

Case ID: 27

Decision

To	EU Pledge Secretariat	Date of mtg	9 April 2021
From	EASA Secretariat	Date sent	29 April 2021

First instance ruling – Nestlé

Description: Nesquik Instagram Post

Complaint

Nesquik Portugal posted an Instagram video on the 15th of February advertising their collaboration with Portuguese arts and crafts personality, Sofia Cotrim (33.3K Instagram followers). The video (by the 22nd of February) had received 18,400 views. Sofia Cotrim’s Facebook account, where this collaboration was also promoted, has almost 50,000 followers.

The caption of the post reads: ‘Dia 16 de Fevereiro, pelas 16h, temos uma surpresa FUNtástica para todos aí em casa! Reúnam os materiais necessários e assistam ao live na página de @sofiacotrim_mundo! Contamos convosco? 🍷’ (In English: On the 16th of February, at 4pm, we have a FUNtastic surprise for everyone there at home! Gather the necessary materials and watch the live on the @sofiacotrim_mundo page! Do we count on you? 🍷).

In the short video clip which advertises the live arts and crafts for children broadcast by Sofia Cotrim, viewers are informed about the ‘materials you must have’ in advance of the broadcast which, aside from general arts and crafts materials (e.g. sellotape, an empty egg carton) includes three types of (empty) Nestle products: 2 cartons of Nesquik All Natural Chocolate Milk, 1 400g tin of Nestle chocolate powder and 1 tin of Nestle condensed milk.

A post on Sofia Cotrim’s own Instagram shows that this was a marketing event paid for by Nestle: ‘#parceria @nesquikportugal’.

The use of a personality who regularly posts content for children (many of her recent online events listed on her website are child-oriented) as well as the fact that Sofia Cotrim’s own website lists the Nesquik event as intended for 4-12 year olds, demonstrates that this has clearly targeted young children under 12.

The fact that event participation would require at least three different types of Nestle products (chocolate milk, powder and condensed milk) to be purchased and then empty (encouraging buying and/or consumption), combined with the promotion of a simple and engaging activity (obviously designed for young children) with a strong emphasis on ‘fun’ (‘temos uma surpresa FUNtastica’) further demonstrates the clear attempts to make this marketing example very attractive to young children.

Advertiser's response

It was never our intention to target children below the age of 12 with these NESQUIK publications. Our communication target group for NESQUIK are adults, parents with kids, as you can understand by the facts bellow:

1. Sofia Cotrim is a well-known personality in Portugal with a TV show where she performs home design arts and crafts
2. Nestlé Portugal has commissioned Sofia Cotrim the organization of an arts and crafts activity to involve parents and their children
3. Such activity requires the collection of general arts and crafts materials as well as empty boxes of Nestle products
4. Traffic in the last 30 days in Sofia Cotrim's IG page shows that 99,1% of the users are above 18 years old and that 91,3% of users have ages between 18 and 54 years old
5. Nestlé Portugal NESQUIK Studios IG page had a post promoting the arts and crafts activity
6. Traffic in the last 30 days in Nestlé Portugal NESQUIK Studios IG shows that 98,3% of the users are above 18 years old and that 96,4% of users have ages between 18 and 54 years old
7. Instagram, like other social media platforms, has an age gating policy at 13, complying with the US Children's Online Privacy Protection Rule ("COPPA"). As per this rule, children aged < 13 cannot have a profile on this platform.

In summary:

- a. Sofia Cotrim's IG audience is mainly composed of adults
- b. Sofia Cotrim's usual activities both in her IG page, as well as on her TV show, are addressed to adults
- c. Her IG page aims to communicate to parents – 25-54 years old
- d. Suggesting them arts and crafts activities, some of them with their children
- e. As per IG rules, children aged < 13 cannot have a profile on this platform
- f. The Nestlé Portugal NESQUIK Studios IG page aims to communicate to parents – 25-54 years old
- g. Suggesting them activities with their children
- h. As per IG rules, children aged < 13 cannot have a profile on this platform
- i. Because both Sofia Cotrim's IG communication and Nestlé Portugal NESQUIK Studios IG communication is addressed to adults such communication doesn't fall under the EU Pledge rules

