

Case ID: 24		Decision	
To	EU Pledge Secretariat	Date of mtg	26 March 2021
From	EASA Secretariat	Date sent	13 April 2021

Ruling – Ferrero

Description

Ferrero Kinder Surprise Facebook post in France

Complaint

The Kinder France Facebook [page](#) featured a link to the Kinder website which was posted the 29th of January for a promotion of a free application that can be downloaded on smartphone and tablet. In this application, children can play games with animals including the “Natoons” which are animal character toys in Kinder Surprise products, which you can only acquire through the purchase of the Kinder Surprise products. They can also unlock some surprises thanks to a QR code by following the instructions paper that you can find inside a Kinder product. The name ‘Natoons’, which itself sounds like ‘cartoons’, is very childish.

According to the complainant, the creative execution of the advert with animal characters is very appealing to young children with the bright colours and invitation to discover more on the game app ‘Applaydu’. The application claims to be aimed at families as it is written on the Facebook page “Discover the savanna animals with your family from home” but the Kinder website clearly identifies children from 4 to 9 years old.

Moreover, “surprises” in the games can be unlocked only if you buy a Kinder Surprise product, which according to the complainant can be a powerful and influential allure for children. The Kinder Surprise product is visible in the corner of the video advert throughout the ad.

Advertiser's response

Ferrero replied that all of its brands globally do not communicate directly to children and that it has always believed in the crucial role played by parents in educating their children to a balanced and varied diet and an active lifestyle. Therefore, Ferrero claims that advertising and marketing communications concerning their food products are directed primarily to adults who make the household purchasing decisions and to young people 12 years and older, in terms of content, as well as of media purchasing.

According to Ferrero, Applaydu is an immersive experience designed by a team of experts as a fun edutainment app for families with children aged 4 to 9 years old to use together. They claim that the

app has been created following the highest standards and includes a series of safeguards specifically developed to protect its youngest users: that parental permission is required when first setting up the app and parents have access to a 'dashboard' that allows them to always control their child development and progress, the app does not include any references to Kinder or its branding (nor mentions words that could create a direct connection with products e.g. no 'toys', no 'surprises', etc.), it is totally free from advertising and from in app purchases. The app is also free to download and does not require any purchase of products to be enjoyed.

They have also pinpointed that the Facebook post mentioned in the complaint has been designed and placed to target adults and that they have taken all the available measures to ensure compliance with their commitment:

- The wording of the accompanying post - '*découvrez les animaux de la savane en famille*' and '*donnez vie aux surprises de vos enfants*' – but also the wording embedded into the visual creative is clearly directed at the adults.
- The link available in the post redirects users to the section of the Kinder website dedicated to Applaydu. A section that clearly address the adults both in terms of language and visuals.
- It was placed in a 'age-gated' environment, as Facebook requires users to be over 13 years old to register on the platform. Ferrero also stressed that the demographic data of their Facebook profile shows that more than 98% of the followers is above 18 years of age.

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 advertised product 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 company-owned social media profiles, interactive games and apps fall under the non-measured media category where adequate data are unavailable, the Panel assessed the overall creative execution of the post and the Appplaydu application.

Ferrero's Facebook post displays at the forefront a brightly coloured animal toy which was deemed by the Panel to be particularly appealing to children. The panel also considered that the online application to which the post features an online game is clearly targeted towards children well under 12 years old.

However, the Panel deemed that the text of the Facebook post is clearly addressing parents, inviting them to use the app and play the online game alongside their children. The Panel considered that the phrasing is not targeted towards children, as the use of the French pronoun "vous" (formal second person singular) over the informal "tu" indicates that the post is intended to communicate to adults in their role as parents, rather than to directly invite children.

Furthermore, the Panel considered the fact that an age-screening mechanism pops up before granting access to the application. They also noted that the Facebook platform itself also contains an age-screening mechanism barring anyone under 13 years old from registering on the platform. These elements were assessed bearing in mind that the presence of an age-screening mechanism is not sufficient by itself for compliance but should be considered together with the other criteria and factors.

Having taken the above evidence and information into account, the Panel judged that the Ferrero Facebook post and the online Appplaydu game, as presented in this case, are not primarily directed to children under the age of 12, and therefore compliant with the EU Pledge commitment.

Panel decision: complaint not upheld

Case ID: 24

Appeal

To	EU Pledge Secretariat	Date of mtg	27 May 2021
From	EASA Secretariat	Date sent	28 July 2021

Appeal ruling – Ferrero Kinder Surprise Facebook post in France

Complainant's appeal

In general, we would have quite some concerns that even when a marketing post is judged by the panel to be appealing to children under 12 years old (as was the case in all of the below examples), complaints are not upheld simply because a formal 'vous' has been used, creating a worrying loophole precedent. We believe that if this were to be accepted, food companies marketing their non-compliant products in a manner which is of clear appeal to children under 12 years old can be exempted merely by using 'vous' (or a similar formal/adult-addressing form), even when it is clear that this is not the most important, obvious or powerful element of the marketing.

Age-Screening

While it is acknowledged in the rulings that an 'age-screening mechanism' is not sufficient by itself for compliance', at the same time it was also considered and cited by the panel when rejecting the complaints. Age-screening mechanisms are well-recognised as unreliable tools to prevent children under 13 years old from using a social media platform as it is sufficient to simply input an older birthdate to be granted access. The WHO have highlighted the problem of a substantial proportion of underage children using these platforms. Moreover, Instagram itself has acknowledged that it is an issue as 'young people can lie about their date of birth'.

