

# **CMA Infant Formula and Follow-On Formula Market Study Nestlé UK Response dated 29 November 2024 to the CMA's Interim Report dated 8 November 2024**

## **1. Introductory Remarks**

1. Nestlé UK<sup>1</sup> welcomes the opportunity to continue to engage constructively with the CMA on its infant formula (“**IF**”) and follow-on formula (“**FOF**”) market study and in any future UK Government consultation processes (pending the CMA's Final Report recommendations). Nestlé is supportive of a market that functions within the regulatory framework in a manner which protects consumers and empowers parents<sup>2</sup> to make well-informed feeding decisions for their babies. Nestlé supports and promotes exclusive breastfeeding in the first six months of life, with the gradual introduction of appropriate complementary foods as advised by healthcare professionals (“**HCPs**”). Nestlé also recognises that breastfeeding is not always an option for parents. For those who cannot or choose not to breastfeed, IF is the only safe alternative to breastmilk up to the age of six months. In this regard, Nestlé is committed to compliance with applicable regulations, as well as its own robust global policies and compliance and governance systems, and the Infant Nutrition Industry Code of Practice as published by British Specialist Nutrition Association through which it provides transparent and evidence-based information to parents when permitted and the NHS / HCPs, empowering parents to make informed decisions for their child's health and well-being.
2. To that end, and to support the CMA as it works to finalise its findings and recommendations, in this response Nestlé sets out its views on the CMA's provisional analysis and findings regarding the regulatory framework (**Section 2** below), the role of the NHS / HCPs (**Section 3** below), pricing (**Section 4** below), supply to the NHS (**Section 5** below) and competitive dynamics (**Section 6** below). Additionally, Nestlé provides its views on the possible measures identified by the CMA, including on which of these are likely to have the biggest impact on improving outcomes for parents and those which could have an adverse impact on parents, as well as potential impacts on other stakeholders (**Section 7** below).
3. For the avoidance of doubt, Nestlé has not sought to comment on every aspect of the CMA's Interim Report (“**IR**”) provisional analysis and findings nor on all of its provisional views of possible measures to address its emerging concerns. Instead, Nestlé has focused on the areas where it feels its experiences can provide the most valuable insights to the CMA. The absence of commentary by Nestlé on any aspect of the IR therefore does not mean Nestlé agrees with such content.
4. In summary, Nestlé:
  - is supportive of effective and well-enforced regulation that protects consumers, including through preserving the aim of not discouraging the WHO recommendations regarding breastfeeding;

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<sup>1</sup> The references to Nestlé in this submission refer to Nestlé UK, unless otherwise stated.

<sup>2</sup> In line with the CMA approach, Nestlé refers to parents throughout this Response to collectively include parents and other caregivers.

- continues to compete vigorously with a range of manufacturers over price and nonprice attributes of various formula products, in a market with a demonstrated capacity for new entrants to expand rapidly;
  - believes that information provided by manufacturers, and in healthcare and retail settings should emphasise that all formulas meet the compositional standards set by regulation and are therefore nutritionally complete;
  - believes that such information should be coupled with access to information from manufacturers on the benefits (supported by scientific research) that additional ingredients included in certain formula products beyond regulatory compositional standards can offer to babies. Equipped with this information, parents will be able to better understand the differences between formula products and brands (which are priced differently), and in turn this should encourage increased levels of customer switching between brands;
  - accordingly supports the CMA's proposed measures which appear best-suited to achieving that goal, including provision of increased information in healthcare settings (see Sections 7.1.1-7.1.4 below) and in retail settings (see Section 7.2), as well as clarifications to the existing regulatory framework (see Section 7.3.1);
  - holds concerns about those of the CMA's proposed measures which are unlikely to be effective and/or could impose an undue burden on the NHS (Section 7.1.5-7.1.6), cause supply chain issues such as introduction of a pre-approval system by a competent authority that is already under resourced (Section 7.3.2), impede provision of information to parents (such as standardised packaging, stricter thresholds on certain types of claims and/or a broader prohibition on advertising) (Sections 7.4.27.4.4) or those which could hamper manufacturers' incentives to innovate and in doing so, harm consumers (Section 7.5.1-7.5.2).
5. Nestlé's responses to the specific questions raised by the CMA in Section 9 of the IR are contained in this narrative submission. **Annex 1** sets out those questions and indicates where they are answered in this submission.

## 2. Importance and shortcomings of the regulatory framework

6. As the CMA acknowledges, IF and FOF products are highly regulated in the UK (and indeed elsewhere). Nestlé is strongly in favour of regulation that supports families on their infant feeding choices and contributes to the best possible nutrition for the healthy development of infants and young children driven by evidence-based science. Nestlé agrees that regulation in this market is important from a public health messaging perspective, particularly given the vulnerabilities experienced by consumers in this market.<sup>3</sup>
7. However, while Nestlé supports the aims of the applicable regulations, it has concerns that the current regime has the undesired effect of unduly restricting parents from accessing the information that they need to make a fully informed choice about feeding their infants prior to purchase, which in turn impacts the competitive outcomes in the market.

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<sup>3</sup> 3 IR from para. 5.38.

8. In respect of the current framework, Nestlé considers that overall, the regulatory requirements are generally clear, and Nestlé and other manufacturers are able to operate in full compliance with them. However, there are certain areas where the current regulation could be clarified through additional guidance (particularly guidance that supports parents) and where further resources to support enforcement would be beneficial. These views are explored further in this Section 2, and possible measures for addressing these concerns as proposed by the CMA are explored in more detail in Section 7.

