Professor Amandine Garde
Director of the Law & NCD Unit

School of Law and Social Justice
[redacted]

13 March 2024

To the Competition & Markets Authority
InfantFormula@cma.gov.uk

Dear Sir / Madam,

Re: Market study into the supply of infant and follow-on formula

We very much welcome the CMA market study into the supply of infant formula and follow-on formula in the UK.

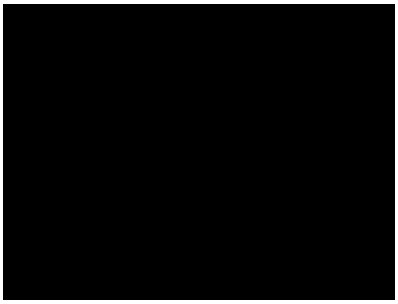
Andrea Gideon is a Senior Lecturer in Law at the University of Liverpool, where she has researched and taught competition law since 2014. During this time, she was seconded twice to the National University of Singapore to work on projects on competition law in ASEAN, one of which concerned competition law and healthcare provision in ASEAN. In 2016, was also appointed a non-governmental advisor to the International Competition Network by the Competition and Consumer Commission Singapore (CCCS). Since 2019, Andrea has, next to her Senior Lectureship at the University of Liverpool, been an Adjunct Senior Research Fellow at the EW Barker Centre for Law and Business of the National University of Singapore to work on a research project on competition law reform in ASEAN. Amongst Andrea's research interests are the interface of competition and health policies and she has written, given invited talks and worked on a consultancy project in this area. She is a member of the Law & Non-Communicable Diseases Research Unit.

Amandine Garde is Professor of Law and Founding Director of the Law & Non-Communicable Diseases Research Unit. She specialises in the role that legal instruments can play in preventing chronic diseases. As a consumer lawyer, she is particularly interested in the regulation of the commercial determinants of health and how demand can be reduced at population level for goods, services and brands associated with poorer health outcomes in the UK and beyond. She has written extensively on childhood obesity and cancer prevention. She is the first president of the Law and public health section of the European Association of Public health, a honorary member of the UK Faculty of Public Health, and a Commissioner of *The Lancet*-Chatham Commission on Improving Population Health post COVID 19. She is principal investigator of a three-year NIHR-funded project on trade challenges of NCD prevention measures at the WTO, and she has worked with Unicef and WHO for over a decade. She recently was a member of the Technical Advisory Group that has supported the WHO Guidance on regulatory measures aimed at restricting digital marketing of breast-milk substitutes (2023). She was also involved in the 2023 Lancet Series on Breastfeeding.

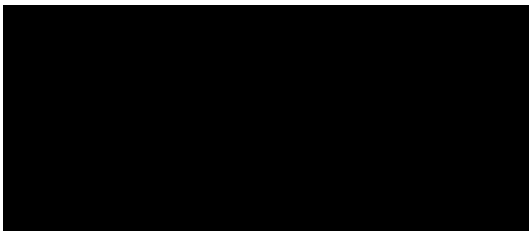
Our response to the invitation to comment you published on 20 February is attached. As the time to provide comments was particularly limited, we have done the best we could in the circumstances. Rather than discuss all relevant research findings that we may be aware of, we have attempted to extract a series of core messages which may be of interest. We hope that our response is nonetheless helpful for your purposes. Please do not hesitate to contact us if you would like to discuss further any of the points we have raised.

We confirm that we are happy for this response to be published as it is on your website. It does not contain any confidential information.

