

# LEGAL MEASURES CONCERNING MARKETING OF BREAST-MILK SUBSTITUTES IN THAILAND\*

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## ABSTRACT

It is widely accepted that mother's breastfeeding is one of the best ways to ensure child health growth and survival. WHO and UNICEF recommended that "mothers worldwide should exclusively breastfeed their infants for first six months to achieve optimal growth, development and health. Thereafter, they should be given nutritious complementary foods and continue breastfeeding up to the age of two years or beyond."

Even though we have known numerous benefits of breast milk for infants and young children, however the rate of breastfeeding are low, one among factors that causes to the declination of breastfeeding is marketing of breast-milk substitutes. Breast-milk substitutes are marketed directly to consumer via mass media and advertisement and indirectly via incentives, free samples, donation of formula, promotional gifted to new mothers and gifted given to health workers. The design, packaging and labeling of milk for older children, milk for mother and related products are packed and designed to look closely resemble with breast-milk substitutes and promoted in ways that cross-promote its formula product. This leads to confusions as the purpose of the product. The promotion of breast-milk substitutes and marketing influences and induce mother to believe that breast-milk substitutes are equivalent or better than to human breast-milk and finally decide to stop breastfeeding.

In 1981, the International Code of Marketing of Breast-milk Substitutes<sup>1</sup> was developed and adopted by WHO and UNICEF as a 'minimum standard' to help protect and promote breastfeeding and to ensure breast-milk substitutes are used safely when necessary. Furthermore, in 2016 WHA 69th has adopted the 'Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children'<sup>2</sup> which aims to promote, protect and support breastfeeding,

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<sup>1</sup> This article is summarized and arranged from the thesis "Lemon Laundering: Consumer Protection on Resale of Returned Defective Cars Without Disclosing Prior Mechanic Problems" Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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prevent obesity and non-communicable disease, promote healthy diets, and ensure that caregivers receive clear and accurate information on feeding.

In Thailand, the directly regulation controlling the marketing of breast-milk substitute is the Regulation of Marketing of Foods for Infants and Young Children and Related Products 2008. However, this regulation is not legislative or statutory law that can be enforced against the marketing of breast-milk substitutes. In addition, the Announcement of the Food and Drug Administration Criteria for Food Advertisement B.E.2551 and revision (No.2) B.E.2555 (2012) under the Food Act B.E.2522 laid down prohibitions related to advertisement. However, the announcement and its revision can restrict only an advertisement of food for infant and young children. As a result, those prohibitions do not cover the promotion and marketing instrument.

In order to comply with the International Code of Marketing of Breast-milk Substitutes, the Ministry of Public Health has been pushing forward the drafts of "Legal Control of Marketing of Food for Infant and Young Children" into the national legislation to improve the measures to control the marketing of breast-milk substitutes. Currently, there are two drafts regarding the Department of Health and the Council of State no.1087/2559.

Thus, this thesis aims to study the situation and the current legal measure in Thailand concerning the marketing, advertising and labelling of breast-milk substitutes, including both of the drafts of legal control of marketing of food for infant and young children. Simultaneously, the thesis also studies the International Code of Marketing of Breast-milk Substitutes as the minimum requirement for all governments and the foreign law of the European Union, the United Kingdom and the Philippines in order to compare and seek appropriate legal measures to control the marketing of breast-milk substitutes in Thailand.

**Keywords:** Breast-milk substitute, Breastfeeding, Marketing of Breast-milk substitute, Marketing, Promotion, Advertising

## บทคัดย่อ

การเลี้ยงลูกด้วยนมแม่เป็นวิธีที่ดีที่สุดและปลอดภัยที่สุดในการให้เด็กได้รับสารอาหารที่มีคุณค่าสูงสุด องค์การอนามัยโลก (WHO) และองค์การทุนเพื่อเด็กแห่งสหประชาชาติ (UNICEF) แนะนำให้ประเทศสมาชิกส่งเสริมการเลี้ยงลูกด้วยนมแม่อย่างเดียวนานครบ 6 เดือน และให้นมแม่ควบคู่กับอาหารตามวัยจนถึง 2 ปี หรือนานกว่านั้น

ถึงแม้ว่าจะรู้ถึงคุณประโยชน์จากนมแม่ แต่อย่างไรก็ตาม อัตราการเลี้ยง ลูกด้วยนมแม่อย่างเดียว 6 เดือน กลับลดลง ซึ่งหนึ่งสาเหตุสำคัญมาจากการใช้กลยุทธ์ทางการตลาดที่แยบยลของผู้ผลิตและจำหน่ายอาหารทารก และเด็กเล็ก ผ่านการโหมทำการตลาดและการ โฆษณานานมรวมถึงผลิตภัณฑ์ที่เกี่ยวข้อง เช่น การแจกตัวอย่างผลิตภัณฑ์ฟรี การบริจาคผลิตภัณฑ์ การให้ของขวัญชุดผลิตภัณฑ์แก่กลุ่มหญิงตั้งครรภ์รวมถึงแม่ และครอบครัวของทารกและเด็กเล็ก การให้ผลประโยชน์ต่อบุคลากรทางการแพทย์ การออกแบบผลิตภัณฑ์ที่ไม่ถูกห้ามทำการตลาดหรือโฆษณาหากแต่เป็นผลิตภัณฑ์แบรนด์เดียวกัน กลยุทธ์ทางการตลาดที่หลากหลายก่อให้เกิดความสับสนหลงผิด เข้าใจว่านมผงมีคุณค่าเทียบเท่า และสามารถใช้ทดแทนนมแม่ได้จนนำมาซึ่งการตัดสินใจหยุดการให้นมแม่

