory measures implemented at national and subnational levels.**
38. **RECOMMENDATION 11: Member States should monitor developments in digital technologies and their impact on Code compliance and adapt regulatory measures to capture new digital technologies, channels or marketing practices.**

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