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[redacted]

3 December 2024

Dear Sir / Madam,

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

I am writing on behalf of my colleague, Dr Andrea Gideon, and myself.

We would first like to thank the CMA for the opportunity to comment on its interim report on the Infant formula and follow-on formula market study (the Interim Report). We have read it carefully and support many of the statements / proposals it contains.

However, due to the particularly short timeframe that interested parties were given to provide feedback on the Interim Report, we have had to focus our comments on the 'Possible measures to improve outcomes in this market' (paragraphs 8.13 seq of the Interim Report). We nonetheless hope that our response is 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 would also like to refer the CMA to the letter we sent on 13 March 2024 as part of the first consultation on this study.

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

Yours faithfully,

[redacted]

Amandine Garde

Comments on the CMA's interim report on the 'Infant formula and follow-on formula market study'

Submitted by Dr Andrea Gideon and Professor Amandine Garde on behalf of the Law & Non-Communicable Diseases Research Unit at the University of Liverpool[1]

Introduction

Before commenting on specific aspects of the Interim Report, we would like to note, by way of preliminary remark, that the evidence is 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. We would have welcomed a clearer overarching statement to this effect in the introduction of the Interim Report. Sentences such as the one that follows could indeed be seen as ambiguous: 'Infant formula is a vital part of the weekly shop for many parents3 across the UK who rely on it to ensure their babies get the best possible start in life.'

Even though we do agree with the CMA that infant formula may, at times, be a necessity ('an essential, non-substitutable product for parents and carers who need or choose to use it'), this does not in any way reduce the obligations of all four UK nations to do all is in their power to respect, protect and promote the right to the enjoyment of the highest attainable standard of health and all related rights and protect and promote breastfeeding wherever possible.

We specifically refer the CMA to the Lancet Series on Breastfeeding published on 7 February 2023 and which provides the latest evidence on 1) the importance of breastfeeding; and 2) the strategies that the commercial milk formula industry has deployed over the years to displace breastfeeding, and which also reflects on the human rights obligations that governments to regulate this industry to promote better health for all infants and their mothers.[2]

This remark does not in any way affect our appreciation of the added value of this study. This is particularly so as, and we very much agree with the CMA on this overarching point, that several features of the infant formula market have led to 'poor outcomes for consumers'.

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[1] For further information on the Law & NCD Research Unit, please visit: https://www.liverpool.ac.uk/law/research/research-clusters/law-and-non-communicable-diseases/.

[2] The three papers making up this Series are available at: https://www.thelancet.com/series/Breastfeeding-2023.

Turning to more specific aspects of the Interim Report:

(a) Information and supply in healthcare settings

We support the proposal that further information could usefully be provided to make consumers more clearly aware of the fact that all infant formula lawfully placed on the market meet a baby's nutritional needs, irrespective of their price or the claims that manufacturers may have made to promote their specific products.

We specifically support the proposal that, in hospitals and healthcare settings, where parents and other carers may be particularly vulnerable, such information should be consistent and disclosed prominently at key decision points. The results in the Interim Report strongly indicate that many parents are not clear enough on this messaging and are driven by the misleading signalling of manufacturers which results in parents paying far more than necessary.

However, we do not think that the proposal that the NHS should have a broader formula range or rotate procurement could resolve the problem that parents and carers could consider the brand provided in the hospital as superior and/or endorsed by hospitals or other health care facilities. While the suggestion distributes such endorsement between more providers and thus is less selectively favouring a particular brand, it still can influence later purchase decisions. This is why we consider that the proposed alternative to display formula in standardised packaging is preferable: not only this will avoid interfering with the public health messaging that all infant formula have the same nutritional content, but it will also reduce the potential that indirect endorsements may undermine breastfeeding – a point that must underpin all recommendations that the CMA will make in its final report, as noted above.

(b) Information and price promotion in retail settings

As the CMA has noted, 'parents lack timely, clear, accurate and impartial information to enable them to come to an informed decision about which product(s) best meets their needs and preferences'. Whilst 'brand influence may play an outsized role in decision-making' (this latter point being most likely an understatement of existing evidence), 'information from impartial sources appears to be limited when parents are making decisions' – hence the importance of 'rebalancing the information environment'. We consider that this can be done through mandated disclosure and through marketing restrictions and support the CMA proposals to this effect.

We strongly endorse the recommendation that disclosure should be mandated that all infant formula is of sufficient and equal nutritional value in retail settings. We would also argue that such information should not only appear on shelves; it should appear directly on the packaging. This is because packaging could be displaced in shops; or the shelf indication could be misplaced. The information must be attached to the product itself. Such a cost, which would have to be borne by manufacturers, is proportionate to the public health and consumer protection issues that infant formula raises.

