

## **IBFAN-ICDC's Rejoinder to Nestlé's response to *Breaking the Rules, Stretching the Rules (BTR), 2010***

Nestle gave a 77 page response to the 43 pages in the BTR on Nestle Code violations. The Nestle response can be downloaded at <http://www.babymilk.nestle.com/who-code-compliance/allegation-and-nestle-responses/Pages/default.aspx>

The denials issued by Nestle to the evidence of Code violations in the BTR are based on a very narrow interpretation of the International Code of Marketing of Breastmilk Substitutes which cannot be supported by a plain reading of the actual text.

A long running dispute between Nestlé and health advocates, UN bodies, governments and civil society organisations such as IBFAN pertains to its responsibilities under the Code. Under Article 11.3 of the Code, companies should ensure their conduct at every level conforms to the Code's provisions independently of other measures. Nestlé disregards the requirements under these provisions, even though they have been clarified in subsequent Resolutions of the World Health Assembly, and by UNICEF legal experts, who support implementation of the Code.

For example, Article 5.5 of the Code prohibits companies seeking direct and indirect contact with pregnant women and mothers of infants and young children. Nestlé, however, targets these groups with stalls in supermarkets, with baby clubs and on the internet. UNICEF has confirmed that it is no excuse to argue, for example, that contact is being sought even in relation to a product that is not within the scope of the Code, such as cereals labelled for 6 months, but Nestlé disputes that its baby clubs and other initiatives violate the Code.

Similarly, Article 9.2 of the Code is very clear. Labels should not have, 'pictures or text which may idealise the use of infant formula', yet Nestlé has introduced logos on labels in 120 countries, by its own count, claiming its formula 'protects' babies and making claims about added ingredients, even though babies fed on formula are more likely to become sick than breastfed babies and, in conditions of poverty, more likely to die. The World Health Assembly has returned to this issue, stating in 2010: "nutrition and health claims shall not be permitted for foods for infants and young children, except where specifically provided for, in relevant Codex Alimentarius standards or national legislation". Nestlé's 'protect' and other claims have no such authorisation, yet in long-running correspondence with IBFAN, Nestlé refuses to remove the logos.

These are just two examples demonstrating Nestlé disregard for World Health Assembly requirements and those who attempt to implement and defend the Code.

Nestlé also makes an unwarranted distinction between "lower risk" and "higher risk" countries. This dichotomy cannot be supported by the language of the Code and of the World Health Assembly resolution which adopted the Code in 1981. Clearly, the Code is the minimum standard applicable in all countries. It is the responsibility of all

manufacturers and distributors to ensure that their conduct at every level conforms to the Code independent of any other measures taken for its implementation<sup>1</sup>.

The unilateral decision by Nestlé to divide the world according to risks is purely guided by business considerations and by what they are allowed to get away with.

In all countries, Nestlé and the baby food industry as a whole, attempts to undermine implementation of the Code and then cites the weaker measures as justification for violations. For example, in South Africa Nestlé advertised infant formula and follow-on formula in supermarkets with the shelf talkers shown in BTR. When this was exposed by IBFAN, Nestlé excused the practice by saying that the industry-funded Advertising Standards Authority (ASA), had rejected a complaint under the voluntary advertising code. The complaint had been brought by Nestlé's competitors who, like IBFAN, found the strategy to be a violation of the International Code. By defending the strategy using the voluntary measures, Nestlé attempts to justify violations and drives down standards for all companies, who may now feel compelled to advertise in supermarkets as well.

National legislation existing in most so-called "lower risk" countries is weaker than the Code and Nestlé explicitly says it will follow these weaker measures rather than the Code. IBFAN holds companies to a minimum standard in all countries. Even if bottle-fed babies are unlikely to die in industrialized nations, they are more likely to get sick and land in hospital which can and should be avoided. Infants deserve to be protected in all countries.

IBFAN-ICDC observes that when it suits Nestlé, the company conveniently drops its low and high risks criteria and relies instead on food standards and customs that are not supported by competent and reliable scientific evidence. It is especially bad when Nestlé chooses to apply those standards and customs to other sovereign countries which have their own national laws or policies such as the case of Russia and Armenia or Kyrgyzstan. Or the debatable "custom" in Germany to give teas to babies from the 1<sup>st</sup> week of life.