### **2.1. Importance of effective regulation**

9. As the CMA notes<sup>4</sup> the regulatory framework in this market is designed to support important public health goals, and Nestlé agrees that any amendments to the regulatory framework should preserve the key aim of not discouraging breastfeeding.
10. In line with this, and as previously submitted to the CMA, Nestlé takes great care to avoid any practices that could discourage exclusive breastfeeding for the first six months of a baby's life. This position is core to Nestlé's own global policies which cover IF, and Nestlé would not advocate any departure from this approach – for example, to enable advertising on IF or to enable short-term price promotional activities on IF.<sup>5</sup> For FOF and growing up milk (“**GUM**”), Nestlé ensures that its advertising and promotional activities are in compliance with the regulatory framework.
11. However, Nestlé considers that the current regulations have a limiting effect on Nestlé's ability to effectively communicate comprehensive evidence-based factual information on the benefits of all formula products (i.e., IF, FOF and GUM) to parents and the NHS / HCPs, which then has an adverse impact on parents' ability to make informed choices (discussed further in Section 2.2.2 of this Response below).
12. For each of IF, FOF and GUM, Nestlé ensures that its branding, labelling, on-pack messaging and communications through other channels where permitted (e.g., social media, baby clubs etc.) occur in accordance with the regulation applicable to the relevant formula stage, for example, **not** promoting IF and ensuring sufficient differentiation between IF and other formula types. Rigorous internal review occurs by experts in Nestlé's Regulatory, Medical, Legal and Corporate Communications teams prior to the release of any communications / product content. Nestlé is also committed to taking onboard any feedback from external authorised bodies and revising its approach where needed. **[CONFIDENTIAL TO NESTLE]**
13. Further, and as described in Section 2.3 of this Response, Nestlé also recognises the importance of effective enforcement of any applicable regulation.

### **2.2. Additional guidance to clarify existing regulation and enable transmission of transparent and evidence-based information**

14. As noted above, Nestlé generally finds the existing regulatory framework is clear but has concerns that it is unduly restrictive when it comes to communicating crucial evidence-based factual information about the benefits of baby formula products to parents.
15. In circumstances where regulation is less clear, Nestlé currently relies on a combination of available guidance, past rulings from the Advertising Standards Agency (“**ASA**”), and

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<sup>4</sup> IR at para. 6.63-6.64.

<sup>5</sup> The latter as mentioned by the CMA in the IR at para. 6.34-6.35.

observations of general market practice and its understanding of the spirit of the regulation – all these sources are carefully considered by subject matter experts at Nestlé before any decision is made on approach.

16. However, Nestlé agrees with the CMA's provisional findings<sup>6</sup> that there are some provisions of Regulation 2016/127 where greater clarity on interpretation is required. In Nestlé's view, this could be achieved through publication of guidance and would not warrant legislative amendments (which could unnecessarily delay improved outcomes).

#### **2.2.1. Clarify what constitutes 'information' and 'advertising'**

17. Nestlé agrees that an expansion in guidance on what the terms 'information' and 'advertising' in Regulation 2016/127 mean would be beneficial to the market. For example, it is unclear whether purely factual and objective information regarding a product's characteristics is correctly considered 'information' when provided reactively (for example, in response to a consumer query) when the same content would be 'advertising' if published proactively. The distinguishing line can be blurry, and often results in consumers not receiving the information they need proactively to make an informed choice. In this regard, Nestlé would welcome more certainty to ensure a level playing field.

#### **2.2.2. Enable manufacturers to provide comprehensive communication on the evidence-based properties of different formula products**

18. Nestlé fully supports the important messaging that all formula is nutritionally complete (in accordance with relevant compositional standards set by regulation which mandate inclusion of certain ingredients). Nestlé also believes manufacturers have an important additive role to play in providing evidence-based factual information to parents and the NHS / HCPs on any additional nutritional benefits which are contained in IF, FOF and GUM, and the differences in benefits contained in different brands of formula (in Nestlé's case between SMA, SMA Advanced and Little Steps). Currently parents do not have adequate easy to understand information on packaging etc. to enable them to understand the differences between products, to compare the choices on the market and come to the fully informed right choice for their circumstances. This leaves parents confused about what the differences are between products and brands and how this feeds into why there are different price points. For example, the current regulations restrict Nestlé from referring directly to the inclusion of five Human Milk Oligosaccharides ("**HMOs**") in its SMA Advanced range which has been clinically shown to promote early gut health by supporting the intestinal immune system, a healthy gut barrier and shaping the gut microbiome trajectory towards that of breastfed infants. Instead, it must refer to the scientific names such as '2FL' (i.e., one of the HMOs). It is also unable to articulate important differences between its brands which are a relevant factor in price (for example that SMA contains a modified whey profile – which allows for a protein content and amino acid profile closer to human milk to support additional growth – that Little Steps does not contain). These claims are all backed by clinical evidence but are unable to be included as 'health claims'.

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<sup>6</sup> 6 IR at para. 6.43.