In the Interim Report, the CMA has also observed that unverifiable claims on labels and packaging are signalling and therefore constitute indirect advertisement for manufacturers as well as a tool to charge

higher prices. We would go further and suggest that all claims – which are, by definition, voluntary information used by a manufacturer / retailer / advertiser or other commercial actor to highlight the positive attributes of its products – are marketing tools. Their use should therefore be strictly regulated. We will specifically mention Resolution 58.32 of the World Health Organization (WHO) which urges Member States to ensure that nutrition and health claims are not permitted for breast-milk substitutes. We know that claims nonetheless remain extensively used on infant formula and other formula. We support the prohibition of all claims (including and beyond nutrition and health claims) on infant formula, as well as the robust and consistent enforcement of existing rules on nutrition and health claims. We also call for the financing of research on the impact that standardised packaging, including plain packaging, of infant formula has on consumers.

As we noted in our letter of 13 March, we are particularly concerned about cross-promotions – a strategy frequently used by infant formula manufacturers to indirectly promote their products (as the CMA itself has acknowledged). We therefore strongly support the proposal to mandate the clear separation of infant formula from follow-on formula or so-called growing-up milks in retail settings, as this can help to address the problems associated with cross-promotion. We would urge the CMA to extend such approach to other settings, to include the online environment too.

We strongly advocate against loosening any regulation on the prohibition of advertisement. The UK should be systematically guided by the WHO/Unicef Code on the marketing of breastmilk substitutes (the Code). Importantly, the Code defines breastmilk substitutes as including both infant and follow on formula for children up to 36 months of age. We also call on the CMA to recommend that digital online marketing of infant formula should be addressed as a matter of urgency. Retail environments are increasingly online nowadays. Thus, this plea to address digital marketing is relevant both in this section (on retail settings) and in the section dealing more broadly on marketing restrictions. We put forward a few points in support of this position. Firstly, digital marketing is well documented that digital marketing is extensively used to target parents and other carers, often at times when they are particularly vulnerable and/or sensitive to such marketing – as the CMA has repeatedly and rightly noted in its Interim Report, parents are guided by the desire to do the best they can for their children. It is well established that infant formula manufacturers have exploited this vulnerability/sensitivity for commercial gain to the detriment of public health and consumer protection. Secondly, it is also established that digital marketing is particularly insidious due to use of personal data and profiling of consumers, making it more personalised and therefore potentially all the more effective. This was recently recognised by the WHO that has published a wide array of report on the digital marketing of infant formula and developed guidance for Member States on this specific issue. This guidance was published on 16 November 2023. To introduce the specific provisions it contains, the WHO has noted:

> 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.
>
> In light of this evidence, the Seventy-fifth World Health Assembly requested that WHO develop guidance for Member States on regulatory measures aimed at restricting the digital marketing of

breast-milk substitutes. This guidance applies to marketing of products within the scope of the Code as well as foods for infants and young children that are not breast-milk substitutes.[3]

It therefore seems that there is no reason why updating the UK regulatory framework (in terms of the media / marketing strategies it covers as well as the products falling within the scope of the prohibition it establishes from marketing) should not be envisaged as an urgent priority. This is particularly so as the UK has recently adopted pioneering legislation on the digital marketing of foods high in fat, salt and sugar to protect children in the online environment from the harmful impact of such marketing that is due to take effect in October 2025.

We will conclude this section on retail settings by commenting on price reductions. Since the majority of consumers do not switch (particularly as switching is also discouraged by healthcare professionals), price competition could arguably fail to have as much effect as other forms of competition. Since switching is rare, such competition might incentivise mainly new mothers, who have not quite settled on a feeding method. This could, in turn, undermine breastfeeding as well as capture parents and other carers with a brand that may, ultimately, be too expensive for them. Advertising of price reductions could also promote bulk buying, which could disadvantage low-income families who are less likely to be in a position to take advantage of the offer (not addressing the problems that may have given rise to this market inquiry in the first instance). One cannot exclude either that price reductions might also create shortages. Finally, there is a risk that companies could use such reductions as an exclusionary strategy against potential competitors and then raise prices again when a competitor has exited the market. We therefore consider that these risks outweigh any potential benefits.

(c) Clarifying, monitoring and enforcing the existing regulations

We strongly welcome the recommendation to clarify and strengthen the current regulatory regime and its effective monitoring and enforcement. As noted above, we call for making the digital environment a priority. We also endorse the recommendation that packaging should be pre-approved, although the move towards more standardised packaging – to in time achieve plain packaging (subject to the research we have advocated for above) – could reduce pre-approval and enforcement costs. More generally, we support the recommendations for monitoring compliance with the rules that require infant formula and follow-on formula to be clearly distinct and the strengthening of the powers of the competent authority to approve products before they enter the market. We consider such recommendations, as all the ones we support, are both suitable and necessary to ensure compliance (the packaging continues to be used as a marketing device, with various claims being made to promote the product and related products in the case of cross-promotions, which needs to be addressed).

