

CODEX ALIMENTARIUS COMMISSION



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Organization

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JOINT FAO/WHO FOOD STANDARDS PROGRAMME CODEX COMMITTEE ON NUTRITION AND FOODS FOR SPECIAL DIETARY USES

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REVIEW OF THE STANDARD FOR FOLLOW-UP FORMULA: DRAFT SCOPE, DESCRIPTION AND LABELLING FOR FUF FOR OLDER INFANTS

Prepared by New Zealand

Background Paper on Cross Promotion

Purpose

This Background Paper has been prepared by New Zealand (Chair of the EWG for the Review of the Follow-up Formula Standard), at the request of the Chair of CCNFSDU. The purpose of this paper is to provide the Committee with the history and background on previous work that may assist and facilitate the discussion on cross promotion at CCNFSDU41. This paper also provides a summary of comments received through the Codex Online Commenting System (OCS) in response to CL 2019/69-FH issued in August 2019. This summary does not include any recommendations.

Introduction

At CCNFSDU40, a statement that cross promotion was not allowed on the label/labelling was introduced to the labelling provision 9.6.4 for follow-up formula for older infants.

This sentence, along with the full labelling provisions for follow up formula for older infants were sent to CCFL45 for endorsement, and CCNFSDU agreed to advance Section A: follow up formula for older infants to Step 5 for adoption by CAC42.

At CCFL45 the Committee agreed to inform CCNFSDU that it had endorsed the labelling provisions, however with regard to 9.6.4, the first sentence was endorsed and it was agreed to return the last sentence (relating to cross promotion) to CCNFSDU for further discussion, noting that this concept had received very little discussion in CCNFSDU and the lack of a definition for “cross promotion” had raised concerns for members in that Committee.

Following CCFL45, CCEXEC77 noted the outcome of CCFL45 and recommended to CAC42 that the sentence relating to the restriction on cross promotion which was not endorsed by CCFL, be sent back to CCNFSDU for further discussion.

CAC42 consequently adopted the proposed draft text (Section A: follow-up formula for older infants – as endorsed and amended by CCFL), and noted that the last part of section 9.6.4 on cross promotion would be further considered by CCNFSDU.

This sentence currently reads as follows:

Cross promotion between product categories is not permitted on the [label/labelling] of the product.

Background

The labelling provisions for follow-up formula for older infants (6-12months) have been extensively discussed at both CCNFSDU39 and CCNFSDU40.

The provisions in Section 9.6 Additional Labelling Requirements are largely based on Article 9 of the [WHO International Code of Marketing of Breastmilk Substitutes](#), and Recommendation 4 of the [WHO Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children](#) (specifically provision 9.6.2).

At CCNFSDU40 an additional concept of cross promotion was introduced as part of provision 9.6.4.

Some delegations were not in favour of a provision on cross-promotion and raised concerns on whether it included advertising and marketing, and that it went beyond the mandate of CCNFSDU.

As presented in the report of [CCNFSDU40](#) (para 50), WHO clarified that *the intent of the provision on cross promotion was to avoid messages on labels that a product for a particular age group was also suitable for another age group or that reference was made to a similar product for another age group.*

The concept of cross promotion has not been part of previous EWG consultations on the labelling provisions.

CCFL 45

Cross promotion was discussed at CCFL45 as part of the Committee's decision to endorse the labelling provisions for follow-up formula for older infants.

The Committee noted that the concept of 'cross promotion' *had received very little discussion in CCNFSDU and the lack of a definition for "cross promotion" had raised concerns for members in that Committee* and the following is a record of the discussions as presented in the [final report](#);

