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<b>Case ID: 23</b>		<b>Decision</b>	
<b>To</b>	EU Pledge Secretariat	<b>Date of mtg</b>	26 March 2021
<b>From</b>	EASA Secretariat	<b>Date sent</b>	2 April 2021

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### **Ruling – McDonald’s**

#### **Description**

McDonald’s Chicken Avocado online game promoting a new McDonald’s burger

#### **Complaint**

The complaint concerns a very simple and intuitive advergaming to promote the new McDonald’s Chicken and Avocado Burger which requires the user to employ simple swiping actions on the screen to direct the Avocado character to join the Chicken character on a basic grid pattern with some obstacles to avoid (rainbows and McDonald’s arches which block the avocado and yellow buttons which remove such obstacles). The score is calculated according to how quickly you achieve this ‘reunion’ and the number of movements required. There are three levels (Beginner, Intermediate, Expert) with sub-levels for each of them. There are, according to an Instagram story promoting the game, over 60 levels in total. The user is also encouraged to share their score with the hashtag #chickenavocado to be eligible to be entered into a prize draw. Whilst you have to be 18 years old to actually enter the prize draw, there is nothing to stop young children from playing the game itself (and then asking a parent/guardian to enter the competition). According to the complainant, the animated brand characters themselves are likely to be very appealing to young children, with child-like design similar to cartoons which would be popular with this demographic. Between levels there are interludes of the Chicken and Avocado cartoon characters interacting in an amusing and jokey manner which would be attractive to children. The characters encourage the user throughout the game to continue ‘Tu progresses!’, ‘Cours, Avocado, Cours!’ Moreover, the use of the informal “tu” clearly demonstrates that this game is intended for a young child audience, which the text itself confirms (the text "tu progresses" would not be used as such if the audience was primarily a teenage audience). The game’s design uses bright and attractive colours, likely to be appealing to children. Animated images of the Chicken Avocado Burger are included in the website page in addition to a photo of the burger. The advergaming [website](#) was promoted on both Facebook and Instagram stories of McDonald’s France from the 4th of February.

### Advertiser's response

The advertiser answered that the product is not intended for children and that it is targeted towards adult consumers and featured exclusively on their adult menu. According to the advertiser, online gaming is increasingly popular amongst adults in France. Colourful and regressive design for products aimed at adults is in line with current digital trends, and is upheld by similarly designed games targeted towards adult users. Moreover, according to the advertiser, the use of “tu” in French is in line with common social media marketing practices, which is aimed at creating a more personal experience for the audience. The advertiser emphasised that the game has been promoted on platforms that are targeted to audiences over 15 years old and age-gated for 13 years and older.

### EU Pledge commitment

- *EU Pledge members commit either to:*
  - *Only advertise products to children under the age of 12 years that meet the common EU Pledge Nutrition Criteria; or*
  - *Not to advertise their products at all to children under the age of 12 years.*
- *The above policy covers marketing communications for food and beverage products that are primarily directed to children under 12 in covered media.*
- *Marketing communications means paid advertising or commercial sales messages for food and beverage products, including marketing communications that use licensed characters, celebrities, influencers, and movie tie-ins primarily appealing to children under 12. Company-owned, brand equity characters are not covered by the policy.*
- *Primarily directed to children under 12 means advertising in measured media where 35% or more of the audience is under 12 years of age. Where adequate data are unavailable, companies will consider other factors as appropriate, which may include the overall impression of the advertising, actions taken to restrict child access and the target demographic based on the company's media plan*
- *Covered media means the following vehicles: TV, radio, print, cinema, online (including company-owned websites and company-owned social media profiles), DVD/CD-ROM, direct marketing, product placement, interactive games, outdoor marketing, mobile and SMS marketing. Packaging, in-store and point of sale as well as forms of marketing communications which are not under the direct control of the brand owner, such as user-generated content, are not covered by this policy.*

### **Decision**

The McDonald's Chicken Avocado burger is not compliant with the EU Pledge nutrition criteria, therefore the advertisements and the game surrounding the promotion of the food product must not be directed or appealing primarily to children under 12. Since online games fall under the category of non-measured media, the Panel considered the overall impression of the game.