19. FOFs are designed to provide a number of important nutritional benefits to babies alongside an adequate complementary diet during the weaning period from six months and therefore have different nutritional compositions than IF. For example, SMA and SMA Advanced have protein and HMOs at age adapted levels respectively. Furthermore, FOF are designed to meet the specific dietary iron needs of babies from six months of age. Infants are born with a certain amount of iron stored in their bodies, which is primarily derived from maternal iron stores during pregnancy. These iron stores are typically sufficient to meet the infant's needs for the first few months of life. After this period, the iron stores can become depleted, whilst iron needs to increase from six months onwards. The latest dietary survey indicates that in the UK, 10–14% of infants aged 7–11 months have an iron intake below the Lower Reference Nutrient Intake (LRNI). Additionally, national dietary surveys show that iron intake is inadequate for infants over six months. FOF are developed with enough iron to support the needs of a growing infant. These FOF products are important on a standalone basis, not just by reference to IF. Nestlé therefore disagrees with the CMA's implication<sup>7</sup> that these are predominantly brought to market for the purpose of brand building for IF.
20. There is currently only a small set of approved 'health claims' which manufacturers are able to make in respect of FOF. This has a limiting effect on manufacturers' ability to communicate the value which can be derived from parents providing FOF to babies after six months (relative to continuing to provide IF up to one year old), and then for GUM after one year (relative to providing cow's milk alone). In turn, this has a limiting effect on a parent's ability to make informed decisions about what product to choose for their baby and exacerbates the issues the CMA has identified with a lack of customer switching. **[CONFIDENTIAL TO NESTLE]**
21. Nestlé is concerned that these regulatory limitations are contributing to the issues identified by the CMA and may be leading consumers to make choices which are ultimately not best suited to their circumstances (including their financial circumstances) on the basis of a lack of information. The CMA acknowledges that parents' decision making is driven by what they perceive to be the best for their baby. The CMA also observes that in the absence of a complete understanding of the benefits and differences between products, parents tend to use higher prices as an indicator of higher quality or what is 'best'.<sup>8</sup>
22. Ideally, parents should know that:
- all formulas meet the compositional standards set by regulation to provide the necessary nutrients for a baby's growth and development and are therefore nutritionally complete; and
  - certain formula products go beyond regulatory standards to offer certain additional benefits supported by scientific research (and are therefore priced differently).
23. If parents are equipped with this comprehensive information, rather than resorting to taking price as a proxy, they would be able to make informed decisions based on objective criteria regarding nutritional content. Introducing guidance that expands what information can be provided about formula products would enhance choice and product differentiation in the market and support parents' decision making, thus driving competition in the market.

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<sup>7</sup> IR at para. 6.4, 6.11, 6.15-6.16, 6.26-6.29.

<sup>8</sup> IR at para. 5.23.

### 2.3. Supporting effective enforcement of existing regulation

24. Nestlé agrees with the CMA's provisional findings that there are some provisions of Regulation 2016/127 which appear to be underenforced<sup>9</sup> and/or are enforced inconsistently and is in favour of more support being given to the competent authority to ensure timely and consistent enforcement across all manufacturers.
25. Nestlé understands that the relevant competent authorities responsible for regulation enforcement are under significant resource pressure. For example, in Nestlé's experience, it can take around six months to obtain an acknowledgement letter from the Nutrition Legislation Team following notification of labelling / packaging changes, and with a substantive review taking much longer. For this reason, Nestlé has significant concerns regarding the potential efficacy of the CMA's proposed recommendation for a 'pre-approval' process prior to market launch (which is discussed further in Section 7.3.2 of this Response below). Rather than introducing an additional burden on the competent authority which could introduce a bottleneck and slow down essential products reaching the market, Nestlé would support measures to support or empower the competent authority to more effectively apply and enforce their existing mandate e.g. through additional resource. Nestlé also recognises the importance of effective enforcement by the ASA and the Trading Standards Offices.

### 3. Greater role for the NHS / HCPs in information provision

26. Nestlé appreciates the important role that the NHS and HCPs play in the provision of health information regarding the benefits of exclusive breastfeeding and on feeding choices in general to their patients and looks forward to continuing its efforts to support the delivery of comprehensive scientific and factual information on its products in line with applicable and appropriate procedures on interaction with the NHS / HCPs. Consulting with HCPs has the ability to ensure that parents receive accurate and tailored information that takes into account their specific circumstances and the unique needs of their child. Nestlé believes that the expertise and support of HCPs is invaluable and could be a balanced unbiased resource for parents navigating the complexities of infant feeding.
27. That being said, at present, the important UNICEF Baby Friendly Initiative ("**BFI**") (which Nestlé fully supports, given its core principle of supporting exclusive breastfeeding where possible) may be having the unintended impact of limiting important discussions on formula feeding, including important information that would help parents make an informed choice. This consequently disempowers and stigmatises parents who may not be able to, or do not wish to, breastfeed for various reasons. As the CMA has found through its consumer research<sup>10</sup> many parents do not feel they received enough information from the NHS on formula feeding and wish they had been better prepared for unexpected feeding situations. Further to this, the NHS's own research demonstrates that many parents are not happy with the level of support they receive, whatever their feeding experience. **59%** of women who fed their baby with breast milk (or expressed breast milk) only in the first few days after giving birth are more likely to say their feeding choices were 'always' respected by midwives compared with women who fed their baby both breast and formula (**21%**) or formula only (**21%**).<sup>11</sup>

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<sup>9</sup> IR at para. 6.43.

<sup>10</sup> IR at para. 5.29.

<sup>11</sup> Care Quality Commission, '2021 Maternity Survey – Statistical release', published February 2022 and available here: [https://www.cqc.org.uk/sites/default/files/20220210\\_mat21\\_StatisticalRelease.odt](https://www.cqc.org.uk/sites/default/files/20220210_mat21_StatisticalRelease.odt).

28. Subject to Section 3.1 below, Nestlé can see the benefits of a greater role for the NHS in providing factual messaging regarding formula (including the range of available IF products in the market, pricing, and benefits of additional / differing ingredients in addition to 'nutritionally complete' messaging) and considers this further in respect of certain of the CMA's recommendations in Section 7.1 of this Response below. Nestlé is particularly conscious that any expanded NHS role needs to be balanced with a continued role for manufacturers who are best placed to provide comprehensive information on the evidencebased benefits of their products given they invest heavily in the research, development and manufacture of formula.

### **3.1. Concerns over existing resource pressures**

29. Nestlé has serious concerns about the NHS's ability to withstand the additional financial strain (both with start-up costs and ongoing roll-out) and resourcing pressure which an expanded role in formula feeding information provision and education could carry. This should be borne in mind when considering the scope and proposed roll-out of any expanded role.