26. With respect to 9.6.4, there were discussions on whether to delete or retain cross promotion and the following perspectives were raised in this discussion:
 - It was important to protect and support breastfeeding and that labelling should be distinct on follow up formula for older infants and should avoid confusion with other products such as infant formula and formula for special medical purposes.
 - Without a definition for "cross promotion" and understanding of the intent of the provision, it would be difficult to consider endorsement of the provision. Such lack of definition could lead to different interpretations of the provision and to unnecessary trade barriers.
 - Restricting cross promotion might go beyond the mandate of Codex and could result in legal uncertainties and trade impediments and infringe on intellectual property rights and trade marks as recognized in international agreements such as WTO TBT and TRIPS. It was necessary to determine if restrictions on cross promotion were compatible with the established rules for international trade by the WTO and WIPO.
 - There were views that exceptions that allow countries to implement measures to pursue legitimate health objectives.
 - A proposal for a footnote was made to clarify that for 9.6.4 it was without prejudice to international framework on trademarks conferred registered trademarks to their owners.
 - The term "cross promotion" should not be used but if the concept were needed, alternative wording was required.
 - The intention of the statement was not clear. If the intent of cross promotion is to avoid messages that a follow-up formula for older infants is also suitable for another age group, then the issue was sufficiently covered by the first sentence in 9.6.4 and would therefore be appropriate to delete the last sentence to avoid duplication.
 - Even if cross promotion were defined, it would be difficult to implement and enforce.
 - The statement on cross promotion should be retained, as it was important to guard against confusion to consumers when products are not readily distinguishable in order to protect public health. It was critical to protect consumers and such guidance would help countries to limit or prohibit types of promotion.
 - Cross promotion was defined and used by WHO and could be used within Codex. It was important to ensure conformity of WHA resolutions and Codex.
 - The issue of cross promotion was important and consideration should be given to expanding the first sentence in 9.6.4 to address the intent of limiting or prohibiting cross promotion.
27. The Representative of WHO explained that WHO had two technical guidance documents which provided definitions on cross promotion. These definitions encompassed broader aspects of advertising and marketing promotion which include packaging, branding and labelling of a product to closely resemble that of another, such as brand extension. In response to the comments by delegations, she noted that one of the terms of reference of CCFL is to address "problems associated with the advertisement of food with particular reference to claims and misleading descriptions" and, therefore, it was within the scope of the work of CCFL; if it was not clear what cross promotion meant, it seemed contradictory to say that something which is not clear on what it was would create a trade or IP related problem. Therefore, the Representative proposed to retain the sentence on cross promotion, especially given the fact that not much discussion took place at CCNFSDU and return it to CCNFSDU for further discussion.

WHO DOCUMENTS

Information Note on Cross Promotion

In May 2019, WHO uploaded a new Information on Cross Promotion. It can be viewed at:

<https://www.who.int/nutrition/publications/infantfeeding/information-note-cross-promotion-infant-formula/en/>

The Information Note includes detail on what WHO consider to be cross-promotion. The following Cambridge English Dictionary definition is included in the Note (please read the document in full as this is not a comprehensive summary).

What is cross-promotion?

The Cambridge English Dictionary defines cross-promotion as “activities that use one product to advertise another; the fact of a company advertising one of its products in or on another of its products.”

The Information Note also refers to the WHO set of recommendations on the marketing of foods and non-alcoholic beverages to children (see summary below).

A framework for implementing the set of recommendations on the marketing of foods and non-alcoholic beverages to children

In May 2010, the World Health Assembly (WHA), through resolution WHA63.14, endorsed a set of recommendations on the marketing of foods and non-alcoholic beverages to children. The main purpose of the recommendations was to guide efforts by Member States in designing new policies, or strengthening existing policies, on food marketing communications to children in order to reduce the impact of marketing foods high in saturated fats, trans-fatty acids, free sugars, or salt. The [framework document](#) includes a definition of ‘cross promotion’:

Cross-promotions: A consumer sales promotion technique in which the manufacturer attempts to sell the consumer new or other products related to a product the consumer already uses or which the marketer has available.

Guidance on Ending Inappropriate Promotion of Foods for Infants and Young Children

In 2016 the WHO completed their ‘[Guidance on Ending Inappropriate Promotion of Foods for Infants and Young Children](#)’. This guidance, whilst not ‘endorsed’ was ‘welcomed with appreciation’ at the 69th World Health Assembly. The following definitions are contained within the Guidance.

Definitions

Foods for infants and young children are defined as commercially produced food or beverage products that are specifically marketed as suitable for feeding children up to 36 months of age.

Marketing means product promotion, distribution, selling, advertising, product public relations and information services.

Promotion is broadly interpreted to include the communication of messages that are designed to persuade or encourage the purchase or consumption of a product or raise awareness of a brand. Promotional messages may be communicated through traditional mass communication channels, the Internet and other marketing media using a variety of promotional methods. In addition to promotional techniques aimed directly at consumers, measures to promote products to health workers or to consumers through other intermediaries are included. There does not have to be a reference to a brand name of a product for the activity to be considered as advertising or promotion.

Cross-promotion (also called brand crossover promotion or brand stretching) is a form of marketing promotion where customers of one product or service are targeted with promotion of a related product. This can include packaging, branding and labelling of a product to closely resemble that of another (brand extension). In this context, it can also refer to use of particular promotional activities for one product and/or promotion of that product in particular settings to promote another product.

CODEX DEFINITIONS

General Standard Labelling of Prepackaged Foods (CODEX STAN 1-1985)

The following ‘Definition of terms’ are relevant to the discussion on cross promotion and the sentence proposed in Section 9.6.4 of the Labelling provisions for follow-up formula for older infants: **“Label”** means any tag, brand, mark, pictorial or other descriptive matter, written, printed, stencilled, marked, embossed or impressed on, or attached to, a container of food.

“**Labelling**” includes any written, printed or graphic matter that is present on the label, accompanies the food, or is displayed near the food, including that for the purpose of promoting its sale or disposal.