In the hypothesis that the above conclusions are not true and that the audience for the above mentioned communications would have more than 35% of children under the age of 12 (EU Pledge threshold) or 25% of children under the age of 12 (Nestlé Marketing to Children Policy threshold):

1. NESQUIK is a product that meets EU pledge nutritional criteria.
2. NESQUIK is rated B as consumed with milk on Nutri-Score and is therefore deemed healthy for children.
3. Any arts & crafts activity requires materials.
4. Nestlé Tradicional is sweet condensed milk. It does not meet the EU pledge nutritional criteria.
5. In Portugal sweet condensed milk is considered an ingredient and is not consumed as sold.
6. Nestlé Tradicional is not communicated to children.

Final conclusions and action plan:

- a. In face of 1 and 2 above communicating Nesquik to children under the age of 12 would be compliant with EU Pledge rules.
- b. In face of 3, we believe that suggesting as craft material any kind of product packaging is not enough to stimulate its consumption. In fact, what is beyond such type of arts and crafts activities it to stimulate children (and parents) to recycle, creating fun family moments in a period where families are confined at home due to severe movement restrictions due to the COVID-19 pandemic.
- c. In face of 4 and 5 above we also consider that the suggestion of an empty package of sweet condensed milk, a product that is not to be consumed by children, is not a stimulus to its consumption.
- d. Nestlé Portugal strictly adheres to EU Pledge rules, to the Portuguese Law on Marketing to Children, as well as to Nestlé Marketing Communication to Children Policy, which imposes stricter audience criteria than the EU Pledge
- e. The activities mentioned above, as well as its communication, are compliant with the Portuguese Law, the EU Pledge and the Nestlé Marketing Communication to Children Policy

Nevertheless, we already developed and published a new version without the condensed milk can to be more in line with the complainant's concerns.

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 case was brought before the Panel of experts as one of the products appearing in the post, namely the condensed milk, is not compliant with the EU Pledge nutrition criteria. The classification of products as compliant or not compliant with the nutritional criteria rests with the EU Pledge secretariat which informs the Panel whether a case is within remit or not.

The appearance of one non-compliant product in the post means that marketing communications surrounding the promotion of the food product must not be directed or be appealing primarily to children under 12 years of age. Creatives published by company-recognised influencers on their own feed paid-for by the brands are considered as non-measured media. Therefore, the Panel assessed the overall creative execution of the post appearing on the influencer's profile.

The panel has noted that the post concerned a craft activity mainly designed for children younger than 12. The language used in the post is targeting parents, inviting them to enjoy the activity together with the children. The use of "Contamos convosco" (Do we count on you?) is directed at the whole family, while the verb tense ("deve") used in the sentence "Materiais que deve ter" (materials you must have) indicates that the text addresses adults and not children, as otherwise the text would have said "Materiais que debes ter". The Panel considered that the influencer profile overall seems to be addressed to parents, in order to construct crafts together with their children. Additionally, the experts noted that the social media platform contains an age-gating mechanism barring anyone under 13 years old from creating a profile, even though the presence of an age-screening mechanism is not sufficient by itself for compliance.

Based on the above observations, the Panel deemed that the post is not primarily appealing to children under the age of 12 and therefore judged that the post is not in breach of the EU Pledge commitment, and the complaint is not upheld.

Panel decision: complaint not upheld

Case ID: 27

Appeal

To	EU Pledge Secretariat	Date of mtg	11 June 2021
From	EASA Secretariat	Date sent	28 July 2021

Appeal ruling – Nestlé

Complainant's appeal

Children's Rights

It is now widely accepted that child nutrition, and the regulation of food marketing more specifically, has become a major public health and children's rights issue. The latest EU Children's Rights Strategy that was published in March is very explicit in this regard. It refers to the revised version of the Audiovisual Media Services Directive (2018) which stresses the importance of ensuring that self- and co-regulatory codes of conduct 'effectively reduce the exposure of children' to audiovisual communications for the marketing of unhealthy food.