Yours faithfully,



Amandine Garde



Andrea Gideon

Contextualising this CMA study

The effective prevention of diet-related diseases requires that governments address their main underlying risk factors: unhealthy diets, physical inactivity, tobacco and alcohol use; to which the WHO has more recently added air pollution. One of the interventions that States should implement to make our living environments healthier, fairer, and more sustainable is to promote breastfeeding. The evidence is indeed unequivocal that human infants (below 12 months of age) and young children (aged between 12 and 36 months) are most likely to survive, grow and develop to their full potential when fed human milk from their mothers through breastfeeding. This is due to the dynamic and interactional nature of breastfeeding and the unique living properties of breastmilk. Thus, when possible, exclusively breastfeeding is recommended by WHO for the first six months of life, and continued breastfeeding for at least the first two years of life, with complementary foods being introduced at six months postpartum. It is therefore paramount to create environments where mothers that are able breastfeed can do so without facing barriers.[1]

In recent years, we have moved away from personal responsibility, biomedical discourses to recognise the more structural factors contributing to ill health and their complex interaction. This complexity is increasingly well documented, and it has become clear that the commercial determinants of health are largely implicated in the growth of NCDs worldwide as some of their products and/or commercial practices drive ill health and increase associated health inequities.[2] One of the most important structural barriers undermining breastfeeding all over the world, including in the UK, is the ubiquitous, [redacted] and increasingly personalised marketing of breastmilk substitutes (BMS) by the commercial milk formula (CMF) industry. Such marketing is particularly relevant to this CMA study, as it has shaped both the supply and the demand sides of the CMF market.

Before we proceed any further, it is important to highlight that we are concerned about the marketing of BMS, not the existence of the product itself. We acknowledge that in some cases, i.e. when infants cannot be breastfed, infant formulas have an important role as substitutes to provide the nutrients that infants need.

The globalisation of the CMF industry – from economic to political power

As the third paper in the 2023 Lancet Breastfeeding Series[3] and other related papers[4] have shown, the substantial power of corporate actors with interests in expanding CMF markets is deployed in

[1] See, in particular, the first paper of the 2023 Lancet Breastfeeding Series: Perez-Escamilla, Tomori, Hernandez-Cordero et al, on behalf of the 2023 Lancet Breastfeeding Series Group: 'Breastfeeding: crucially important, but increasingly challenged in a market-driven world'.

[2] The WHO has defined the commercial determinants of health as 'a key social determinant, and refer to the conditions, actions and omissions by commercial actors that affect health': https://www.who.int/news-room/fact-sheets/detail/commercial-determinants-of-health. See also, recently, the 2023 Lancet Series on the Commercial Determinants of Health: https://www.thelancet.com/series/commercial-determinants-health

[3] Baker, Smith, Garde et al, on behalf of the 2023 Lancet Breastfeeding Series Group, 'The political economy of infant and young child feeding: confronting corporate power, overcoming structural barriers, and accelerating progress'.

[4] See, in particular, Baker, Santos, Neves et al, 'First-food systems transformations and the ultra-processing of infant and young child diets: the determinants, dynamics and consequences of the global rise in commercial milk formula consumption', *Matern Child Nutr* 2021: 17: e13097; and Baker, Russ, Kang et al, 'Globalization, first-food systems system transformation and corporate power: a synthesis of literature and data on the market and political practices of the transnational baby food industry', *Global Health* 2021:17:58; Baker et al, 'Global trends and patterns of commercial

various ways to block more effective CMF marketing regulation and breastfeeding protection. Over the years, the CMF industry has become particularly concentrated through a suite of mergers and acquisitions, with integrated global supply chains and increased international reach. This, in turn, has meant that trade in commercial milk formulas relies on a few major industry players trading across borders, using marketing strategies that often have a cross-border dimension, not least digital marketing, which ultimately makes the development, implementation, enforcement and monitoring of robust regulatory frameworks even more challenging.

The CMA study has noted the extent to which the UK market is highly concentrated, with Danone having 71% share of the infant formula market. We discuss possible competition law implications of this highly concentrated market below.