ด้วยความมุ่งมาดปกป้องทารกให้ได้รับสารอาหารที่ดีที่สุด รอดพ้นจากการทำการตลาดที่ไร้จริยธรรม สมัชชาสุขภาพโลกได้ ประกาศ International Code of Marketing of Breast-milk Substitutes ในปี 1981 และ Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children ในปี 2016 เพื่อเป็นคำแนะนำให้ประเทศสมาชิกขององค์การอนามัยโลกใช้เป็นแนวทางในการ สนับสนุนและส่งเสริมการให้นมแม่ รวมถึงปกป้องทารกและเด็กเล็กที่พึ่งได้รับสารอาหารที่ดีที่สุดคือนมแม่ จากการทำตลาดนมผงรวมถึงผลิตภัณฑ์ที่เกี่ยวข้อง ที่ไร้จริยธรรม ของผู้ประกอบการ โดยส่งเสริมให้ประเทศสมาชิกรื้อถอนหลักเกณฑ์สากลดังกล่าวไปปรับใช้กับกฎหมายในประเทศของตน

สำหรับสถานการณ์ในประเทศไทย ปัจจุบันกฎหมายที่เกี่ยวข้องกับการควบคุมการทำการตลาดอาหารทดแทนนมแม่หรือนมผง คือ ประกาศกระทรวงสาธารณสุขหลักเกณฑ์ว่าด้วยการตลาดอาหารสำหรับทารกและเด็กเล็กและผลิตภัณฑ์ที่เกี่ยวข้อง พ.ศ.2551 แต่อย่างไรก็ตามแม้ว่าประกาศกระทรวงฉบับนี้เป็นเพียงหลักเกณฑ์ให้คำแนะนำและขอความร่วมมือจากภาคส่วนที่เกี่ยวข้อง หากแต่ไม่ได้มีผลกำหนดโทษต่อผู้ฝ่าฝืนแต่อย่างใด จึงไม่มีประสิทธิภาพมากพอที่จะใช้ควบคุมการละเมิดหลักเกณฑ์สากลว่าด้วยการตลาดอาหาร สำหรับทารกและเด็กเล็กและผลิตภัณฑ์ที่เกี่ยวข้องได้แต่อย่างใด นอกจากนี้แม้ประเทศไทยจะมีประกาศสำนักงานคณะกรรมการอาหารและยา เรื่อง หลักเกณฑ์การ โฆษณาอาหาร พ.ศ. 2551 ซึ่งอยู่ภายใต้ พระราชบัญญัติอาหาร พ.ศ.2551 เพื่อควบคุมการ โฆษณานมผง แต่อย่างไรก็ตามหลักเกณฑ์นี้ใช้ควบคุมได้เพียงการทำ การ โฆษณาแต่ไม่รวมไปถึงการทำ การตลาดหรือ โปร โหมชั่น หลากหลายรูปแบบที่บริษัทผู้ผลิตสร้างขึ้น

ปัจจุบันเพื่อให้เป็นการดำเนินตามหลักเกณฑ์สากลว่าด้วยการตลาดอาหาร สำหรับทารกและเด็กเล็กและผลิตภัณฑ์ที่เกี่ยวข้อง ประเทศไทยมีความพยายามในการผลักดัน ร่างพระราชบัญญัติควบคุมการตลาดอาหาร สำหรับทารกและเด็กเล็กควบคุมการทำการตลาดอาหารสำหรับทารกและเด็กเล็ก พ.ศ. ....

วิทยานิพนธ์ฉบับนี้มุ่งศึกษาสถานการณ์การละเมิดหลักเกณฑ์สากลว่าด้วยการตลาดอาหาร สำหรับทารกและเด็กเล็กและผลิตภัณฑ์ที่เกี่ยวข้อง ของไทย กฎเกณฑ์ต่าง ๆ ที่ใช้บังคับกับการทำการตลาด การ โฆษณา นอกจากนี้ยังมุ่งวิเคราะห์ร่างพระราชบัญญัติควบคุมการตลาดอาหารสำหรับทารกและเด็กเล็กควบคุมการทำการตลาดอาหารสำหรับทารกและเด็กเล็ก พ.ศ. .... และนำไปเปรียบเทียบกับ หลักเกณฑ์สากลว่าด้วยการตลาดอาหาร สำหรับทารกและเด็กเล็กและผลิตภัณฑ์ที่เกี่ยวข้อง กฎหมายของสหภาพยุโรป ประเทศอังกฤษและประเทศฟิลิปปินส์เพื่อหาแนวทางที่เหมาะสมในการควบคุมการตลาดอาหาร สำหรับทารกและเด็กเล็กของประเทศไทย

**คำสำคัญ:** อาหารทดแทนนมแม่,การให้นมแม่,การตลาด, โปร โหมชั่น,การ โฆษณา

## Introduction

Mother's breastfeeding is one of the best ways to ensure child health growth and survival. Even though we have known numerous benefits of breast milk for infants and young children, the advertising and promotion of breast-milk substitutes and their use led to a decline in breastfeeding rates in developed countries. Over the following 100 years, the breastfeeding rates have been decreasing from over 70% in the 1930s to 14% in the 1970s.<sup>1</sup>

Following years of growing concern about the aggressive marketing of breastmilk substitutes, the International Code of Marketing of Breastmilk Substitutes and the Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children are adopted in May 1981 and in May 2016 respectively as an international health policy framework to regulate the marketing of breastmilk substitutes in order to protect breastfeeding. In view of the vulnerability of babies in the early months of life and the risks involved in inappropriate feeding practices, the marketing of breastmilk substitutes requires special treatment.