Business actors, including the food and advertising industries, have a responsibility to ensure that human rights, and children's rights more specifically, are duly respected when conducting their marketing activities. The marketing of unhealthy food negatively affects the right of children to the enjoyment of the highest attainable standard of health, their right to adequate nutritious food, their right to privacy and their right to be free from exploitation.

As highlighted in the UN Committee on the Rights of the Child's recent General Comment No. 25 on children's rights in relation to the digital environment (also published in March 2021), because the business sector affects children's rights directly and indirectly in the provision of its services and products relating to the digital environment they 'should respect children's rights and prevent and remedy abuse of their rights in relation to the digital environment.' Moreover, States parties should make the best interests of the child a primary consideration when regulating advertising and marketing addressed to and accessible to children. It is clear that, by failing to protect children from actual exposure to unhealthy food marketing, business actors do not meet their human rights responsibilities and in particular are failing to respect a variety of children's rights and uphold their best interests as a primary consideration.

Age-Screening

While it is acknowledged in the ruling 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 complaint. Indeed, the Panel states that 'the social media platform contains an age-gating mechanism barring anyone under 13 years old from creating a profile'. However, the mere presence of an age-gating mechanism does not in itself 'bar' children under the age of 13 from creating profiles. 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

While the Panel decision states that ‘the overall creative execution of the post’ has been assessed, the reasons justifying this decision mainly focus instead on the use of tenses in the textual captions and merely ‘notes’ that the post concerned a craft activity mainly designed for children younger than 12. However, the actual tone of the textual caption would in any case be considered to be addressed to children – emphasizing the ‘FUNtastic surprise’ that Nestle have prepared for viewers which is clearly not addressed to adults or parents. The question ‘Contamos convosco?’ should be considered in the context of the tone of the post in which it appears and therefore does not necessarily mean ‘the whole family’, as the Panel says, but rather children (plural).

Moreover, the other textual caption cited by the Panel ‘Materiais que deve ter’ is just one marginal element of the post. Unfortunately, other more attention-grabbing elements of this marketing example, or indeed the overall effect of the post, have not been taken into account or given as much weight as the tense used as mentioned above in assessing their contribution to the creative execution. Indeed, the child-appealing elements (and not the textual captions) are actually the central focus and most powerful elements of the marketing post: – a video to encourage children to tune into a craft-making activity (requiring the purchase of multiple Nestle products including one which was non-compliant with the Pledge), the intended audience for the video and crafting activity (as the creator has described herself it is intended for children aged 4-12 years old), as well as the emphasis on ‘fun’ and ‘surprises’. The creator’s own posts after the event demonstrate furthermore how this post was obviously intended for children with the end result of the craft being a very rudimentary robot, clearly of a skill level for young children.

It seems instead that all of the above child-appealing elements have been overridden simply by the use of a formal tense instead of an informal tense in the textual caption of the Instagram post which is clearly less attention-grabbing and powerful than the central aspects of this marketing example – the video.

Advertiser's response

First of all it was never our intention to target children below the age of 12 with these NESQUIK publications. Our communication target group for NESQUIK are adults, parents with kids, as you can understand by the facts below:

A. Nesquik Algebra Instagram Story

1. Traffic in the last 30 days in Nestlé Portugal NESQUIK Studios IG shows that 98,3% of the users are above 18 years old and that 96,4% of users have ages between 18 and 54 years old
2. Instagram, like other social media platforms, has an age gating policy at 13, complying with the US Children's Online Privacy Protection Rule ("COPPA").
3. The challenge presented implies equations with several unknown factors which is in the math curriculum of teens in secondary schools, aged 13 and above;

In summary:

- a) Nestlé Portugal NESQUIK Studios IG audience is mainly composed of adults;
- b) The Nestlé Portugal NESQUIK Studios IG page aims to communicate to parents – 25-54 years old
- c) Suggesting them activities with their children
- d) As per IG rules, children aged < 13 cannot have a profile on this platform;
- e) The challenge presented is complex and it is not solvable by children <12 years old without the support of their parents
- f) Because Nestlé Portugal NESQUIK Studios IG communication is addressed to adults such communication doesn't fall under the EU Pledge rules