Appeal to Children

Whilst all of the complaints were judged by the panel to have child-appealing elements, (and would also clearly induce pester power), it seems that this has been overridden simply by the use of the 'vous' form instead of 'tu'. Indeed, the child-appealing elements are actually the central focus of the marketing post – pictures, videos or interactive games being much more powerful than textual information, not only in terms of capturing attention but also in generating an emotive response. We believe that a small linguistic change in a marketing post is not sufficient to outweigh the clear overall primary appeal of the posts towards children under the age of 12 years old, generated from the most important and powerful elements of the marketing (pictures, videos, interactive games)

The most eye-catching element of the post is not the text caption but is naturally the vividly-coloured cartoon video, the central focus of which is the Zebra toy (which can only be found in Kinder Surprise chocolate eggs – an element which incidentally would undoubtedly induce pester power for children towards their parents). The fact presented by the cartoon zebra 'Did you know...that zebras can run up to 80km/h?' is obviously of interest to younger children. We cannot agree that the Appplaydu app is presented in this case as not of interest to children under the age of 12 years old. Not only is the app described by Ferrero itself as appropriate for 4-9 year olds but this demographic targeting is corroborated by the childish nature of the video (cartoon appearance, inclusion of a cartoon wild animal presenting a fact which would be of interest to younger children, the presence of the zebra toy in the video). The use of 'vous' in the less eye-catching accompanying caption should not outweigh the overall appeal of the post, which is primarily for children under the age of 12 years old.

Advertiser's response

All Ferrero's brands globally do not communicate directly to children. Ferrero has always believed in the crucial role played by parents in educating their children to a balanced and varied diet and an active lifestyle. Therefore, advertising and marketing communications concerning our food products are directed primarily to adults who make the household purchasing decisions and to young people 12 years and older, in terms of content, as well as of media purchasing.

Applaydu is an immersive experience designed by a team of experts as a fun edutainment app for families with children aged 4 to 9 years old to use together. The app has been created following the highest standards and includes a series of safeguards specifically developed to protect its youngest users: parental permission is required when first setting up the app and parents have access to a 'dashboard' that allows them to always control their child development and progress, the app does not include any references to Kinder or its branding (nor mentions words that could create a direct connection with products e.g. no 'toys', no 'surprises', etc.), it is totally free from advertising and from in app purchases. The app is also free to download and does not require any purchase of our products to be enjoyed.

As for all the marketing communications concerning our food products, the Facebook post mentioned in the complaint has been designed and placed to target adults. We have taken all the available measures to ensure compliance with our commitment:

- The wording of the accompanying post - 'découvrez les animaux de la savane en famille' and 'donnez vie aux surprises de vos enfants' – but also the wording embedded into the visual creative is clearly directed at the adults.
- The link available in the post redirects users to the section of the Kinder website dedicated to Applaydu. A section that clearly address the adults both in terms of language and visuals.
- It was placed in a 'age-gated' environment as Facebook requires users to be over 13yo to register to the platform. Please also note that the demographic data of our Facebook profile shows that more than 98% of our followers is above 18 years of age.

Below you can find screenshot that substantiate the information provided above and here the link to the Applaydu section of our website <https://www.kinder.com/fr/fr/applaydu>.

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 lodged by the plaintiff. As per the EU Pledge commitment, either party can file an appeal of the decision of the First Instance Panel on one of three specific grounds. The Appeal Panel may consider an appeal admissible if the appellant provides additional evidence relating to the case 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 arguments provided by the plaintiff, the Appeal Panel judged that the appeal is admissible considering that the outlined arguments may contain sufficient elements pointing towards a possible substantial flaw of adjudication. Consequently, the Appeal Panel reassessed case 24 for the overall creative execution of the post.

The Appeal Panel considered the original decision's argument relating to the age-gating mechanism as correct and necessary, since the First Instance Panel is required to take into account all aspects of the advertisements. This includes all measures taken by the marketers to ensure that adverts published in non-measured media are not by default accessible or visible to children under 12, such as age-screening systems. However, this measure does not normally stand on its own for the advert's compliance, and must be considered in combination with all other factors.

The Appeal Panel first looked into the creative execution of the Facebook post. The bright, vivid colours of the zebra animal toy by itself does appeal to young children below the age of 12. However, the Appeal Panel noted that there is not much animation in the video, the zebra is quite static and there is no music or voiceover accompanying the post. Whilst it may be appealing to a certain extent to some children, the Appeal Panel did not find that it would appeal primarily to this demographic based only on these elements. The trivia about the zebra's speed is something of a broader interest than just to children younger than 12 years old.

Moreover, the Appeal Panel also took into account the language accompanying the post, which is clearly targeting parents. This is one of the factors taken into account before taking a decision for this case, but not the only one. Similarly to the First Instance Panel, the Appeal Panel has considered all aspects of the ad, ranging from its placement to the creative execution, from the tone of the language used to the participants' age. There is not any one component in the assessment made by both Panels that is a major decisive factor in concluding that the ad is appealing primarily to under-12-year-olds. All elements are assessed individually and then evaluated holistically to judge whether the advert would likely be more appealing to children under 12 than to any other age-group.

Based on the arguments and rationale outlined above, the Appeal Panel does not overturn the original decision. The complaint remains not upheld and the Ferrero Kinder Surprise Facebook post is compliant with the EU Pledge commitment.

Decision regarding the appeal: admissible.

Decision regarding the complaint: not upheld.