### **3.2. Concerns over impartiality and consistency in information provision**

30. The CMA refers to healthcare sources as 'impartial' and while Nestlé recognises the value in clear, accurate and impartial information for parents, it holds concerns over whether consistent impartiality is possible in a healthcare setting which is fully aligned and structured to promote the BFI policy. The BFI policy does not allow HCPs to engage with manufacturers or share any information on formula, which might underplay the role of formula for parents who cannot or choose not to breastfeed.
31. Anecdotally, Nestlé is aware of inconsistency between healthcare trusts and among HCPs, some of whom will provide information and make recommendations on formula feeding to parents whereas others will not engage on this at all. Further to this, other NHS trusts will ask for all information from formula manufacturers to be funnelled through one single point of contact, meaning parents have hugely differing experiences. Many medical associations will have terms of reference which will forbid or dissuade any correspondence or relationship with formula manufacturers. While Nestlé observes HCPs are an important factor in parents' decision-making, the CMA should take into consideration this entrenched policy stance against formula feeding in healthcare settings.<sup>12</sup>

## **4. Pricing**

32. Nestlé considers that it faces stiff competition from a number of providers in the IF and FOF market, and that despite the complexity of the regulatory framework, the market is dynamic with evidence of price and non-price competition (discussed further in respect of competitive dynamics in Section 6 below) at the manufacturer level and at the retail level.
33. Nestlé remains committed to acting responsibly and transparently, including in relation to pricing. This commitment drives its approach to the creation of operational efficiencies and to absorbing increasing costs before considering responsible price increases.

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<sup>12</sup> IR at para. 5.14.

#### 4.1. Price competition in action

34. As the CMA is aware from Nestlé's prior submissions, in-store pricing is at the sole discretion of the retailer (which aligns with retailer feedback to the CMA evidencing that manufacturers do not place pressure on retailers to adhere to RRP).<sup>13</sup> Nestlé is therefore only able to comment on its observations on market pricing and its own proposed RRP.
35. On that basis, and contrary to the CMA's provisional findings that there is weak competition between retailers on price,<sup>14</sup> Nestlé considers there is active price competition in the market, led by retailers' practice of monitoring price competitiveness for certain products and the prevalence of 'price-matching' style strategies to ensure they do not lose loyal valuable family shoppers by becoming an outlier on these essential products. For example:
- As the CMA has already identified,<sup>15</sup> in February 2024, Iceland introduced Little Steps first IF 800g powder at a price well below the RRP, and this triggered a price response by most other major retailers.
  - Additionally, during February 2024 the market saw price reductions of 7% announced in the press by Danone on their Aptamil and Cow & Gate brands. The initial move was seen in Tesco reducing Aptamil formula lines from £14.50 to £13.50 and Cow & Gate from £11.25 down to £10.50. At their own discretion Tesco also chose to move the price of SMA IF 800g powder [CONFIDENTIAL TO NESTLE] £13.00 – this also resulted in a market-wide movement to reduce SMA. Currently (as of 25 November 2024), Sainsbury's and Tesco are stocking SMA at £13 and Asda at £13.25, [CONFIDENTIAL TO NESTLE].
36. Nestlé notes that this price matching strategy is common across many categories of grocery products and should not be used as evidence of a lack of competition for IF and/or FOF.

#### 4.2. Nestlé's independent and in-depth approach to pricing decisions

37. As previously submitted to the CMA, [CONFIDENTIAL TO NESTLE]. It is factually incorrect<sup>16</sup> and inconsistent with other CMA findings to state that Nestlé has been strongly constrained by Danone's pricing and that Danone's price increases enabled Nestlé to increase its prices to at least pass on its cost increases. [CONFIDENTIAL TO NESTLE]:
- [CONFIDENTIAL TO NESTLE]
  - [CONFIDENTIAL TO NESTLE]
  - The CMA acknowledges that Danone made pricing changes in February 2022, September 2022 and March 2023<sup>17</sup> and that Nestlé made pricing changes in Summer 2021, February 2022 and February 2023.<sup>18</sup>

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<sup>13</sup> IR at para. 7.104.

<sup>14</sup> IR at para. 7.109, 7.122.

<sup>15</sup> IR at para. 7.113(b).

<sup>16</sup> As the CMA has asserted in the IR at para. 7.54(b).

<sup>17</sup> IR at para. 7.53.

<sup>18</sup> IR at para. 7.54.



- The fact that Danone and Nestlé both made pricing changes in February 2022 is not indicative of Nestlé being constrained by Danone, as the Nestlé internal pricing decision was made a significant length of time earlier. **[CONFIDENTIAL TO NESTLE]**

- In the case of the 2023 pricing changes, Nestlé's price moved a month prior to Danone's and so is clearly driven by Nestlé's own assessment of relevant cost price changes. **[CONFIDENTIAL TO NESTLE]**.

38. Additionally, and as previously submitted to the CMA, Nestlé always seeks to seize all possibilities to create operational efficiencies and absorb increasing costs before considering responsible price increases. For example: the 2021 price increase was **[CONFIDENTIAL TO NESTLE]**.

## 5. Supply to the NHS

39. The decision as to what products are made available in NHS hospital settings is determined by the NHS Trusts through their invitation to tender processes. Many of the product types Nestlé supplies to the NHS are specialist IF products (e.g. SMA Gold Prem 1 and High Energy products) which are prescription-based NHS specific products that cannot be purchased in normal retailers or over the counter, so would have less impact on consumer choice regarding standard IF.

40. Nestlé recognises the importance of its continued supply to the NHS. As the CMA acknowledges,<sup>19</sup> the NHS Supply Chain function (with responsibility for tender processes in IF) indicated to all manufacturers that prices should be kept low and Nestlé is mindful of such feedback when engaging with the NHS.

## 6. Competitive Dynamics

41. As noted above, Nestlé considers the IF and FOF markets to be dynamic markets where manufacturers (and increasingly, retailers through own-label offerings) are competing on price and non-price aspects. While Nestlé acknowledges aspects of the regulatory framework are complex, barriers to entry are clearly not insurmountable.