B. Nesquik Instagram Post promoting Paid Partnership with Arts and Crafts Personality's Instagram Live

1. Sofia Cotrim is a well-known personality in Portugal with a TV show where she performs home design arts and crafts
2. Nestlé Portugal has commissioned Sofia Cotrim the organization of an arts and crafts activity to involve parents and their children
3. Such activity requires the collection of general arts and crafts materials as well as empty boxes of Nestle products
4. Traffic in the last 30 days in Sofia Cotrim's IG page shows that 99,1% of the users are above 18 years old and that 91,3% of users have ages between 18 and 54 years old
5. Nestlé Portugal NESQUIK Studios IG page had a post promoting the arts and crafts activity
6. Traffic in the last 30 days in Nestlé Portugal NESQUIK Studios IG shows that 98,3% of the users are above 18 years old and that 96,4% of users have ages between 18 and 54 years old
7. Instagram, like other social media platforms, has an age gating policy at 13, complying with the US Children's Online Privacy Protection Rule ("COPPA"). As per this rule, children aged < 13 cannot have a profile on this platform.

In summary:

- a) Sofia Cotrim's IG audience is mainly composed of adults
- b) Sofia Cotrim's usual activities both in her IG page, as well as on her TV show, are addressed to adults
- c) Her IG page aims to communicate to parents – 25-54 years old

- d) Suggesting them arts and crafts activities, some of them with their children
- e) As per IG rules, children aged < 13 cannot have a profile on this platform;
- f) The Nestlé Portugal NESQUIK Studios IG page aims to communicate to parents – 25-54 years old
- g) Suggesting them activities with their children
- h) As per IG rules, children aged < 13 cannot have a profile on this platform;
- i) Because both Sofia Cotrim's IG communication and Nestlé Portugal NESQUIK Studios IG communication is addressed to adults such communication doesn't fall under the EU Pledge rules

In the hypothesis that the above conclusions are not true and that the audience for the above mentioned communications would have more than 35% of children under the age of 12 (EU Pledge threshold) or 25% of children under the age of 12 (Nestlé Marketing to Children Policy threshold):

1. NESQUIK is a product that meets EU pledge nutritional criteria;
2. NESQUIK is rated B as consumed with milk on Nutri-Score and is therefore deemed healthy for children;
3. Any arts & crafts activity requires materials.
4. Nestlé Tradicional is sweet condensed milk. It does not meet the EU pledge nutritional criteria.
5. In Portugal sweet condensed milk is considered an ingredient and is not consumed as sold.
6. Nestlé Tradicional is not communicated to children.

Final conclusions and action plan:

- a) In face of 1 and 2 above communicating Nesquik to children under the age of 12 would be compliant with EU Pledge rules;
- b) In face of 3, we believe that suggesting as craft material any kind of product packaging is not enough to stimulate its consumption. In fact, what is beyond such type of arts and crafts activities it to stimulate children (and parents) to recycle, creating fun family moments in a period where families are confined at home due to severe movement restrictions due to the COVID-19 pandemic.
- c) In face of 4 and 5 above we also consider that the suggestion of an empty package of sweet condensed milk, a product that is not to be consumed by children, is not a stimulus to its consumption.
- d) Nestlé Portugal strictly adheres to EU Pledge rules, to the Portuguese Law on Marketing to Children, as well as to Nestlé Marketing Communication to Children Policy, which imposes stricter audience criteria than the EU Pledge
- e) The activities mentioned above, as well as its communication, are compliant with the Portuguese Law, the EU Pledge and the Nestlé Marketing Communication to Children Policy

Nevertheless, we already developed and published a new version without the condensed milk can to be more in line with your concerns.

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.

The Appeal Panel noted the complainant's general comments in their preamble to their appeal. They also noted however that the First Instance and Appeal Panels were required to assess compliance of advertising solely against the EU Pledge commitments.

Based on the arguments provided by the plaintiff in the second part of the text, 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 27 for the Nestlé Nesquik Instagram video.

The Appeal Panel noted that the Instagram video contains one product that is non-compliant with the EU Pledge nutrition criteria. Regardless of the inclusion of mostly compliant products and of the nutrition score of the products when combined, if the advertisement features a product that is non-compliant with the nutrition criteria as set out in the EU Pledge, the ad is within remit of the Panel. As the First Instance Panel rightfully outlined, creatives published by company-recognised influencers on their own feed paid-for by the brands are considered as non-measured media.