In Thailand, breast-milk substitutes are marketed both directly and indirectly. On one hand, consumers are aware the marketing of breast-milk substitutes via mass media and advertisement. On the other hand, free suppliers and promotions to and through health workers and facilities, retailer or policy maker indirectly influence consumers. In addition, internet marketing on company websites including social media or via mobile applications is also linked to consumers' awareness. Therefore, the marketing influences social norms by creating extensive, modern and comparable images of breast-milk substitutes instead of breast milk.<sup>2</sup>

According to IHPP's research<sup>3</sup>, Thai women accepted that there are the following two promotion strategies which had impacts toward their decision-making to buy the formula milk. There are advertisement, especially, through television commercials (78.5%) and personal selling through suggestions by medical and public health personnel (50.8%)<sup>4</sup>

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<sup>1</sup> Jelliffe D, Jelliffe E. *Feeding young infants in developing countries: comments on the current situation and future needs Studies in Family Planning* (1978) cited by e-Library of Evidence for Nutrition Actions (eLENA) of WHO  
<[http://www.who.int/elena/bbc/regulation\\_breast-milk\\_substitutes/en/](http://www.who.int/elena/bbc/regulation_breast-milk_substitutes/en/)> accessed 28 September 2015

<sup>2</sup> *ibid.*

<sup>3</sup> นงนุช ใจชื่น และคณะ. *ผลกระทบของการส่งเสริมการตลาดนมผงต่อ นวัตกรรมทัศนคติ และพฤติกรรมของการเลี้ยงลูกด้วยนมผงของหญิงไทย*. โครงการวิจัยและสนับสนุนการส่งเสริมการเลี้ยงลูกด้วยนมแม่, สำนักงานพัฒนานโยบายสุขภาพระหว่างประเทศ, 2558 (Nongnuch Jaichuen and Kannaphon Phakdeesethakun. *Impacts of marketing communications on Thai women's breast-milk substitute myth, attitude, and behavior*. International Health Policy Program, (2015)

<sup>4</sup> *Ibid.*

According to the report of IBFAN,<sup>5</sup> it concluded that “Thailand has no national law protecting mothers, parents, and infants against the aggressive and unethical marketing of breast-milk substitutes, but has only a number of voluntary measures.”<sup>6</sup>

Thailand obviously implements the regulation to be in accordance with the International Code of Marketing of Breast-milk Substitutes by enforcing the Regulation of Marketing of Foods for Infants and Young Children and Related Products 2008. However, this regulation is not legislative or statutory law that can be enforced against the marketing of breast-milk substitutes. In addition, the Announcement of the Food and Drug Administration Criteria for Food Advertisement B.E.2551 and revision (No.2) B.E.2555 (2012) under the Food Act B.E.2522 laid down prohibitions related to advertisements. However, the announcement and its revision can restrict only an advertisement of food for infant and young children. It does not cover the promotion and marketing instrument. This is the loophole of Thailand because there is no direct provisions to control the marketing of breast-milk substitutes. Therefore, this is one of the main factors that obstructs breastfeeding and influences mothers to choose an infant formula. Since Thailand has no national legislation controlling the marketing of breast-milk substitutes, the question arises that what should Thailand do to follow the International Code of Marketing of Breast-milk Substitutes to reach the best protection and achieve the right measures.

In this article, the author will analyze analyzes the current legal control in Thailand through the comparison of the International Code of Marketing of Breast-milk Substitutes, the Guidance on Ending the Inappropriate Marketing of Food for Infant and Young Children, the Regulation of the European Union, the Regulation of the United Kingdom and the law of the Philippines in the issue as follows:

## **5.1 The problem of scope of protection**

According to the, WHO recommendation advocates that “*Exclusive breastfeeding is recommended up to 6 months of age, with continued breastfeeding along with appropriate complementary foods up to two years of age or beyond.*”<sup>7</sup> And the Guidance on Ending the Inappropriate Promotion of Food for Infants and Young Children requires to ensure that all milk products intended and marketed as

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<sup>5</sup> IBFAN-GIFA-Geneva Infant Feeding Association ‘*Report on the situation of infant and young child feeding in Thailand*’ International Baby Food Action Network , (2012)

<sup>6</sup> The International Code Documentation Centre, ‘State of the code by Country 2011’ <[http://www.unicef.org/lac/20160509\\_WHO\\_UNICEF\\_IBFAN\\_2016\\_Code\\_Status\\_Report\\_EN.pdf](http://www.unicef.org/lac/20160509_WHO_UNICEF_IBFAN_2016_Code_Status_Report_EN.pdf)> accessed 18 September 2015

<sup>7</sup> World Health Organization, ‘*Breastfeeding*’ <<http://www.who.int/topics/breastfeeding/en/>> accessed 13 August 2015

suitable for feeding young children up to the age of 3 years, including growing-up milk are adequately covered by national legislation.