[redacted]

The Code on the marketing of breastmilk substitutes and the scope of the CMA market study

An extensive body of research documenting the widespread marketing of infant milk formula

Extensive research has documented the sophisticated, pervasive strategies that the CMF industry has deployed not only to maintain their market shares, but also to increase the sales of their products across age ranges and ensure brand loyalty from one generation to the next. See in particular:

- the second[7] and third papers of the 2023 Lancet Series on Breastfeeding (and all the references they contain)
- Hastings et al, 'Selling second best: how infant formula marketing works';[8]
- Tulleken et al, Marketing of breastmilk substitutes during the COVID-19 pandemic;[9]
- WHO report on 'How the marketing of formula milk influences our decisions on infant feeding'.[10]

milk-based formula sales: is an unprecedented infant and young child feeding transition underway?' *Public Health Nutr.* 2016;19(14):2540–50.

[redacted]

[7] Rollins, Piwoz, Baker et al, on behalf of the 2023 Lancet Breastfeeding Series Group, 'Marketing of commercial milk formula: a system to capture parents, communities, science, and policy'.
[8] *Global Health* 2002, 16:77.
[9] Lancet. 2020 24-30 October; 396(10259): e58.
[10] https://www.who.int/publications/i/item/9789240044609.

Concerns have also been raised as digital marketing has increased the exposure to and the power of formula marketing (including through personalised marketing), thus increasing its potential to affect the feeding decisions parents make. As a result, the WHO has devoted significant resources to a better understanding of the exposure to and impact of digital marketing, and how it could be effectively regulated. See in particular:

- the second and third papers of the 2023 Lancet Series on Breastfeeding (and all the references they contain);
- the WHO report on scope and impact of digital marketing strategies for promoting BMS;[11]
- the systematic scoping review on digital marketing of BMS WHO commissioned;[12]
- the Guidance on regulatory measures aimed at restricting digital marketing of BMS it has produced (published on 16 November and now before the World Health Assembly).[13]

All this research has demonstrated the extensive exposure to and the [redacted] impact of such marketing on mothers (and health professionals). According to WHO, the CMF industry is a $55 billion that invests $7 billion globally in formula milk advertising.

- Formula milk marketing is pervasive, personalised and powerful.
- CMF companies use manipulative marketing tactics that exploit parents' anxieties and aspirations.
- CMF companies distort science and medicine to legitimise their claims and push their products.
- The CMF industry target health professionals – whose recommendations are influential – to encourage them to promote formula milk products.
- CMF marketing undermines parents' confidence in breastfeeding.
- Counter-measures can be effective but must be comprehensively expanded and scaled up.[14]

Packaging also is an important component of the marketing strategies CMF companies have deployed to the point that WHO has called for strong regulation, including plain packaging for formula products.[15]

Some research has also been undertaken more specifically in the UK, including:

- the UK was one of the countries where study participants were interviewed for the WHO report on 'How the marketing of formula milk influences our decisions on infant feeding'.
- Amy Brown and her colleagues also interviewed 1300 mothers on the adverts for infant formula they see and how they make decisions over which type of formula they give their babies.[16]

[11] Published in 2022: https://www.who.int/publications/i/item/9789240046085.
[12] Jones, Bhaumik, Morelli et al, 'Digital Marketing of Breast-Milk Substitutes: A Systematic Scoping Review', *Current Nutrition Reports* (2022) 11:416-430.
[13] https://www.who.int/publications/i/item/9789240084490
[14] Executive summary of the WHO report 'How the marketing of formula milk influences our decisions on infant feeding', cited above.
[15] WHO report 'How the marketing of formula milk influences our decisions on infant feeding', cited above.
[16] Brown, Jones and Evans, *Marketing of infant milk in the UK: what do parents see and believe?* (2020):

The Code on the marketing of breastmilk substitute

The WHO / Unicef Code on the marketing of breastmilk substitute was adopted in 1981. It defines BMS marketing broadly to include not only infant milk, but other milk intended to replace breastmilk, and it calls on States to prohibit the marketing of all BMS.