SUMMARY OF COMMENTS RECEIVED IN RESPONSE TO CL 2019/69 ISSUED IN AUGUST 2019

In response to CL 2019/69, comments on cross promotion were received from 21 Codex Members (CM), one Codex Member Organisation (CMO), and three Codex Observers. The cross promotion statement currently forms part of provision 9.6.4 of the Additional Labelling Requirements for Follow-up Formula for Older Infants. At CCFL45 the Committee agreed to inform CCNFSDU that with regard to 9.6.4, the first sentence was endorsed and it was agreed to return the last sentence (relating to cross promotion) to CCNFSDU for further discussion.

The text currently reads as follows:

Cross promotion between product categories is not permitted on the [label/labelling] of the product.

From the responses received, 16 (15 CM, 1 CO) supported a provision on ‘cross promotion’, 8 (5CM, 1 CMO, 2 CO) supported deletion, and 1 CM supported the intent of the provision and provided modified text but also stated they were open to deletion of the sentence should this approach be the preferred option of the Committee.

From the comments it is clear that understanding of what constitutes ‘cross promotion’ and what it extends to differs between members. It would appear that there is not a common understanding of what this provision is trying to achieve, nor the application.

Responses varied from those who support the text as presented, (some with a preference for ‘labelling’ over ‘label’, others did not comment), to those that support what they understand to be the ‘intent’ of the provision but provided alternative wording, many without the inclusion of the term ‘cross promotion’, and some who also provided edits to the first sentence within provision 9.6.4 in addition to the cross promotion statement.

Request for clarity

Many respondents expressed their concern about the lack of clarity around the intent and application of the cross promotion provision. Comment was made that without a Codex definition for ‘cross promotion’ there would be no clear understanding of the term’s intent which would lead to different interpretations of the provision within the Standard.

Furthermore, comment was made that the provision will likely be subject to different interpretations at the national level. In other literature, the term is broadly defined and often covers different concepts. Concern was expressed that this could lead to inconsistent legal and regulatory approaches and unnecessary barriers to trade. It was the view of some that this therefore goes against the Codex aim to facilitate international trade of safe foods through the use of harmonized norms.

Additional views expressed:

- The scope of the term cross-promotion by the WHO, if applied within the proposed Codex Standard without an appropriate Codex definition, would raise legal and trade issues.
- The draft Codex standard already requires products to be labelled in such a way to enable consumers to distinguish between infant formula and follow-up formula and achieves the purpose of avoiding consumer confusion among product categories.
- Interpretation of the term considered at CCNFSDU40 appears to differ from the definition used in the WHO Guidance on ending the inappropriate promotion of foods for infants and young children.
- It cannot be excluded that other definitions for cross promotion could be used.
- Unless carefully modified, the provision could possibly have unintended consequences beyond safeguarding and promoting the health of older infants (as well as infants and young children).
- Concern over the scope and relevance of the provision and the possible extension to advertising and marketing.

Interpretations of cross promotion

The responses to the CL highlight the differing interpretations of what constitutes ‘cross promotion’. A collection of these interpretations is presented below:

- Brand cross-over promotion, brand stretching, line extension, product range extension.
- As per the WHO document ‘A framework for implementing the set of recommendations on the marketing of foods and non-alcoholic beverages to children’ which defines cross promotion as; A

consumer sales promotion technique in which the manufacturer attempts to sell the consumer new or other products related to a product the consumer already uses or which the marketer has available.

- Messages on labels that a product for a particular age group is also suitable for another age group, or a reference made to a similar product for another age group.
- Properties of one product being applied to another, resulting in inappropriate use of a product.
- Line extension resulting in infant formula, follow-up formula and growing up milks appearing similar or the same to consumers.
- Sequential branding.
- Promotion of other products on infant formula labels, or promotion of infant formula on labels of other products.
- A form of marketing promotion where customers of one product or service are targeted with promotion of a related product.
- Promotion of products for young children on products for older infants.

Intent of the cross promotion provision

The responses to the CL highlight the differing views on the intent of the 'cross promotion' provision. A collection of these is presented below:

- The packaging design, labelling and materials used for the promotion of complementary foods must be different from those used for breast-milk substitutes so that they cannot be used in a way that also promotes breast-milk substitutes (for example, different colour schemes, designs, names, slogans and mascots other than company name and logo should be used).
- Companies that market breast-milk substitutes should refrain from engaging in the direct or indirect promotion of their other food products for infants and young children by establishing relationships with parents and other caregivers (for example through baby clubs, social media groups, childcare classes and contests).
- The intent behind the sentence is to avoid the promotion of products for young children on products for older infants. The reason for this is to avoid misleading the caregiver into thinking that the child must move to the product for young children when this product is not necessary to meet the child's nutritional requirements.
- The intent is to prohibit the ability to use the label of follow-up formula for older infants to refer to other products in the category range.

Conclusion

The differences in interpretation make it difficult to understand what members think should, or should not be regulated. If retained, it would be imperative that any provision relating to cross promotion be drafted in a way so as to ensure it is interpreted and implemented in a consistent way by Codex.