In foreign countries, the Philippines, in spite of its full-implementation of the International Code, the scope of protection in the country covers only an infant which means *“a person falling within the age bracket of 0-12 months.”*

The European Union Regulation 609/2013 and Infant Formula and Follow-on Formula Regulations 2007 define ‘Infant’ and ‘Young children’ in the same definition. ‘Infant’ means a child under the age of 12 months and ‘Young children’ means a child aged between one and three years.

There are the dissenting opinion of the Pediatric Nutrition Manufacturer Association (PNMA) that the scope of controlling should cover to only infant from one day old – 1 years old by claiming that the products for infants over 12 months old, should cautiously provide useful information to customers. Moreover, the PNMA premises that *“Exclusive breastfeeding is recommended up to 6 months of age, and continued breastfeeding along with appropriate complementary foods at least to 1 year”*<sup>8</sup>This premise is not fully conformed to the recommendation of WHO that recommends to *“continue breastfeeding along with appropriate complementary foods up to two years of age or beyond.”*

In Thailand, both of the draft law from the Department of Health and the draft law from the Council of State No.1087/2559 intend to protect 0-12 month old infant and young children at the age of 1-3 years old. Therefore, the scope of both drafts to protect infant and young children up to the age of 3 years old conforms to the recommendation of the Guidance on Ending the Inappropriate Promotion of Food for Infants and Young Children.

Thus, the author agreed to specify the scope of protection to products up to 3 years following to the Guidance on Ending the Inappropriate Promotion of Food for Infants and Young Children. When the draft of controlling the marketing of breast-milk substitute are enforced as the legislation, it will cover to the product which intend to feed infants and young children for up to 3 years conforming to the Guidance on Ending the Inappropriate Promotion of Food for Infants and Young Children

## **5.2 The measures to control the advertising and the marketing of breast-milk substitutes in Thailand**

According to an inappropriate marketing through advertisements, there are different measures. On one hand, the Philippines absolutely prohibits advertisement of infant formula. On the other hand, the European Union Regulation 609/2013 and the Infant Formula and Follow-on Formula Regulations, 2007 of the

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<sup>8</sup> Principle and standing point of the Pediatric Nutrition Manufacturer Association, >[http://www.pnma.or.th/files/doc1\\_th.pdf](http://www.pnma.or.th/files/doc1_th.pdf)> accessed 13 March 2016

United Kingdom allow manufacturers to advertise under the condition of advertisements specializing in the baby care and scientific publications which they shall contain only scientific and factual nature.

In case of promotions, all of the foreign laws apply the same method. The European Union Regulation 609/2013, the Philippines, and the Infant Formula and Follow-on Formula Regulations, 2007 of the United Kingdom prohibit a sale promotion for infant formula complying with the International Code of Marketing of Breast-milk Substitutes.

In Thailand, there are the following two provisions controlling advertisements and promotions in Thailand: (1) the Regulation of Marketing of Foods for Infants and Young Children and Related Products 2008; and (2) the Announcement of the Food and Drug Administration Criteria for Food Advertisement B.E.2551 and revised (No.2) B.E.2555 (2012)

Firstly, the Regulation of Marketing of Foods for Infants and Young Children and Related Products 2008 is the most direct provision enforcing promotional tactics under the marketing instrument. However, it has the status as the regulation of the Ministry of Public Health (MOPH). Accordingly, it only requires a cooperation from the government sector under the authority of the Ministry of Public Health to support and promote breastfeeding. Therefore, this regulation cannot be a practically enforcing tool. Even if this regulation has its enforcing status as the legislation which can enforce the violation of advertisement or the other marketing strategies, the scope of the regulation covers for only children up to 2 years old. Consequently, the regulation does not conform to the Guidance on Ending the Inappropriate Promotion of Foods for Infant and Young Children which recommends to cover the product which intend to feed infants and young children for up to 3 years old.

Moreover, this regulation provides the measure control of marketing of breast-milk substitutes which is similar to the International Code of Marketing of Breast-milk Substitutes but it has the status as the regulation of the Ministry of Public Health which does not provide any sanction to violators.

Secondly, the Announcement of the Food and Drug Administration Criteria for Food Advertisement B.E.2551 and revision (No.2) B.E.2555 (2012) can control only the advertisement of food for infant and young children products, but cannot covers the other marketing strategies as required by the International Code of Marketing of Breast-milk Substitutes.

In relation to the issue of domestic law, Thailand should provide the national legislation to control the violation conduct of the manufacturer, distributor and representative rather than the regulation without any sanction. Both of the drafts restrict not only the advertisements but also other forms of promotion. In case of controlling the marketing, both of the drafts restrict not only the advertisements but also other forms of promotion of designated products to the general public, including promotion methods to contact with or give free samples, support seminars, meetings, and activities

to pregnant women and mothers, create the marketing in health care facilities, or provide profitable to health workers.