### 6.1. Barriers to entry and expansion are not insurmountable

42. As is apparent from the CMA's own evidence base,<sup>20</sup> the market is evolving and any barriers to entry are clearly capable of being overcome as shown by the presence of multiple new entrants in recent years such as Kendal, Aldi, Sainsbury's, Arla, and Lidl (even if Sainsbury's and Arla subsequently decided to exit). In particular, Nestlé queries the CMA's provisional conclusion that prospects for future entry are limited<sup>21</sup> given the recency of Lidl's entrance.

43. Moreover, the CMA notes that despite relatively recent entry, Kendal is now the second largest IF manufacturer by revenue share,<sup>22</sup> demonstrating the potential for rapid expansion.

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<sup>19</sup> IR at para. 7.40.

<sup>20</sup> IR at para. 7.7.

<sup>21</sup> IR at para. 7.46(c).

<sup>22</sup> IR at para. 4.6.

It is not inconceivable that this observed growth could have been a factor for the recent decision by Lidl to introduce their own-label formula range and could similarly impact future entrants.

44. Nestlé does not agree that there is limited suitable manufacturing capacity in the UK and the rest of Europe,<sup>23</sup> and notes that Kendal's brand 'Bonya' is produced within a completely different factory structure at a facility in Europe.

## 6.2. Non-price product differentiation supports informed parent decision-making

45. As articulated above (in particular in Section 2.2.2), while all formula is nutritionally complete and Nestlé fully agrees that messaging which clarifies this important point should be preserved and encouraged, there are important differences in the composition of formula as between IF, FOF and GUM and between different brands and ranges. To support parents to make informed decisions about feeding choices for their babies, it is vital that evidencebased information on non-price benefits can be communicated transparently to consumers. Manufacturers are best placed to lead on this, as they invest significantly in the research, development and manufacture of formulas to support these findings.

## 6.3. Retailer buyer power

46. As the CMA's own evidence shows,<sup>24</sup> manufacturers like Nestlé are heavily reliant on large retailers as the key route to market [CONFIDENTIAL TO NESTLE]. The grocery supermarkets make up 49.65% of the UK Grocery landscape<sup>25</sup> and retailers represent the vast majority of manufacturers' aggregate revenues in formula milk. [CONFIDENTIAL TO NESTLE]
47. [CONFIDENTIAL TO NESTLE]
48. In relation to pricing, as the CMA acknowledges,<sup>26</sup> retailers have a sophisticated understanding of CPIs and the drivers behind CPIs, with many having nutritional experts in house or employing outside parties to analyse the validity of CPIs by reference to manufacturers' recipes. As such, any CPIs passed on to retailers must be credible and must stand up to scrutiny and challenge from retailers.

## 7. Possible Measures

49. Nestlé provides its views below on certain of the possible measures identified by the CMA, including its views on which of these are likely to have the biggest impact on improving outcomes for parents and those which could have an adverse impact on parents, as well as potential impacts on other stakeholders.
50. In particular, Nestlé considers that the possible measures most likely to be effective and proportionate in addressing the issues identified by the CMA are a combination of:
- increased information in healthcare settings (see Sections 7.1.1-7.1.4 below) and in retail settings (see Section 7.2), which should continue to reiterate that all formulas are nutritionally complete in line with relevant compositional standards. This should occur

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<sup>23</sup> As the CMA suggested in the IR at para. 7.19-7.20.

<sup>24</sup> IR at para. 7.88.

<sup>25</sup> Kantar Worldpanel w/e 4th Aug 2024 <sup>26</sup>

IR at para. 7.92.

in tandem with an ongoing role for manufacturers who are best placed to provide comprehensive evidence-based scientific information on additional ingredients contained in their formula products and empower consumers to identify differences between offerings accordingly (including those which drive pricing). Introducing shelf position standards in retail settings could also support the aim of informed decision making. If implemented effectively, Nestlé is hopeful these measures would empower parents to make better-informed feeding decisions for their babies;

- clarifications that enable retailers to publicise prices and long-term price reductions of IF (see Section 7.2.3), which could have a positive impact on price competition at the retailer level; and
- clarifications to the existing regulatory framework (see Section 7.3.1), to provide manufacturers with additional guidance as to the distinction between 'information' and 'advertising' which could help to create a level playing field in terms of regulatory compliance approach and ensure consistency in the delivery of important information to consumers, as well as to provide further guidance and a more expansive approach to enable manufacturers to provide more comprehensive information on IF, FOF and GUM to consumers.

51. While Nestlé is open to considering a review of its existing packaging design and colours to see if any further incremental changes to differentiate IF and FOF could be made, more comprehensive changes (e.g. introducing separate brand names) is likely to make consumer choice more, not less, confusing (see Section 7.4.1).
52. Additionally, Nestlé holds concerns about those of the CMA's proposed measures which are unlikely to be effective and/or could impose an undue burden on the NHS (Section 7.1.57.1.6), cause supply chain issues such as introduction of a pre-approval system by a competent authority that is already under resourced (Section 7.3.2), impede provision of information to parents (such as standardised packaging, stricter thresholds on certain types of claims and/or a broader prohibition on advertising) (Sections 7.4.2-7.4.4) or those which could hamper manufacturers' incentives to innovate and in doing so, harm consumers (Section 7.5.1-7.5.2). Nestlé therefore does not support these proposed measures.