(d) Strengthening labelling and advertising rules

As noted above, we agreed with the CMA recommendations to strengthen labelling and advertising rules. Once again, we consider that labelling will be more effective if it combines mandatory disclosure informing the consumers that all formula are equivalent in satisfying the nutritional needs of their babies irrespective of their price, whilst ensuring that marketing (including on the packaging) is strictly regulated

[3] https://www.who.int/publications/i/item/9789240084490.

in line with the Code as interpreted by subsequent World Health Assembly resolutions and relevant guidance. We specifically agree with the need to set 'stricter thresholds for certain types of claims, or to prohibit the use of phrases/claims which are difficult for parents to meaningfully assess, but which can be persuasive'.

We also support research into the role that packaging plays in promoting the use of infant formula, from one brand or another but also potentially and very importantly to the detriment of breastfeeding. It is indeed necessary to rebalance the information environment to place the promotion of breastfeeding at the heart of regulatory initiatives in this field (whilst also clearly recognising that for some infant formula is a necessity). We consider that the plain packaging of infant formula that would allow brand differentiation without allowing formula marketing is likely to be the most suitable tool to facilitate such rebalancing. Hence our support for further research into the role it could play.

We also support the view that advertising restrictions should apply not only to infant formula but other products that fall withing the scope of the Code. This is particularly so as follow on formula are not a necessity (thus distinguishing them from infant formula) and are often used as indirect promotion of infant formula that may be. We therefore agree that the CMA is right to question the value that derives from follow-on formula for parents and babies.

(e) Backstop measures (not currently recommended): price controls

The CMA is not currently recommending price controls in the form of price or profit caps. We would encourage the CMA to reconsider its position.

One concern the CMA has mentioned regarding price or profit caps is that they may reduce the incentive to innovate and therefore limit choice. However, as the CMA itself has pointed out, the market is highly regulated, with strict rules on the nutritional content of infant formula. Although products all fulfil the nutritional needs of infants, many claims around research and innovation are brand building and thereby promote 'intangible, non-verifiable benefits'. Arguably, reduced spending on such brand building would be a positive side-effect. This is particularly so as, within price caps or profit caps, there can be still margins for research and differentiation.

Another concern that the CMA has identified relates to 'product shortages if some manufacturers scale back or exit the market'. This concern seems unlikely to materialise unless price or profit caps are set at an unreasonably low level. If there are still profits to be made, large manufacturers will not want to leave a profitable market to competitors – it is well documented that the infant formula market around the world has become highly concentrated over the past two decades. We were not able to find any evidence that in Greece, where profit caps where introduced, any manufacturers have exited the market or that there were shortages. Indeed, only a day after the measure took effect, prices seem to have lowered significantly.[4]

Finally, the CMA is concerned that prices might converge at the ceiling. This has happened in some markets: for example, the higher education market where tuition fees have converged around the cap. However, this is an entirely different market: universities are still not able to charge actual prices and

[4] https://www.ekathimerini.com/economy/1233065/price-cuts-have-taken-effect/

receive state funding, which is not the case in the formula market. Some market entrants over the last decade, as described in the interim report, differentiate themselves almost entirely on lower prices (e.g. Aldi, Lidl), there is therefore no reason to believe that this would change.

Instead, price or profit caps seem to be a way of bringing prices down quickly and with certainty. It also seems a more proportional measure than certain alternatives such as investigating potential excessive prices as abuse of dominance. However, this alternative should also be considered if the further investigation as part of this market study shows that there is indication of excessive pricing. With the largest manufacturer alone holding a market share between 50-60%, as the Interim Report indicates, and high barriers to entry as well as lack of countervailing buying power from retailers, there is little doubt as to the dominance of at least one manufacturer in this market. The CMA recognises the largest manufacturer as a clear price leader largely unconstraint by competitors or consumers. As such, high pricing should be critically monitored as potential exploitative abuse.[5] The CMA's interim report shows that while costs for e.g. value and standard products are virtually the same, the price is different without a discernible reason. This shows that it is entirely possible and profitable to make products cheaper and that the additional pricing is unnecessary and possibly exploitative, as parents are clearly overpaying. Equally, below cost selling to the NHS (mentioned as a frequent occurrence in the interim report) should be monitored as a potentially exclusionary practice. The threat of intensive monitoring (e.g. through a market investigation) or even a potential investigation into an infringement could act as a deterrent for such practices.

Conclusion

Overall, we welcome many of the CMA's proposals. With public measures such as stricter enforcement of advertisement bans, increased information and price/profit caps, competition in the infant formula market can actually be increased and entry enabled. The reputational advantages of incumbents could be minimised through stricter enforcement against unverifiable claims, cross-promotion and increased information on the nutritional equivalence of all formulas. Price or profit caps will not only bring prices down but can also combat the misleading assumption that price equals quality and, along with measures as standardised packaging, can enable own-label competition.

Once again, we thank the CMA for the opportunity to contribute to its reflection and remain available for further discussion. We look forward to reading its Final Report in the New Year.

[5] Excessive pricing can and has been prosecuted under UK competition law (see e.g. the Flynn Pfizer case confirmed by the CAT https://www.gov.uk/government/news/70-million-in-fines-for-pharma-firms-that-overcharged-nhs).