Furthermore, in case of advertisement, both of the drafts absolutely prohibit the advertisement of food for infant and young children, without any exception as the Announcement of the Food and Drug Administration Criteria for Food Advertisement B.E.2551 provide. On the contrary, the European Union Regulation 609/2013 or the Infant Formula and Follow-on Formula Regulations, 2007 has opened channel to advertisements with an information of scientific and factual nature.

In the issue of allowance to advertise breast-milk substitute product, the author would agree with the channel opening for advertisement. In order to be the source of information for consumer, advertisements are supposed to contain only information of scientific and factual nature, not the absolute prohibition to advertise as the draft provide. The reason is when there is any conflict of promotions creating by manufacturers, the committee can sensor related information.

If the country approves the draft to be the law, this law will restrict not only the advertisements but also other forms of promotion of designated products to the general public, including promotion methods to contact with or give free samples, support seminars, meetings, and activities to pregnant women and mothers, create the marketing in health care facilities, or provide profitable to health workers.

### **5.3 The measure to control the marketing tactics which cause the risk of confusion to the consumer**

The Guidance to End the Inappropriate Promotion of Foods for Infants and Young Children, the recommendation No.5 prohibits the cross promotion to promote breast-milk substitutes through indirect promotions of foods for infants and young children. Similarly to the Infant Formula and Follow-on Formula Regulations 2007 of the United Kingdom No.19 and the European Union Regulation 609/2013 which requires the different labels in order to make a clear distinction to consumers between the infant formula and follow-on formula. While Thailand have already prohibited to advertise both of No.1 and No.2 which are infant formula and follow-on formula respectively as described under the current Announcement of the Food and Drug Administration Criteria for Food Advertisement B.E.2551. However, manufacturers can continue applying the cross promotion as one instrument of marketing through No.3 and No.4 and related product in the same branding, labelling, packaging or styling. Therefore, the author would apply the concept of prevention of the cross promotion with the group of forbidden to advertise or promote product (No.1 and No.2) and the group of permitted to advertise or promote product (growing-up, follow-up milk and related product).

The author would raise the arguments about the current situation in Thailand which there is a lack of the provision of avoidance of the confusion and the provision concerning the advertisement, labeling and presentation as follows:

### **1. Advertisement**

Currently, the announcement only prohibits the advertisement regarding product No.1 and No.2 which manufactures describe on the labels that it is suitable for one day old to 12 months old infants and 6 months to 3 years old infants and young children respectively. However, product No.3 which labels specified ages of target group who are more than one year old and No.4 product which the label specify that suitable for everyone in families can be advertised under the condition. This announcement has already prohibit to advertise both of No.1 (infant formula) and No.2 (follow-on formula) while No.3 (growing-up, follow-up milk) and related product can be advertise under the condition.

In Thailand, in order to control the risk of confusion among the products, if the scope of protection can cover only one year old infants, the manufacturer can continue to apply cross promotion tactic by promoting their infant formula product which is forbidden to promote through the product for older children which is allowed to promote.

Thus, in the author's opinion, the concept to prevent the cross promotion and the avoidance of risk of confusion should be applied to the group of forbidden to advertise or promote product (No.1 and No.2) and the group of permitted to advertise or promote product (growing-up, follow-up milk and related product) through the same branding, labelling, logo or styling.

However, if the scope of the draft covers the breast-milk substitute products up to 3 years old, the problem of making cross promotion between the infant formula or follow-on formula and growing up milk in the same brand will be eliminated because the scope of control is wider to cover No.3 which labels are specified for children who are more than one year.

### **2. Labeling**

In case of labeling, the DH Guidance Notes of Infant Formula and Follow-on Formula Regulations 2007 requires the font size of specific terms that should be clearly featured on the packaging and its size must not be smaller than the brand name. The different block text and the different of colour scheme can avoid the risk of confusion to the consumers. In this issue, the author would separately analyze the following issues: (1) the presenting name; (2) the pictures and blocks; and (3) the color scheme of formula products.

Firstly, regarding the presenting name, the size of the specific terms on label under Thai law is controlled by the Notification of Ministry of Public Health

No.367 Clause 13 (3) and Notification of Ministry of Public Health No.351 Clause 13 (3). It states about the presenting name of food that *“If the manufacturer would like to use the Trade name such name type or kind of food shall be appeared in the same line together with trade name and size of letters may be different from trade name but shall be legible”*. While the DH Guidance Notes of Infant Formula and Follow-on Formula Regulations 2007 and the European Union Regulation 609/2013 require that *“The specific terms ‘infant formula’ and ‘follow-on formula’ should be clearly featured on the packaging, in a font size should no smaller than the brand name.”*

In light of names of food, it is explicitly clear that the font size of the names which is bigger than the trade name can be understandable than the smaller one. It can assist consumers to differentiate each product. If the Notification of the Ministry of Public Health which controls labels imposes that the font and size of type of food (such as infant formula, follow-on formula, growing-up milk or flavored powder milk) should be no smaller than the trade name.

Secondly, regarding the pictures and blocks of text, the current law controls on label which are the Notification of Ministry of Public Health No.156 (B.E. 2537). This notification requires only the specific statement which provides necessary information about appropriate usages of the product. In addition, such a statement should not discourage breastfeeding as prescribed by Article 9.1 of the International Code of Marketing of Breast-milk Substitutes. However, the current Thai legal control has no provision to control the pictures and block of text on label as the DH Guidance Notes of Infant Formula and Follow-on Formula Regulations 2007 which requires for the different block of text and picture between infant formula and follow-on formula which may cause to the risk of confusion among them.