The latest WHO Guidance provides as follows:

> *Breastmilk substitutes are any food being marketing 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 three years (including follow-up formula and growing-up milks).*[17]

This definition relies specifically on the Code as interpreted in light of Resolution WHA 69.9 and the WHO Guidance on ending the inappropriate promotion of foods for infants and young children which it published in 2017.[18]

We note the legislative framework currently in place in the UK is not aligned with the Code as it does not prohibit the marketing of all BMS for children from birth to three years of age.

The scope of this CMA market study

Based on this definition, it is therefore most welcome that the CMA has included, within the scope of its market study, not only infant milk formulas but other milk formulas (follow-on formulas, complementary formulas, 'growing-up' milks, 'toddler milks'…).

The body of research mentioned above has identified the extent to which CMF manufacturers use cross-promotions to indirectly promote products that they cannot legally promote to mothers. This is true in the UK as well as elsewhere.

The WHO defines cross-promotions (also called 'brand crossover promotion', 'line extension' or brand stretching') as

> *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. In this context, it can also refer to use of particular promotion activities for one product and/or promotion of that product in particular settings to promote another product.*[19]

Bearing in mind the UK does not fully implement the Code, opportunities for cross-promotions arise and are frequently used. We refer the CMA to the response that the Baby Feeding Law Group – UK has provided to this question, as well as the body of research mentioned above.

Brand loyalty reinforces the concerns surrounding cross-promotions.

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[17] https://www.who.int/publications/i/item/9789240084490.
[18] https://www.who.int/publications/i/item/9789241513470.
[19] https://www.who.int/publications/i/item/9789241513470. This definition also specifically refers to Resolution WHA 69.9 and the Guidance on ending the inappropriate promotion of foods for infants and young children WHO published in 2017.

We are unclear as to why the CMA has excluded milk formulas only available on prescription from the scope of its study, as these are used as BMS and therefore fall within the provisions of the Code.

Lessons from the Singapore Market Enquiry into Formula Milk

The Competition and Consumer Commission of Singapore (CCCS) conducted a market inquiry into the Formula Milk Market in 2015/16 and released its findings in 2017. The inquiry examined competition at each level of the supply chain in the formula milk market in Singapore. The enquiry was triggered by significant price increases (the average retail price had more than doubled in less than ten years).[20]

The market inquiry revealed that the price increase was due to an increased mark-up of retail prices over manufacturing costs. CCCS found that brands work specifically on creating a premium image through heavy investment in aggressive marketing strategies accompanied by introduction of '*new ingredients [allegedly] contributing to attributes desired by parents'*.[21] They attempt to *'entrench consumer brand loyalty instead of competing aggressively on price'*.[22]

Such premiumisation strategies are due to parents' worries around nutrition and safety playing a larger role than price considerations and a perception that these concerns are met better by premium brands and brands used in hospitals. Parents do not readily switch unless there is a medical necessity.[23] Once consumers are entrenched there is then little need for (price) competition.
The situation was accompanied by information asymmetries with parents being unaware that all brands '*are required to meet the safety standards and nutrient composition requirements under the Singapore Food Regulations'*.[24]

While unfair pricing and exploitative strategies have not been further considered as abuses in themselves in Singapore, where the focus is exclusionary abuses due to the total welfare standard employed,[25] the similar situation in the UK could indeed be considered as an exploitative abuse. EU and UK competition law have long employed a consumer welfare standard and investigated and prohibited exploitative abuses under Article 102 TFEU and the Chapter II prohibition of the Competition Act 1998.[26]

In addition to the effects on the consumers, the CCCS also found barriers to entry in the aggressive marketing, premiumisation and consumer entrenchment. The tactics included hospital sponsorship and milk rotation programmes. Given the brand loyalty of consumers once introduced to a product in hospital, manufacturers aggressively sought the first mover advantage. This imposed significant