Considering its very simple rules, level of difficulty adapted for children, the bright colours, the sound-effects and cartoon-like characters, the panel deemed the game design to be particularly appealing to children. Moreover, the panel noted that the use of "tu" in French (informal second person singular) further contributes to the appeal to children, in contrast with the pronoun "vous" (formal second person singular, or plural), which would have instead been used if the game was meant to target an adult audience. Also, the game is easily accessible by everyone who visits the website where the online game is offered and there is no age-screening or parental consent mechanism aimed at verifying the age of visitors before starting the game. Taking those elements together, the Panel thus found the game to be so framed as to appeal primarily to children under 12 years of age.

The Panel took note of the fact that the game draws attention to a contest for which participants are required to be 18 years or older to take part. Participants can also share their results on Facebook, which has a minimum users' age of 13 years or older. However, it considered this as not sufficient by itself to comply with the commitment if the marketing communications are clearly designed to appeal primarily to children under 12.

Having taken all of the above evidence and information into account, the Panel judged that the McDonald's Chicken Avocado online game is appealing primarily to children under the age of 12, and thus in breach of the EU Pledge commitment.

**Panel decision: complaint upheld**

Case ID: 23

Appeal

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To	EU Pledge Secretariat	Date of mtg	07 May 2021
From	EASA Secretariat	Date sent	21 May 2021

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## Ruling – McDonald's

### Advertiser's appeal

McDonald's appeals the Panel's decision on its McDonald's Chicken Avocado online game as the Panel appears to not have considered all three factors that play a role in determining if an advertisement is **primarily** directed to or appealing to children 12 and under, and has not taken into account McDonald's target demographic and environmental evidence of the adult gaming space that currently exists in France. When evaluating unmeasured media, the EU Pledge is meant to look at (1) the overall impression of the advertising, (2) actions taken to restrict child access and (3) the target demographic based on the company's media plan. Further, we believe the focus must be on the word **primarily** appealing, as the standard is higher than just appealing to children.

1. Overall Impression of the McDonald's Chicken Avocado Game
  - a. Although the game uses bright colours, it is our opinion that the Panel did not demonstrate that the specific animation used is **primarily appealing to young children**.
    - i. According to the EU Pledge Implementation Guidance, when evaluating animation and sound effects, the focus is on if it is "**primarily appealing to young children**", recognizing that not all animation is designed for young children and specifically calling out young children.
    - ii. We believe the standard is on **primarily**, and it is not just about if a child may find the colours attractive in addition to adults, but that the animation would be seen as significantly more appealing to children 12 and under than the intended older audience.
    - iii. Here, as McDonald's previously attempted to demonstrate in our evidence to the Panel, the animation is in line with what is used across French marketing and in the game space that targets adults.
  - b. The use of "tu" is regularly used in French advertisements and social media communications to address an adult audience and is the intended target demographic of the advertisement. It is common for "tu" to be used amongst adults who have an informal relationship, and frequent use in marketing communications is intended to create an informal feeling and relationship with the adult audiences. The Panel's perspective that "vous" would be definitively used if it was targeted to adults is not consistent with the evidence presented of what is commonly understood by consumers in advertisements.
2. Actions to restrict child access
  - a. The Chicken Avocado online contest requires participants to be 18 years or older to participate as made clear in its terms of service.

- b. The Chicken Avocado online game was promoted on platforms who restrict against users younger than 13.
  
3. The target demographic based on the company's media plan
  - a. McDonald's target demographic for the Chicken Avocado game itself and campaign surrounding the game, was targeted at individuals 18 years and older.
  - b. To further clarify our evidence submitted to the Panel, we've attached as Annex 1, paid diffusion audience data that demonstrates efforts made to ensure paid audiences that can be measured are over 13 years of age. In addition, the amount of audience that is unknown or unidentified is at thresholds well below the 35% audience threshold used for TV – i.e., 10% for Snapchat and 3% for Facebook.
  - c. McDonald's actions demonstrate that, without a doubt, the intended and actual target of the Chicken Avocado online game and advertisements promoting the Chicken avocado game were adults.

In consideration of the three factors outlined above, and the standard of **primarily** appealing of children, it is our opinion that the Panel's decision to uphold the complaint should be reconsidered.