With regard to the label control in Thailand, there is still a lack of requirements to control the picture and block of text, it is essential to add the different requirements between the group of forbidden to advertise or promote product (No.1 and No.2) and the group of product which are permitted to advertise or promote in order to reduce the risk of confusion to consumer. When the Notification of the Ministry of Public Health which controls on label is added the solution to prevent the confusion, it can reduce the risk of confusion through the similar picture and the position of block of text.

Thirdly, regarding the colour scheme used, there is no provision in Thailand mentioned to control the colour scheme used while the DH Guidance Notes of Infant Formula and Follow-on Formula Regulations 2007 require that the manufacturer should ensure that *“The colour scheme used for infant formula packaging should be clearly different to the colour scheme of follow-on formula packaging. Using different shades of the same colour is not acceptable as it may lead to confusion.”* Furthermore, the Regulation of European Union 609/2013 also requires the different designs to avoidance

of risk between infant formula and follow-on formula in particular as shown by the text images and colours used.

In Thai general market, without the provision to control the different of colour scheme used, it can be easily found the same and similar colour scheme used with the same branding. However, different ages of infants and young children cause the risk of confusion among infant formula (No.1), follow-on formula (No.2) and flavored milk powder which labels specified age of target group from 1 year up (No.3/No.4). In addition, other related products which are closely resembled cause manufacturers to develop the product differentiation. Nonetheless, the manufacturers can simultaneously use similar advertising and marketing in each category.

With regard to Thailand as the present case, it is important to the Notification of Ministry of public Health controlling on label or the draft to add the concept of avoidance of risk of confusion in order to assist consumers to easily distinguish products and protect the cross promotion technique of the manufacturer.

### **3.Presentation**

In the issue of presentation, the current Thai legal control does not mention about how to avoid the risk of confusion by the presentation as provided by the DH Guidance Notes of Infant Formula and Follow-on Formula Regulations 2007. With reference to the guidance, it requires companies' products to be ensured that they are clearly differentiated in order to avoid any risks of confusion prohibit the shelf-talker and other in store promotional devices for follow-on formula to be used in the vicinity of infant formula. In addition to the differentiation, the guidance also requires that the location of follow-on formula should be located at a different part of the store where the infant formula products are located.

Currently, Thailand does not mention to the risk of confusion through the presentation. Generally, it can be found the shelf talker with the company's logo or sale message on a shelf without professional staffs who can recommend the products. Moreover, the group of forbidden to advertise product which are No.1 and No.2 located in the same location on shelf with the grow-up milk and related product. They have the same packaging, labeling, colour scheme used and were not separated and located physically as the DH Guidance Notes of Infant Formula and Follow-on Formula Regulations 2007 has guided. For example, Dumex uses the red colour with the heart picture on label which can convey to love when mother chooses this breast-milk substitutes for her infant, Enfa uses the shelf-talkers conveying to the consumer when they feed her infant with Enfa's product, it can make her children intelligence, healthy, happiness or well-being.

If the draft is added by the concept of avoidance of risk of confusion through the presentation of the product, it can prevent consumers from being aroused by the shelf talker as the promotional device and the consumers can distinguish the different of product by separating the location.

However, in relation to in-store presentation, this regulation should not enforce with to mini-stores which does not have enough area to locate the product in difficult location. The mini-store who are exempted should grant the pharmacist or the nutritionist to recommend customers in the area of the store in order to make a clear differentiated understanding about the product all the time.

#### **5.4 The measures and sanction to control the health worker**

The International Code of Marketing of Breast-milk Substitutes state that health worker should not accept financial or material inducement or give samples of infant formula to pregnant women and mothers of infants or members of their families.

The Guidance on Ending the Inappropriate Promotion of Foods for Infant and Young Children under recommendation No. 6 state that health worker should not accept free products, samples or reduces-price, gifts or incentive of foods for infant and young children from companies.

In the Philippines under the Executive Order No.51 section 8, mention to health worker following to the International Code of Marketing of Breast-milk Substitutes that health worker should not accept financial or material inducement or give samples of infant formula to pregnant women and mothers of infants or members of their families. Otherwise the health worker who violates the Executive Order No.51 may be suspended or revoked their license, permit or authority in the event of repeated violations.

Currently, Thai law does not emphasize to an essential role of health workers or any prohibition to them in order to support breastfeeding. The provision is focusing only on prohibition of the manufacturer, distributor, importer and their representative to make a promotion than prefer the restriction to the health worker and who have no less important than anyone. While personal selling through suggestions by medical and health worker (50.8%) has an impact to her decision making of purchasing breast-milk substitutes in Thailand.

Thus, Thailand legal control concerning with health worker should not only impose the duty but also the sanction to them. By following to the Executive Order No.51 of Philippines, the health worker who violated the Executive Order No.51 shall be suspended or revoked their license, permit or authority by the Ministry of Health. Because, the health worker has an important role to consumers' decision-making process.