[20] CCCS, CCS's Findings From the Market Inquiry into the Supply of Formula Milk (2017) available on https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/formula-milk-market-inquiry-findings p. 1.
[21] Ibid p. 1-2.
[22] CCCS, Market Inquiry into the Supply of Formula Milk for Infants and Young Children in Singapore (OCCASIONAL PAPERS, CCCS 2017) p. 4.
[23] CCCS p. 2, CCCs (n 22) p. 5.
[24] CCCS p. 2.
[25] Gideon A, 'Competition in the healthcare sector in Singapore – an explorative case study' (2016) 16 NUS CLB Working Paper Series 1 available on https://www.cccs.gov.sg/resources/publications/occasional-research-papers/archive/competition-in-the-healthcare-sector-in-singapore p. 40-41.
[26] Rodger BJ and MacCulloch A, Competition Law and Policy in the EU and UK (Routledge 2022) p 245-247, 276-283.

barriers to entry for new competitors or barriers to expansion for non-premium generic brands, which do not / cannot engage in such practices. Network effects then meant that retailers mainly stocked the six main brands in the Singaporean market, thereby further exacerbating the barriers to entry and cementing their dominance.[27]

From the initial findings by the CMA it seems that potentially the market in the UK is even more concentrated with four firms holding 99% of the market share; dominated by Danone with a single market share of 71 % (and thus with an established presumption of dominance).[28] As such, the creation and strengthening of barriers to entry should also be looked into as potential exclusionary abuses under the Chapter II prohibition. Furthermore, if prices seem to simultaneously rise such parallel pricing also needs to be examined in case there is evidence of concerted practices in the seemingly oligopolistic formula market.

In Singapore, no investigations were started on the basis of the market inquiry. Instead, the CCCS issued recommendations to educate consumers, encourage (price) competition in the market and review hospital sponsorship of formula producers.[29] The government followed this up with a taskforce led by Senior Minister of State for Trade and Industry and involvement of the Health Promotion Board including a public education programme to educate parents on the nutritional needs of children, a new Code of Ethics on the Sale of Infant Formula Products in Singapore[30] and certification of hospitals as Baby-friendly Hospitals which includes active encouragement of breastfeeding and barring from sponsorship arrangements with formula companies and which certification none of the private hospitals had at the time.[31] The measures seem to have led to some successes. A newspaper article nine months later reported prices for infant formula had fallen, non-premium brand formula purchase rates increased, total sales of formula decreased (potentially due to increased breastfeeding) and more mothers were intending to simply provide cow milk rather than so called 'follow-on' products after the initial 12 months.[32] However, a qualitative study showed that there continue to be marketing practices in breach of the SIFECS code.[33]

As such these experiences and measures could be of interest for the UK as well. Yet, potential for actual investigations into the conduct of the formula manufacturers should not be dismissed but

[27] CCCS (n 20) p. 2-3, CCCs (n 22) p. 40-49.
[28] CMA 'Price inflation and competition in food and grocery manufacturing and supply' (CMA 2023) available on https://assets.publishing.service.gov.uk/media/65730e9633b7f2000db720e2/Price_inflation_and_competition_in_food_and_grocery_manufacturing_and_supply____.pdf p. 84.
[29] CCCS (n 20) p. 4.
[30] Sale of Infant Foods Ethics Committee Singapore (SIFECS) Code of Ethics 2019 edition (last amended 2020) available on https://hpb.gov.sg/healthy-living/food-beverage/sifecs which includes a complaint mechanism. Inter alia, the new version extended the scope of products from 6 to 12 months (clause 3), widen the scope of the advertisement prohibitions to financial and in-kind inducements such as discounts for hospitals (clause 4) and prohibition of mothercraft services such as newsletters, growth charts, pamphlets etc (clause 4). Violators can receive warning letters and be named and shamed on a government website.
[31] Tay TF, ' Taskforce formed to implement key measures to curb rising prices of formula milk' The Straight Times (Singapore 22 May 2017) <https://www.straitstimes.com/singapore/taskforce-formed-to-implement-key-measures-to-curb-rising-prices-of-formula-milk> accessed 12 March 2024. See also the government's response to the CCCS' findings on https://www.hpb.gov.sg/newsroom/article/response-to-competition-commission-of-singapore%27s-recommendations-on-formula-milk and OECD 'Designing publicly funded healthcare markets – Note by Singapore' (OECD 2018) available on https://one.oecd.org/document/DAF/COMP/WP2/WD(2018)45/en/pdf.
[32] Tay TF, 'Average prices of formula milk fall; there will be restrictions on the claims such products can make' The Straight Times (Singapore 8 Feb 2018) <https://www.straitstimes.com/singapore/greater-consumer-awareness-more-affordable-options-contribute-to-fall-in-average-prices> accessed 12 March 2024.
[33] Topothai C et al 'Commercial milk formula marketing following increased restrictions in Singapore: A qualitative study' (2024) *Matern Child Nutr* 20(1).