## **7.1. Information and supply in healthcare settings**

### **7.1.1. Improve information given to parents on formula feeding in healthcare settings**

### **7.1.2. More support for healthcare providers on IF information and advice**

### **7.1.3. Official information from healthcare providers that the use of FOM is optional**

### **7.1.4. Provision of price information about IF and factual independent information about the benefits of ingredients added by manufacturers to IF by healthcare providers**

53. **Nestlé supports (in tandem with manufacturer role):** Nestlé agrees that there is scope to improve the provision and consistency of information given to parents on formula feeding in healthcare settings and the CMA's findings would be a good opportunity to spearhead such improvements. While messaging should continue to support the important aim of not discouraging exclusive breastfeeding in the first six months of a baby's life and of reiterating

that all formula is nutritionally complete in line with compositional standards, it is important that the evidence-based scientific benefits of additional ingredients which differentiate stages and brands of formulas can be communicated to parents in language they understand. For example, the benefits of adding HMOs and their role in immunity, amongst others.

54. Nestlé supports the provision of information in healthcare setting on range and unit prices of IF, factual messaging on packaging, and the benefits of additional ingredients. It believes there is an important role for manufacturers to play in that process as they are a reliable source to provide comprehensive information on the evidence-based benefits of their products, given they invest heavily into the research, development and manufacture of formulas for various purposes. If executed correctly, Nestlé considers this measure could have a big impact on improving outcomes for parents who need or choose to use IF, in particular on choice and understanding of product differentiation. The ability to properly communicate with consumers on the benefits of formula products, which derive from extensive research and development, would further incentivise manufacturers to continue to innovate. Nestlé assumes that publication of price information on retail pricing of IF is also likely to stimulate increased competition on price at the retail level, which could potentially lead to permanent reductions. That being said, in-store pricing is at the discretion of the retailer and could change frequently. Accordingly, the CMA must consider how HCPs will be able to provide up to date and accurate information to parents.
55. However, Nestlé has concerns about whether these recommendations could be effectively implemented given they would entail an additional resource and cost burden on the NHS which is already under immense pressure. In addition, as discussed above, the NHS's BFI policy position encouraging breastfeeding (which Nestlé fully supports given its core principle of supporting exclusive breastfeeding in the first six months of life) could present a barrier to effective adoption of the remedy, as this policy is very entrenched across the NHS structure and any changes may face difficulty gaining traction and buy-in. It is also for this reason, that Nestlé believes there could be a role for manufacturers to play in supporting increased information provision in healthcare settings. Nestlé otherwise looks forward to continuing to engage with the CMA on this potential recommendation and in participating in any future UK Government consultations on this topic.

#### **7.1.5. Requirement for IF to be presented in standardised packaging in healthcare settings**

56. **Nestlé does not support:** It is Nestlé's view that this recommendation is unlikely to have the positive impact desired by the CMA. Nestlé understands that families' experiences across NHS care settings vary considerably. Given the general and important focus on breastfeeding, in certain settings, especially where the setting is BFI accredited, formula is only provided in 'emergency' situations where feeding needs arise. In other settings, parents might be offered a choice of different formula brands or may be offered one formula brand only. Where a choice of brands is offered, it is Nestlé's understanding that the parent would be asked verbally, which means that the choice will be made before parents see any formula branding or packaging. Within any of these contexts, and as with any other decision that a parent may make about their baby, it is important that a parent understands which brand their baby is consuming, in order to provide continuity following discharge from hospital as switching formulas may lead to tolerance issues, which could increase the need for healthcare professional support and subsequently place a greater burden on the NHS. As

previously submitted to, and acknowledged by, the CMA,<sup>26</sup> this may be because of a difference in ingredients potentially leading to gastrointestinal issues.

57. In addition, standardised packaging may contribute to existing concerns over the misplaced 'stigma' associated with formula feeding, as it may attract comparisons with other 'taboo' products that have plain packaging requirements such as cigarettes. From a consumer perspective, this recommendation is therefore likely to have little positive impact.
58. From a manufacturer perspective, Nestlé also queries whether introduction of a separate set of packaging could create disruption, uncertainty and increase cost in the supply chain. This would also add to start-up costs for new entrants.

#### **7.1.6. Balanced procurement by healthcare providers or rotation of brands**

59. **Nestlé queries impact:** While Nestlé notes the potential benefit of presenting different products to parents in healthcare settings, Nestlé is not certain that this recommendation on its own will have the kind of positive impact desired by the CMA. It is important context to note that often parents are expected to bring in their own formula. Hospitals only maintain limited stock, which are provided upon request. Some hospitals already do maintain a rotation of brands, however, as described above, absent an improvement in the provision and consistency of information given to parents in healthcare settings, simply presenting various brands will not help parents make objective purchasing decisions. Moreover, an obligation to conduct "balanced procurement" and maintain the requisite inventory for a rotation of brands could place an undue burden on the NHS, and may also lead to product waste.

## **7.2. Information and price promotion in retail settings**

### **7.2.1. Clearly provide information on nutritional sufficiency of IF etc. in retail settings**

60. **Nestlé supports (in tandem with manufacturer role):** As with the increased provision of information in healthcare settings, Nestlé also supports the increased provision of information in retail settings. While messaging should continue to support the important aim of not discouraging exclusive breastfeeding in the first six months of a baby's life and of reiterating that all formula is nutritionally complete in line with compositional standards, it is important that the evidence-based scientific benefits of additional ingredients which differentiate stages (for example, the benefits of FOF after six months of age relative to continuing to provide IF) and brands of formulas can be communicated to parents in language they understand.
61. If executed correctly, Nestlé considers this measure could have a big impact on improving outcomes for parents who need or choose to use infant formula, in particular on choice and understanding of product differentiation. Nestlé looks forward to continuing to engage with the CMA on this potential recommendation and in participating in any future UK Government consultations on this topic.

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<sup>26</sup> 27 IR at para. 5.10.

