

Brussels, 24 May 2024

## ISDI position on the WHO 'Guidance on regulatory measures aimed at restricting digital marketing of breast-milk substitutes'

### Summary of ISDI's position

1. The Guidance goes beyond the WHO's mandate because its language is mandatory in nature. Since the Guidance constitutes policy recommendations, **Member States should have been involved in its development and should now be consulted on the substance of the text.**
2. The Guidance elevates the (legal) status of the WHO Code above national law and induces manufacturers to violate applicable domestic laws when suggesting that "marketing practices conform to the Code ... irrespective of" any national law and by requiring that manufacturers ensure "supplier compliance". The Guidance should **recognise the pre-eminence of national law above the Code** and **should account for national context** as Member States are best placed to determine the domestic measures that they wish to pursue.
3. The Guidance contains factual inaccuracies, in particular as it relates to definitions and proposed terminology. For example, the definition of BMS is much broader in scope (0-36 months) and goes against the assertion that terms are "used as in the Code". These **factual inaccuracies should be corrected or removed.**
4. The Guidance is inconsistent with Members' digital economic strategies and international obligations, including Members' obligations under the covered agreements of the World Trade Organization ("WTO"), including the protection of brands and trademarks. Therefore, **the Guidance should respect members' international obligations on Technical Barriers to Trade (TBT), the cross-border provision of services and the protection of intellectual property rights.**

ISDI and its members are committed to ensuring the proper use of breast-milk substitutes (BMS), when these are necessary, on the basis of scientific and factual information and ethical marketing.

In 2022, the World Health Assembly (WHA75) requested that by 2024 the WHO Director-General,

- (1) develop guidance for Member States on regulatory measures aimed at restricting the digital marketing of breast-milk substitutes, so as to ensure that existing and new regulations designed to implement the International Code of Marketing Breast-milk Substitutes and subsequent relevant Health Assembly resolutions adequately address digital marketing practices;
- (2) report on the performance of the task described in paragraph (1) to the Seventy-seventh World Health Assembly in 2024.

Following the publication of [the Guidance](#) in November 2023, it was 'noted' by the Executive Board of the WHO in January 2024 and the WHO Secretariat acknowledged that its consultations with Member States prior to its publication were "not enough", committing to hold further regional consultations with Member States on the substance of the guidance.

Ahead of the discussions on the Guidance at the 77th World Health Assembly (WHA77) on 27 May – 1 June 2024, ISDI's position on the Guidance is outlined below.

### **1. The Guidance goes beyond the WHO's mandate: the Guidance constitutes policy recommendations, so it should not use mandatory language and substantive consultations should be held with Member States**

The Guidance goes beyond the WHO's mandate. The WHO's Legal Counsel previously confirmed that the language of the Code is of a recommendatory nature only, in accordance with Article 23 of the WHO Constitution<sup>1</sup>. As such, it is *not* legally binding<sup>2</sup>. Any subsequent "Guidance" developed by the WHO, therefore, is similarly of a recommendatory nature only. References in the Guidance to mandatory actions such as to "prohibit", "prevent" or to apply "sanctions" should be deleted or replaced with language that is of a recommendatory nature.

Furthermore, because the Guidance constitutes policy recommendations, Member States should have been involved in its development. Therefore, the WHO Secretariat should carry through on its commitment to hold substantive consultations on the Guidance and publish the summary report describing the themes raised in the prior public consultation and the subsequent decisions taken in response.

### **2. The Guidance should recognise the pre-eminence of national law above the Code and should account for national context**

The Guidance elevates the (legal) status of the WHO Code above national law by suggesting that "marketing practices conform to the Code ... irrespective of any regulatory measures implemented at national and subnational levels"<sup>3</sup>. In addition, the Guidance induces manufacturers to violate applicable antitrust laws by suggesting that manufacturers ensure "supplier compliance"<sup>4</sup>.

The Guidance should recognise the pre-eminence of national law above the Code and account for national context as Member States are best placed to determine the domestic measures that they wish to pursue if they implement the Guidance.

### **3. The Guidance should correct or remove factual inaccuracies**

There are several inaccuracies in the Guidance, in particular in the definitions and terminology. For example, the Code speaks of "appropriate" marketing. It does not "prohibit all forms

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<sup>1</sup> WHO, Second Meeting of the INB, "Background information related to the identification by the Intergovernmental Negotiating Body of the provision of the WHO Constitution under which the instrument should be adopted," p. 4, 22 July 2022 ([A/INB/2/INF./1](#)).

<sup>2</sup> See [WHA34/1981/REC/1](#), Annex 3 – "Legal and other implications of the adoption of the ... Code..."

<sup>3</sup> Guidance, Recommendation 10.

<sup>4</sup> Recommendation 9.1.

of promotion of breastmilk substitutes”, as the Guidance asserts<sup>5</sup>. Terms such as “cross promotion”, “foods for infants and young children” or “promotion” are not defined in the Code at all. Instead, they are defined – for the first time – in a Secretariat report to WHA69 ([A69/7 Add.1](#)). Finally, the Guidance expands the scope of breast-milk substitutes, as defined in the Code<sup>6</sup>, from 0-6 months to include “any milks (or products that could be used to replace milk, such as plant-based milks), in either liquid or powdered form, that are specifically marketed for feeding infants and young children up to the age of 3 years (including follow-up formula and growing-up milks).”

These factual inaccuracies should be corrected or removed.

#### 4. The Guidance should respect members’ international obligations on Technical Barriers to Trade, the cross-border provision of services and the protection of intellectual property rights

The proposed regulation of so-called cross-border promotion is inconsistent with Members’ other international obligations, including under the covered agreements of the World Trade Organization (WTO). For example, many WTO Members have entered into commitments that ensure access to the markets of other WTO Members for both (i) products, including BMS; and (ii) services, including the cross-border provision of services, such as marketing<sup>7</sup>. In addition, discriminating against imported BMS would violate the WTO’s national treatment obligations.

Finally, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), provides a minimum protection for intellectual property rights, including trademarks and brands. The Guidance disregards this, when it recommends that Member States implement “regulatory measures [that] effectively prohibit ... brand promotion, across all channels and media, including digital media”<sup>8</sup>.

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#### About ISDI

ISDI is the leading international expert association on special dietary foods, including foods specifically designed for infants and young children. ISDI members are national and international associations that are active in this sector from more than 20 countries over 6 continents. Our members manufacture and market foods that are formulated, in accordance with applicable Codex Alimentarius standards, to meet the compositional criteria, quality requirement and nutritional needs of infants and young children.

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<sup>5</sup> Guidance, p. 1 (Background).

<sup>6</sup> The Code defines breastmilk substitutes as “**breast-milk substitutes** are any food being marketed or otherwise represented as a partial or total replacement of breastmilk, whether or not suitable for that purpose.”

<sup>7</sup> Under the WTO General Agreement on Trade in Services (GATS), many WTO Members made commitments in the following services subsectors: **advertising services**, certain computer and related services (especially **data processing** and **database services**), as well as certain telecommunication services (such as **on-line information and/or data processing**). Market access commitments made under mode 1 in any of the aforementioned sectors means, by definition, that digital marketing services are permitted in that market.

<sup>8</sup> Guidance, Recommendations 1 and 2.