opened as a matter of priority if the market study reveals any potential infringements of the Competition Act 1998.

Competition law concerns

The CMA's initial findings show that the market is highly concentrated with Danone holding a market share of 71% and 99% of the entire market held by only four brands.[34] Questions of abuse of dominance (and potentially joint anti-competitive conduct) therefore need to be raised in this oligopolistic market.

Dominance

In the initial findings the CMA states a market share of 71% for Danone, which establishes a clear presumption of dominance. The Singapore market enquiry, discussed above, has shown that there were significant barriers to entry in that market. The situation in the UK is not dissimilar. The CMA describes in its initial findings that there is

> *'little evidence that consumers have switched to cheaper brands, or own-label alternatives (or that consumers newly entering the market are choosing these options). This is despite there being significant savings from doing so, and despite all infant formula products providing all the nutrients a healthy baby needs, until complementary feeding is introduced.'*[35]

Brand loyalty acts as a barrier to entry for new competitors and as a barrier to extension for existing marginal competitors. With such high barriers to entry, there seems nothing to rebut the presumption of dominance and at least Danone can be considered as an undertaking in a dominant position in the formula market.

There may also be reasons to investigate if the four main brands holding 99% of the market share (Danone, Nestle, Kendamil and Hipp)[36] might be collectively dominant or whether any potential parallel conduct is better assessed under the Chapter 1 prohibition of the Competition Act 1998. Other manufacturers seem to play a marginal role.[37]

Abusive strategies

If a dominant manufacturer was to sell its products to the NHS at prices far below recommended retail price in the hope that its products are then provided to mothers with newborns in case of any feeding difficulties, parents are then often locked into this brand. Due to strong brand loyalty in the sector,[38] parents usually stick with these brands after hospital release. These products are then priced

[34] CMA (n 28) p. 84.
[35] Ibid p. 12.
[36] Ibid p. 84.
[37] Ibid.
[38] As both the Singaporean inquiry, the CMA's initial finding and as well as other studies (e.g. Brown A et al 'Marketing of infant milk in the UK: what do parents see and believe? A report for First Steps Nutrition Trust' (2020, London) available on https://static1.squarespace.com/static/59f75004f09ca48694070f3b/t/6053645514d0f3072adec94e/1616077909798/Marketing_of_infant_milk_in_the_UK-what_do_parents_see_and_believe_finala.pdf) show, parents display extreme brand loyalty and are unlikely to switch.

extremely high.[39] Partly completely unnecessary (even undesirable) additions to formula are made to justify further price increases. This is accompanied by misleading advertisement about the superiority of a certain brand (premium brands) and claimed benefits of certain additives in disregard of the WHO Code and national regulation. Finally, buy-in to so called follow-on products is sought long beyond the initial 12 months, where breast milk substitutes are needed for those who cannot or do not want to breastfeed, through strategies such as suggesting that a company's next product is a natural progression.[40]

Overall, companies are engaging in a long term and focused strategy to capture particularly vulnerable consumers.[41] As such, it is not just the high pricing, which could in and of itself be potentially considered an [redacted] abuse, it is the combination of the below market prices selling to the NHS to achieve this consumer capture combined with the high pricing and misleading advertisement which comes together as a long-term [redacted] strategy by these undertakings. If the undertakings, as at least one is, are in a dominant position, these strategies should be investigated as [redacted] abuses under the chapter II prohibition of the Competition Act 1998.