### 7.2.2. Set shelf positioning standards in retail settings

62. **Nestlé supports:** While some differentiation in shelf positioning exists already (for example, some retailers separately place 'special' formula milks such as Lactose Free, Anti Reflux etc), Nestlé is supportive of trialling a revised approach to shelf positioning in retail settings (for example, which separates IF from FOF/GUM in the same aisle, along with appropriate signage to support navigation in the aisle), so long as it does not make it harder for parents to locate these essential products. Coupled with the measure on increased information provision in retail settings, and subject to the outcomes of any trialling, Nestlé is supportive of this measure if it can improve outcomes for parents.

### 7.2.3. Permit manufacturers and retailers to publicise prices and price reductions

63. **Nestlé supports:** Nestlé is supportive of a clarification to enable retailers to publicise prices and long-term price reductions of IF and considers this could have positive impact on price competition at the retailer level. Nestlé looks forward to continuing to engage with the CMA on this potential recommendation and in participating in any future UK Government consultations on this topic.
64. For the avoidance of doubt, as mentioned in paragraph 10 above, Nestlé would not support the introduction of short-term price promotional activities of IF which would be a departure from Nestlé own global policies which cover IF, and the WHO Code.

## 7.3. Clarifying, monitoring and enforcing the existing regulations

### 7.3.1. Clarify how the existing regulations apply to online 'advertising' and provide guidance

65. **Nestlé supports:** As foreshadowed in Section 2.2.1 above, Nestlé agrees that clarificatory guidance on what the terms 'information' and 'advertising' mean would be beneficial to the market. **[CONFIDENTIAL TO NESTLÉ]** Some manufacturers appear to take a more expansive interpretation on this, which may consequentially better support parents by providing them with the information they need to help make an informed decision but may also not be compliant with applicable regulation. Certainty on the distinction would be welcome to create a level playing field and ensure consistency of information delivery.
66. This clarificatory measure would be a good opportunity for the CMA to encourage the reinforcement of the regulation that is already in place and to ensure that all market participants fully understand and comply with the rules.
67. Additionally, as noted in Section 2.2.2 above, Nestlé also believes that manufacturers have an important role to play in communicating the additional nutritional benefits contained in IF, FOF and GUM and the differences in benefits contained in different brands of formula. Currently there is only a small set of simplistic, approved 'health claims' which manufacturers are able to make. As a result, parents do not have adequate easy to understand information on packaging etc. to enable them to appreciate the additional benefits contained in certain formula products (which are therefore priced differently). Nestlé would therefore welcome further guidance and a more expansive approach to enable manufacturers to equip parents with comprehensive information to inform their decision-making.

### **7.3.2. Strengthen the competent authority role and require pre-approval of IF product labelling before placed on market**

68. **Nestlé does not support wider pre-approval (given current authority resourcing constraints):** Nestlé has significant concerns over the current resourcing pressure faced by relevant competent authorities, as explored in paragraph 25 of this Response above, which has led to lengthy timings for even receiving an acknowledgement letter (six months from notification). There are existing regulations in place in this area. Introducing an additional pre-approval approach into a resource-strained system is likely to lead to negative consequences for consumers, delaying the route to market for products, causing supply chain disruption for manufacturers.
69. Further, the infant nutrition category requires a very high focus on innovation, taking into account latest advances in nutrition, infant growth and development. Significant delays and possible uncertainties in getting products to market could disincentivise manufacturers from innovating further. This could likewise disincentivise market entry for new players.

## **7.4. Strengthening labelling and advertising rules**

### **7.4.1. Entirely different branding for IF and FOM**

70. **Nestlé supports in part (differentiation of design/colours but not separate brand names):** Nestlé has observed a variety of current approaches by manufacturers to packaging to differentiate between IF and FOF. While Nestlé believes that its current approach to packaging fully complies with existing regulations, Nestlé would be open to considering a review of its existing packaging design and colours to see if any further incremental changes could be made.
71. However, Nestlé does not support the suggestion of introducing entirely different brand names for IF and FOF (nor the re-brand of IF that would be required in such an instance), and queries how this would support the CMA's goal encouraging greater competition in the marketplace. Nestlé is concerned that this would have negative consequences for parents, who would be faced with an even broader array of brand names (effectively, double) to navigate in the market. This is likely to make consumer choice more, not less, confusing, adversely impacting parents' decision-making process at a time when they are often more vulnerable or under considerable emotional or time pressure. Such an adverse effect would not appear warranted when other measures are available which would be better suited to improving access to evidence-based information in retail settings and ultimately to improving the consumers' choice and experience at point of purchase.

### **7.4.2. Standardised packaging for all infant formula products**

72. **Nestlé does not support:** Nestlé is concerned that standardised packaging would not support the CMA's ultimate aim of providing parents with greater information to support their decision-making. As explained throughout this Response, while all formula is nutritionally complete, there are evidence-based differences for additional ingredients, and this is important information which parents should be able to readily access to inform their feeding choices. A move away from a traditional branded approach could also have the unintended negative consequence of disincentivising overall manufacturer investment in brands (and therefore in products and formulations).

### **7.4.3. Stricter thresholds for certain types of claims (e.g. about intangible / non-verifiable benefits), or to prohibit the use of phrases/claims which are difficult for parents to meaningfully assess**

73. **Nestlé does not support:** Nestlé considers that the current regulations already do not allow for intangible / non-verifiable benefits claims to be made and that its activities are in line with regulation – for example, references to SMA packaging<sup>27</sup> are a means of communicating Nestlé’s investment in nutrition in a manner which parents can digest easily. Therefore, this proposed measure is not necessary.