Nestlé also continues to dispute the scope of the Code and dismisses many entries in BTR relating to follow-up formulas and complementary foods. IBFAN looks to the text of the Code, which is clearly not restricted to infant formula. It accepts the argument that UNICEF put to Nestlé's Chairman, Peter Brabeck-Letmathé, when he was Chief Executive Officer, in 1997: "Nestlé's limitation of the scope of the Code to infant formula is another matter of contention. The plain wording of Article 2 of the Code shows clearly that the term "breastmilk substitutes" can include "other milk products, foods and beverage" depending on how they are marketed." In the case of follow-up formula, the product is a breastmilk substitute in the light of the global public health recommendation on the optimal duration of breastfeeding<sup>2</sup> In the case of complementary foods, if the product is being marketed to babies below 6 months or represented as suitable for them during that period, it is a breastmilk substitute.

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<sup>1</sup> Article 11.3 of the International Code of Marketing of Breastmilk Substitutes

<sup>2</sup> According to WHA resolution 54.21 [2001] operative paragraph 2(4), infants should be exclusively breastfed for the first six months. Thereafter, infants should receive nutritionally adequate and complementary foods while breastfeeding continues for up to two years of age or beyond.

IBFAN's and UNICEF's interpretation is supported by the text of the Code as clarified and extended by subsequent World Health Assembly Resolutions.<sup>3</sup>

IBFAN-ICDC regrets that nowhere in the 77-page response is there any reference to those subsequent World Health Assembly resolutions even though in the past Nestlé had conceded<sup>4</sup> that the resolutions have the same status as the Code. By locking itself within the confines of the 1981 text of the Code, Nestlé attempts to justify many of its marketing practices as acceptable and valid.

IBFAN-ICDC also regrets the way Nestlé sidesteps allegations of violations of sovereign laws by claiming on-going discussions with national authorities like in the case of Botswana. It is worrisome that Nestlé thinks it is possible to “negotiate” on the law.

IBFAN-ICDC, of course, thinks it is laughable that a set of Nestlé instructions entreating its staff throughout to act contrary to clear provisions of a national law is explained away as a mere “draft”. It begs the question why the document was drafted so obviously wrong in the first place.

Even if a law or a directive is not to their liking, the company should comply with its provisions and not pretend to be ‘in talks’ or claim ignorance as in the case of Papua New Guinea, or that a particular material has been discontinued as in the case of Zambia.

Finally, it is noteworthy that while Nestlé highlights that it has an Ombudsman for investigating complaints, the Ombudsman refuses to accept these from external parties and in the last company report on the issue in 2009 stated there had been just one complaint from a staff member. This demonstrates that the Ombudsman system is failing: either staff have been misinformed about the provisions of the Code and Resolutions or fear possible repercussions from reporting management for violations.

As recently as April 2011, former UNICEF head Ann Veneman, who was appointed to the Nestlé Board despite international protests, acknowledged that Nestlé is not fully complying with the Code and pledged to take up the fight from within. UNICEF has in the meantime also confirmed that Nestlé violates the Code.

IBFAN groups are engaged in on-going correspondence with Nestlé over policy issues and specific cases of violations and find that most of the time Nestlé is dismissive of reports. It only makes changes when compelled to do so by legislation or pressure from campaigns such as the Nestlé boycott. In the case of BTR, Nestlé suggest remedial action is required for just 3% of the 130 violations it has counted, meaning it is its intention to continue with 97% of the examples highlighted.

Time, perhaps, for Nestlé to own up to more than just 3% of “areas of concern”. Call a spade a spade; following reports in the BTR, Nestlé is a Code violator, a serious one.

IBFAN-ICDC

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<sup>3</sup>The International Code of Marketing of Breastmilk Substitutes: frequently asked questions, WHO 2008

<sup>4</sup> Infant Feeding in the Developing World, Nestlé S.A. 2001