Furthermore, this [redacted] strategy is employed in a market with consumers in a vulnerable position in the immediate post-natal period and high information asymmetries. The Singaporean market enquiry as well as the CMAs initial findings show that consumers are not clear on the fact that all infant formulas provide the nutrients a baby needs and fall prey to misleading advertisement. Nor are they necessarily clear on the advantages of breastfeeding and that normal cow milk and other general milk substitutes (e.g. oat, coconut, soya) should be given to children over the age of 12-months rather than unnecessary follow-on products. In a market with such high information asymmetries, hospital recommendations or what can be perceived as a recommendation through simple provision of a particular formula in the hospital setting can significantly influence consumer behaviour. This is exactly where the below recommended retail price selling to the NHS comes into this [redacted] strategy. Once a brand loyalty is established, consumers tend to refrain from asserting any choice. This is exacerbated, if, due to certain allergies (e.g. milk protein allergy, lactose intolerance), consumer choice is already limited to certain suitable products.

[redacted] such strategies can have an exclusionary effect on new entrants and marginal existing competitors who might not be able to sell far below recommended retail price to the NHS and will therefore not achieve the same consumer capture.

A further point to investigate would be if some of these companies all sell to the NHS at the same price across all brands. Such parallel pricing could point to a collective abusive strategy or potentially to a concerted practice.

Summary

The practices of formula manufacturers are not coincidental. They are well thought out strategies to capture consumers, inter alia through below recommended retail price selling to the NHS, which are

[39] The CMA's initial findings show that products are priced high with profit margins between 15-30% p. 71, 77.

[40] See e.g. Kamata M et al 'An assessment of infant and follow-on formula labels in the UK and manufacturers' compliance with the Code, UK law and Guidance Notes' (UNICEF). First Steps Nutrition Trust 'Costs of infant formula, follow-on formula and milks marketed as foods for special medical purposes available over the counter in the UK' (First Step Nutrition Trust, 2023).

[41] This starts even before the hospital when digital marketing methods, clubs etc, are already utilised to gain consumer buy in. On strategies of attracting consumers even before birth without appearing to do so see https://www.nzz.ch/wirtschaft/unternehmen/strategien-fuer-die-kundenpflege-ja-nicht-aufdringlich-werden-ld.128393.

then mislead into keeping buying products well beyond the age where this is necessary with prices extremely high at all levels and increasingly so along the product tiers.[42] When conducted by a dominant undertaking there is the necessity to at least consider this from the perspective of an [redacted] abuse of dominance. At the same time, such strategies can also have an exclusionary effect. Finally, any parallel pricing should be investigated from the perspective of a collective abusive strategy or as a concerted practice.

Conclusion

This market study from the CMA is particularly timely, as the commercial practices of the CMF industry [redacted] on public health are increasingly documented. As we concluded in the third paper of the 2023 Lancet Breastfeeding Series, States – including the UK – should do all they can to ensure that the health and rights of children, particularly their right to the enjoyment of the highest attainable standard of health, are duly protected. To this effect, they need to fully implement the Code and regulate CMF manufacturers and retailers which exert their market power in ways that do not uphold the best interests of children as a paramount consideration. We hope that this CMA market study is a step in the right direction.

[42] CMA (n 28) p. 84 describes the price increases along the tiers for Danone and Nestle.