According to the draft of the Department of Health, it imposes a sanction to the health worker in the same way to the Executive Order No.51. When a health worker violates to receive financial or material inducements to promote product or giving any samples to pregnant women or mother of infant and young children, they will be notified to their federation to be considered by the Department of Health and their federation has their own authority to consider to the violation. However, the draft from the Council of State No.1087/2559 does not impose any sanction to health worker.

If there is a sanction provided by the draft from the Department of Health to control health worker who have a close relationship with mother and pregnant women, it can protect one of the channel of promoting infant formula product through health worker as an influential person to encourage and support breastfeeding.

### **5.5 The measures to control an information and the message used to promote breast-milk substitutes**

In light of Thailand, the Notification of Ministry of Public Health No.156 and No.157 require the inclusion of a clear message on the superiority of breastfeeding, and instructions for appropriate preparation, as well as warning against the health hazards of inappropriate preparation of the product. In light of foreign law, the European Union Regulation 609/2013 Article 11 and the Infant Formula and Follow-on Formula Regulations, 2007 No.24 request to clear and necessary information about breast-milk substitutes as same as the International Code of Marketing of Breast-milk Substitutes' requirement.

Even if the Notification of Ministry of Public Health and the draft have already required the statement of the importance of non-introducing complementary feeding before 6 months of age, it still lacks of the statement on the importance of continued breastfeeding for children who are up to two years or beyond following to the Guidance on Ending the Inappropriate Promotion of Food for Infant and Young Children.

Thus, if there is prospective way to promote breastfeeding, especially by legal control through label, it should be continue promoting. At least, consumers who choose to purchase breast-milk substitutes will be acknowledge the recommendation by the WHO about breastfeeding. Therefore, the Notification of Ministry of Public Health and the draft should be added the message of supporting optimal breastfeeding into the compulsory statement provided by law. Moreover, the optimal statement should be conveyed in multiple forms not just only on packaged label but through advertisements, promotion and sponsorship, including brochures, online information.

In case of picture or text, the International Code of Marketing of Breast-milk substitute recommended that the informational and educational materials should not

use any pictures or text which may idealize the use of breast-milk substitutes except a clear information. In addition, the Guidance on Ending the Inappropriate Promotion of Food for Infant and Young Children recommended that messages used to promote food for infant and young children should not include any image, text or other representation. Regarding the image, text or other representation, those which undermine or discourage breastfeeding, make a comparison to breast-milk, or suggest that the product is nearly equivalent or superior to breast-milk cannot use for infants under the age of six months (including references to milestones and stages).

The current Thai legal control on label of infant formula and follow-on formula which are the Notification of Ministry of Public Health No.156 (B.E. 2537) require only the specific statement which provide a clear information about the appropriate usage of the product. However, it has not mention to pictures or text which may idealize the use of breast-milk substitute following to Article 9 of the International Code of Marketing of Breast-milk substitute.

If Thailand added the solution to prohibit the picture or text which may idealize to the use of breast-milk substitutes rather than require for only statement through the Notification of the Ministry of Public Health or passing the draft from the Department of Health in part of requirement on label following to Article 9 of the International Code of Marketing of Breast-milk substitute as the author mention above, the country would have more efficient provision legislation to control various marketing strategies used through the picture or text out of the scope of protection.

## **5.6 The Problem of making a promotion with the other person other than the pregnant, mother in order to get the personal information of the targeted group**

The Article 5.5 of the International Code of Marketing of Breast-milk Substitutes prohibits marketing personnel from seeking direct or indirect contact with pregnant women or with mothers of infant.

In the issue of seeking direct or indirect contact with pregnant women or with mothers of infant, the foreign law and regulation do not provide any prohibition of making a promotion with other people apart from the pregnant women and mother who can be the source of personal information of pregnant women or mothers of infant.

According to the draft from the Department of Health and the draft from the Council of State No.1087/2559, there are provisions to restrict manufacturers, importers and distributors from misleading pregnant women and mothers to believe that benefits of infant and follow-on formula are as good as breast milk.

However, the drafts do not cover of the multiple techniques and channels that marketing personnel is being used to reach directly or indirectly to the target

group. Therefore, the loophole of the drafts is being used to gather personal information of pregnant women and mothers such as name, contact number and the baby due. To get the crucial information, marketing personnel will offer rewards or gifts to anyone rather than pregnant women, mother and her families who is able to provide the information mentioned above to create chance to sell their products in the future. For example, Enfa provides gift voucher to any person who give them five names and personal information of pregnant women or mothers.

Therefore, if the draft is added the scope of protection to prohibit the manufacturer to make the marketing with not only the pregnant women and mothers but also anyone who can give them personal information to be the source of future connection, it can be one of measures to cease the contact between the manufacturer and the targeted group.

### **5.7 The enforcement with the violation**

In case of making the sales promotions other than advertisement under control of the Food Act, the Regulation of Marketing of Foods for Infants and Young Children and Related Products 2008 does not mention about the punishment or sanction to the violator. On the contrary to the law, it is the regulation provide by the Ministry of Public Health requesting only the cooperation from the governmental health care organization, but does not have any legal binding.

The draft from the Department of Health specifies an administrative punishment to fine for any person who fails to perform according to the law. Moreover, this draft imposes the level of a fine which the manufacturer will be fined accumulatively that counts by the days until the actions against the law would be stop.