#### **Grounds for appeal**

*An appeal can be assessed to be admissible considering*

- *additional evidence is available, with a good reason given why it was not provided earlier (such as programmatic which makes it hard to capture a copy of the ad or a research which was not completed at the time of complaint showing the product is in fact compliant)*
- *evidence of a substantial flaw of procedure, and/or*
- *evidence of a substantial flaw of adjudication.*

*The appeal must be made on reasonable grounds and not used as a mean to systematically challenge the decisions achieved by the original Panel.*

### Decision

The Appeal Panel first judged the admissibility of the appeal. As per the EU Pledge commitment, either party can file an appeal of the decision of the First Instance Panel on only three specific grounds. The Appeal Panel may consider an appeal admissible if the appellant provides additional evidence with an acceptable reason as to why it was not provided earlier, or if the appellant provides evidence of a substantial flaw of procedure, or finally if the appellant provides evidence of a substantial flaw of adjudication.

Based on the text and evidence provided by the company, the Appeal Panel judged that the advertiser's appeal is admissible considering the advertiser's evidence of a substantial flaw of adjudication. Consequently, the Appeal Panel reassessed case 23 for the McDonald's Chicken Avocado online advergence.

Regarding the creative execution of the advergence, the Appeal Panel noted that the game contains very simple rules and a level of difficulty adapted for children. It also noted that it , contains bright and vivid colours and the sound effects are reminiscent of cartoon-like characters. Although brand characters as such are outside the scope of the EU Pledge commitment, childish characters displayed in an advertisement contribute de facto to the overall impression conveyed by the communication. Such elements may therefore be considered by the Panel when assessing whether the advertisement primarily attracts the attention of children 12 years or younger, in particular so as they are likely to notice the similarity with other cartoon characters from animated films that are particularly popular with a very young demographic. In addition, the graphic 3D animation of the game is produced with vivid colours and the scenes are brightly lit and set amongst the clouds. Although colourful animations are not an advertising method used only for targeting children, experts deemed that, in this case, the graphic composition of the advergence was substantially childish and contained sufficient elements to render it appealing primarily to children under 12.

The Appeal Panel also discussed the use of the informal French pronoun "tu" as being generally used to address children in daily life as well as in marketing communications. The advertiser reiterated that it is *"common for "tu" to be used amongst adults who have an informal relationship, and frequent use in marketing communications is intended to create an informal feeling and relationship with the adult audiences"*. Whilst experts agreed that the informal pronoun can also similarly be used by close friends of all ages, its use in marketing communications is based on a conscious decision by the advertiser to more closely engage with a particular target audience. The choice of pronoun in the French language can widen or reduce the distance between individuals engaged in a conversation. Using the pronoun "tu" brings an informal tone to the interaction with the ad and addresses the consumer in a friendly and casual way. This could be problematic when the accompanying advert is particularly child-oriented and contains childish elements such as bright colours, cartoon-like graphic texture, animations featuring child-oriented characters, and a game that is accessible to young children. As such, the Appeal Panel did not deem that the use of "tu" was on its own a sine qua non factor rendering automatically the advergence in breach of the commitment. Rather, it contributed in the assessment of the Appeal Panel that, combined with the creative execution and sound effects, the accompanying text of the game would be appealing more to children under 12 years old than to any other audience.

The Appeal Panel took note of the fact that the game draws attention to a contest for which participants are required to be 18 years or older to take part. They also noted that participants can share their results on Facebook, which has a minimum users' age of 13 years or older. However, as per

the EU Pledge commitment, the presence of an age-screening mechanism is not sufficient on its own to guarantee compliance. The game itself is easily accessible by everyone who visits the website where the online game is offered and there is no age-screening or parental consent mechanism aimed at verifying the age of visitors before starting the game. This element further contributes to the Appeal Panel's assessment that the advergame is appealing primarily to a very young audience.

The Panel noted that the company's media plan was not to target a demographic composed mostly of children under 12. Nonetheless, experts still found that, based on its creative execution, sound effects, the game's simplicity, and the use of the informal French pronoun, the McDonald's Chicken Avocado online game is appealing primarily to children under the age of 12, and is thus in breach of the EU Pledge commitment.

The Appeal Panel found the appeal lodged by the advertiser to be admissible on grounds of a substantial flaw of adjudication.

The Appeal Panel did not overturn the initial judgement of the First Instance Panel. The complaint remains upheld.

**Appeal Panel decision: complaint upheld**