As a social media platform, Instagram contains an age-gating mechanism that prohibits anyone under the age of 13 from creating an account. This factor is not a *sine qua non* element in terms of compliance, as under the rules of the EU Pledge commitment, an age-gating mechanism cannot guarantee conformity on its own. The First Instance Panel considers all aspects of the advertisement, such as placement, the cultural and linguistic context, the creative execution, the licensed characters, games, animations, toys, the voice-over and music overlaid on the ad, and the general impression of the ad as a sum of all previous factors. When considering placement of the advert, the First Instance Panel was correct in assessing the age-gating mechanism as having a deterring effect on children from creating an account on the platform. Nonetheless, this factor cannot be considered as solely responsible for compliance, nor would it have been correct if the First Instance Panel ignored it. As such, the Appeal Panel reiterates the original argument, and finds that, whilst the social media platform bars anyone under the age of 13 from creating a profile, this factor must be taken into account with other aspects of the advertisement.

Regarding the creative execution of the Instagram video, the Appeal Panel noted that it contains a colour palette similar to the product's and one that is not particularly childish. It would not attract primarily the attention of children. The Appeal Panel also noted that the video displayed a craft activity mainly designed for children under 12 years old, as the plaintiff pointed out in their screenshots. However, an activity that is designed to be performed by children does not automatically mean that all advertisements for that activity are by definition aimed at them. In other words, the advertising campaign of this activity can still target a different audience and appeal to a distinct demographic all while the aim of the activity is to be enjoyed by children under 12. In fact, the Panel noted that the

video features both an adult and a child manipulating various objects. The inclusion of a child under 12 years old is not an element that renders all such advertising automatically primarily appealing to this demographic. The inclusion of an adult (the Portuguese influencer) in the video indicates that parental guidance is required during part of the activity, namely when cutting with scissors. Whilst this on its own does not automatically make it not appealing primarily to children under 12, it nonetheless implicitly states that the advert is aimed at parents, and the activity is to be enjoyed by children with their parents' guidance.

In addition, the Appeal Panel noted that the video also indicates the need for other household objects when engaging in the crafts activity. Children are unlikely to have such objects readily available and would likely have to consult their parents about accessing that material. This, combined with the use of scissors, confirms that parental guidance is necessary, and contributes to the argument that the ad is largely aimed at parents. The Appeal Panel also remarked that the non-compliant product of the condensed milk is, on its own, unlikely to be of any appeal to children. They would not find the product particularly interesting and parents would need to guide their children in combining multiple products to produce the final drink.

Furthermore, the Appeal Panel concurred with the First Instance decision that the text of the video and of the caption are largely targeting parents. The linguistic element is an important factor in any advertising campaign and the First Instance Panel took into consideration the local context, cultural particularities, and how the Portuguese audience would receive this advert. These factors are important when assessing the compliance of an advertisement, but the linguistic aspect on its own is not a *sine qua non* condition for compliance. As such, the text is mostly aimed at parents and invites them to try out these activities with their children. As the First Instance Panel stated, the use of “*deve*” instead of “*deves*” in the sentence “*Materiais que deve ter*” (Material that you must have) is indicative of the ad intending to target adults rather than children.

The Appeal Panel has, moreover, noted that there is no music in the background or any voice-over that would attract the attention of children. The animations are also not indicative of any appeal to this audience, as they are mostly displaying the necessary material to engage in the activity, the steps in the creation of the toy, and no active animation from any product displayed. In essence, the animations remains minimal with the main focus centred on the crafts activity.

Having considered all the above elements in its assessment of the advertisement's compliance with the EU Pledge commitment, the Appeal Panel did not find any one aspect of the ad as deeply characteristic of an ad that would be primarily appealing to children under 12 years old.

Based on the arguments and rationale outlined above, the Appeal Panel does not overturn the original decision of the First Instance Panel. The complaint remains not upheld and the advert is compliant with the EU Pledge commitment.

Decision regarding the appeal: admissible.

Decision regarding the complaint: not upheld.