### **7.4.4. Prohibition on advertising of FOF, or all brand related advertising**

74. **Nestlé does not support:** As noted above, Nestlé is eager to support parental access to relevant information to allow them to make a fully informed choice about feeding their infants, and this is currently partially achieved through advertising (in line with regulation). Unduly restricting this channel would run counter to the desired aims of providing parents with greater information to understand the value which can be derived from parents providing FOF to babies after six months (relative to continuing to provide IF up to one year old), and then for GUM after one year old (relative to providing cow’s milk alone). In turn, this has a limiting effect on a parent’s ability to make informed decisions about what product to choose for their baby and exacerbates the issues the CMA has identified with a lack of customer switching.
75. Advertising also promotes broader societal discussion regarding relevant products, and if the prohibition on advertising is extended to FOF, this could also have further negative consequences for parents through increased stigmatising of formula feeding.

## **7.5. Backstop measures: price controls and public provision**

### **7.5.1. Set a price cap on the retail price of IF**

76. **Nestlé does not support:** Nestlé shares the CMA’s concerns that price control style measures such as a cap on the retail price of IF would have unintended negative consequences for consumers. **[CONFIDENTIAL TO NESTLE]** which in turn could impede their ability and incentive to innovate and invest in the research, development and manufactures of formulas. The CMA rightly identifies that this could result is less choice for parents and greater risk of supply chain issues if manufacturers were to scale back operations or even exit the market.
77. In this context, Nestlé notes the recent recommendation of the French Competition Authority to remove regulated electricity tariffs, which it described as an obstacle to free competition (on price, innovation and investment). Nestlé respectfully submits that the same would be true in the market structure present in the UK for IF and FOF, where multiple participants are active.

### **7.5.2. Set a profit margin cap on IF**

78. **Nestlé does not support:** Nestlé does not support a profit margin cap for the same reasons as outlined above in relation to price caps.

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<sup>27</sup> 28 IR at para. 6.19 and 6.20.



### 7.5.3. Public provision

79. **Nestlé does not support:** Nestlé shares the CMA's concerns that public provision of IF by the government is very unlikely to be an effective measure. Nestlé agrees that there is likely to be stigma associated with purchase of a lower cost government supplied product and it may not achieve the result of encouraging parents to switch. In addition, such a measure would entail significant upfront costs from public funds but has no guarantee of being an effective remedy and therefore Nestlé does not view it as an effective or proportionate measure. Given the presence of numerous, more favourable measures, Nestlé agrees that this measure does not warrant further consideration.

## Annex – CMA Question Cross-Reference

No.	CMA Question	Nestlé Response Cross-References
<b><i>The market</i></b>		
<b>1</b>	What is the value derived from follow-on formula for a) parents and babies and b) manufacturers and retailers given that the NHS states that 'research shows that switching to follow-on formula at 6 months has no benefits for your baby. Your baby can continue to have first infant formula as their main drink until they are 1 year old'. CMA analysis has found that follow-on formula is generally priced the same as (or sometimes slightly cheaper than) infant formula.	Section 2.2.2 and in particular, paragraphs 18 - 20.
<b><i>Provisional analysis and findings</i></b>		
<b>2</b>	Do you agree with our provisional analysis of market outcomes, as set out in section 4 of this interim report? Please explain why you do or do not agree, providing evidence to support your response where possible.	Section 4 (pricing), Section 2.2.2 and Section 6.2 (product differentiation).
<b>3</b>	Do you agree with our provisional conclusions on the potential drivers of these market outcomes as set out in sections 5, 6, and 7 of this interim report? Please explain why you do or do not agree with regards to the following in particular:	<i>See below</i>
	a. consumer behaviour (section 5)	Paragraphs 6, 18, 20, 21, 23, 27, 65.
	b. the regulatory framework (section 6)	Section 2, Section 3.
	c. competition in the market (section 7) <ul style="list-style-type: none"> <li>i. competition between manufacturers/brands;</li> <li>ii. competition between retailers; and iii. barriers to entry and expansion</li> </ul>	Section 2.2.2 and Section 6.2 (manufacturer product differentiation), Section 4 (manufacturer + retailer pricing and price competition), Section 6.3 (retailer buyer power), Section 6.1 (barriers to entry and expansion).
<b>4</b>	Are there any other factors which we have not addressed in the report which you consider could be contributing to the outcomes we observe?	-
<b><i>Provisional views on possible remedies</i></b>		

<b>6</b>	Please provide your views on whether the possible remedies we have set out in section 8 would be effective and proportionate in addressing the issues we have identified (on their own or in	Section 7.
	combination). We also invite views on the specific questions below, noting that stakeholders can refer to the same remedy in response to Question 7 and 8 if they consider the remedy could have both positive and negative impacts.	
<b>7</b>	Which of the possible remedies (on their own or in combination) set out in section 8 are likely to have the biggest impact on improving outcomes for parents who need or choose to use infant formula? Please explain why, including which of the following outcomes you think would be affected: a. price b. product differentiation and/or c. choice d. other (please specify)	Sections 7.1.1-7.1.4, 7.2, and 7.3.1.
<b>8</b>	Are any of the possible remedies set out in section 8 likely to have an adverse effect on the following outcomes for parents in this market? If so, please explain why. a. price b. product differentiation and/or c. choice d. other (please specify)	Sections 7.1.5-7.1.6, 7.3.2, 7.4 and 7.5.
<b>9</b>	Do you consider that revising the regulations to ensure that manufacturers and retailers are permitted to publicise (i) prices and (ii) price reductions (section 8) is likely to induce the use of infant formula? If yes, please explain to what extent you consider this is likely to occur and any possible mitigations.	Paragraph 10 and Section 7.2.3.
<b>10</b>	Are any of the possible remedies set out in section 8, likely to have an adverse effect on outcomes or unintended consequences for businesses or any other stakeholders in this market? If so, please explain what these outcomes are and why they may arise.	Sections 7.1.5-7.1.6, 7.3.2, 7.4 and 7.5.
<b>11</b>	Are there any other possible remedy options which are not outlined in section 8 which we should consider? If so, please outline how the option would work and its likely impact on market outcomes (such as price, product differentiation and/or choice).	-