The draft from the Council of State No.1087/2559 specifies both of imprisonment and fine to punish any person who fails to perform according to the law per each violation similar to the Executive Order No.51 while the Infant Formula and Follow-on Formula Regulations 2007 imposes only the fine to punish the violator without any imprisonment. However, this draft does not mention about the level of a fine as the draft from the Department of Health mentioned.

If the draft are enforced as the national legislation, not only the violation of advertisement of breast-milk substitute product shall be punished but also the other instrument of marketing which the current law cannot cover such as sales promotion, give free sample of formula, contact with pregnant women or mother that are wide spread violated.

Furthermore, if the level of fine that counts by the days until the actions against the law under section 23 of the draft from the Department of Health is enforced, it will be more efficient to control the violation of the manufacturer than an exact amount of fine in each violation without level. The reason is the breast-milk substitute product has a large amount of market value. As the author mentioned that global sales of breast-milk substitutes total US\$ 44.8 billion per year and are expected to rise to

US\$ 70.6 billion by 2019.<sup>9</sup> While, the market value of breast-milk substitutes in Thailand is 25 billion Baht.

Only the fixed amount of fine without the level along the period of violation may be only a few money comparing with the manufacturer's profit. An amount of fine should be varied to the large amount of benefit of breast-milk substitute product business, apart from the fixed amount of fine in each violation.

Thus, the author would agree with the issue of imposing of the level of fine as the section 23 of the draft form the Department of Health provides because the fixed fine as imposed by the Philippines, the United Kingdom or the draft from the Council of State No.1057/2559 may be effective to cease the violation behavior. If the draft imposes not only the specific amount of fine but also the level of fine that counts by the days until the actions against the law, it can be more effective to enforce with the violation.

## **Conclusion and Recommendation**

Based on the study regarding the measures to control the marketing of breast-milk substitutes products in consideration of the International Code of Marketing of Breast-milk Substitutes, the Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children of WHO, the regulation of European Union, the measures of the United Kingdom, the executive order No.51 of Philippines, and the measures of Thailand, it is found that Thailand lacks of the provision and restriction on controlling of the marketing of breast-milk substitutes products. Thus, the author would provide the recommendations as follows:

6.1 imposing the scope of protection to cover all commercially produced breast-milk substitutes that are marketed as being suitable for infant and young children up to the age of 3 years following to the recommendation of Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children.

6.2 Launch the national legislation to prohibit the marketing of breast-milk substitute products to control not only advertisement but also marketing and the other kind of promotion.

6.3 Launch the provision to avoid risk of confusion between the products in relation to an advertising, labelling and presentation

### **6.3.1 Advertisement**

The draft should be added the provision to separate the difference between the breast-milk substitute products under the scope of the draft

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<sup>9</sup> WHO.UNICEF.IBFAN. *Marketing of Marketing of breast-milk substitutes: National implementation of the International Code status report 2016*. Geneva: World Health Organization; 2016.

and related products in order to assist consumers and enable them to clearly distinguish the product. Consequently, an advertisement of the group of forbidden to advertise or promote product shall not similar to the group of permitted to advertise or promote product which may cause the consumers confuse to use the product under the scope of law.

### 6.3.2 Labeling

#### a. Amending the provision of label on "Presenting Name"

The provision on Presenting Name should be amended to *"If the manufacturer would like to use the trade name such name type or kind of food shall be appeared in the same line together with trade name and size of letters should no smaller than the trade name."*

#### b. Adding the solution through picture and block of text

The Notification of the Ministry of Public Health No.156 controlling on label or the draft should be added the solution through picture and block of text between the group of product which are permitted to advertise or promote and the group of forbidden to advertise or promote product. Likewise, the position on label of the name or type of food, the picture, the brand name and the recommendation to the age of usage should be laid down in the position which less confusion to consumer.

#### c. Adding the solution through Colour scheme used

The Notification of the Ministry of Public Health No.156 or the draft should require for the different colour scheme used for the group of forbidden to advertise or promote product. The *packaging should be clearly different to the colour scheme of the group of product which are permitted to advertise or promote packaging* Furthermore, using different shades of the same colour is not acceptable as it may lead to confusion.

### 6.3.3 Presentation

The draft should add the legal control of companies. The companies must ensure that they are clearly differentiated in order to avoid any risk of confusion through presentation. However, in relation to in-store presentation, this regulation should not be enforced with the mini-store which does not have enough area to locate the product in difficult location. The mini-store who are exempted should grant the pharmacist or the nutritionist to recommend customers in the area of the store in order to make a clear differentiated understanding about the product all the time.

6.4 Impose the sanction to enforce with the health worker who receive financial or material inducements to promote product or giving any samples to pregnant women or mother of infant and young children.

6.5 In case of picture or text, it should be added the provision to prohibit the use of the picture or text on label which may idealize to the use of breast-milk substitutes between the group of forbidden to advertise or promote product and the group of product which are permitted to advertise or promote. And in case of

message on label, rather than prohibit the inappropriate message, the message on label should include the recommendation to breastfeed that is *“Exclusive breastfeeding is recommended up to 6 months of age, with continued breastfeeding along with appropriate complementary foods up to two years of age or beyond.”*

6.6 Launch the prohibition to make the promotion with the other person apart from pregnant women and mothers

6.7 Specify the level to the fines punishment

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### Thesis

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