

Case ID: 28

Decision

To	EU Pledge Secretariat	Date of mtg	9 April 2021
From	EASA Secretariat	Date sent	16 April 2021

Ruling – Ferrero

Description

Kinder Appplaydu Portugal

Complaint

The Kinder Portugal Instagram page posted in their ‘Instagram Stories’ on the 25th of February a promotion for a free application that can be downloaded on smartphone and tablet.

This Instagram ‘story’ shows an image of a Kinder Surprise egg and then the words ‘Discover a world of games in ‘Appplaydu’’. There then appear on screen 11 logos for some of the different elements which can be found in the game app ‘Appplaydu’. These elements include very childish themes, appealing to younger children such as animal sounds, simple swipe action games to find dinosaur bones or tossing ‘treasure’, easy hide and seek memory games as well as games with animals including the “Natoons” which are animal character toys in Kinder Surprise products. They can also unlock some surprises thanks to QR code and following the instructions paper that you can find inside a Kinder product.

The Instagram story then shows one of the miniature Natoon toys (collectible with the purchase of Kinder Surprise eggs) emerge from the chocolate egg to follow a vividly-coloured path through colourful rainbows. The Natoon is a flying unicorn. The bright appealing colours as well as the dynamic cartoon-like audiovisual elements and use of an imaginary creature would be very appealing to young children under 12. Moreover, a child’s toy (toy train) is shown in the background and children’s crayons are also shown towards the end of the post.

Even though the Instagram story says that the app can ‘stimulate your child’s imagination’ suggesting that a parent may be viewing the marketing promotion, the creative execution of the advert is clearly targeting young children, under the age of 12. Moreover, “surprises” in the games can be unlocked only if you buy a Kinder Surprise product, which can be a powerful and influential allure for young children.

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 their food products are directed primarily to adults who make the household purchasing decisions and to young people, in compliance with local requirements, 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 their products to be enjoyed (see last screenshots on app playability below).

As for all the marketing communications concerning Ferrero food products, the Instagram story mentioned in the complaint has been designed and placed to target adults. Ferrero claims to have taken all the available measures to ensure compliance with their commitment:

- The wording embedded in the story - "Descubram", "Suas surpresas", "Vossos filhos" – is clearly directed at the adults.
- The 'paid' reach of the story targeted 100% users over 25yo (65% between 25 and 34, 23% between 35 and 44 and 12% between 45 and 54).
- It was placed in a 'age-gated' environment as Instagram requires users to be over 13yo to register to the platform. Please also note that the demographic data of the Instagram profile shows that more than 98% of the organic 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 marketing communications surrounding the promotion of the food product must not be directed or be appealing primarily to children under 12 years of age. Company-owned social media profiles, interactive games and apps all fall under the non-measured media category, meaning that adequate audience metrics are unavailable, and therefore the Panel is presented with the task to assess the overall creative execution of the advertisements at hand – in this case an Instagram story for a Ferrero Kinder product, linked to an online game app called *Applaydu*.

The video story presents the product alongside 11 cartoon personalities that can be found in the *Applaydu* game application, together with a text inviting users to “discover a world of games” and inviting parents to “stimulate (their) child’s imagination”. The Panel deemed the wording to be targeting parents, inviting them clearly to play the game with their children (“Vossos filhos”).

The Panel also considered the fact that an age-screening mechanism pops up before granting access to the application, as well as the fact that the Instagram platform also contains an age-screening mechanism barring anyone under 13 years of age from registering on the platform. Even though the presence of an age-screening mechanism is not sufficient by itself for compliance, it was considered by the Panel together with the other criteria and factors.

Based on the overall creative execution and the above rationale, the Panel judged that the Instagram post for Kinder is compliant with the EU Pledge commitment.

Panel decision: complaint not upheld

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Decision

To EU Pledge Secretariat

From EASA Secretariat

Appeal Ruling – Ferrero Kinder Appplaydu Portugal

Complainant's Appeal

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. 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 the complaint clearly includes many child-appealing elements such as:

- Emphasis on games for young children in the Kinder app which the food company itself describes as designed for ages 4-9
- The childish themes of the games, including games which feature digitized versions of the toys which are only available with the purchase of a Kinder Surprise chocolate egg (a powerful spur for 'pester power'), as well as icons which clearly show very young children (in cartoon format),
- The chance to 'unlock' surprises with a QR code which is also only found in the Kinder Surprise app (again another impetus for 'pester power')
- The accompanying music is very simple and child-like,
- The cartoon narrative shown in the ad (of the 'Natoon' Kinder Surprise flying unicorn collectible toy) as well as its audiovisual elements, the presence of children's toys in the advert such as a toy train or colouring crayons,

unfortunately, none of these elements or indeed, the overall effect of the marketing example have been taken into account or assessed for their contribution to the creative execution in the adjudication decision. 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 story post. Indeed, the child-appealing elements are actually the central focus of the marketing post – videos, dynamic audiovisual elements/graphics and the promotion of interactive games (such as Appplaydu) being more powerful for children than select phrases using a formal tense, not only in terms of capturing attention but also in generating an emotive response. Moreover, there is not even a voice

over, so the adjudication is relying simply on the text which is clearly less attention-grabbing than the dynamic and fast-moving cartoon of the flying unicorn.

Leaving aside the citing of age-gating which is itself recognized in the panel decision as ‘not sufficient by itself for compliance’, we do not believe that the simple use of a formal tense or reference to ‘your children’ is 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 which we believe would be useful for the Panel to reconsider to take into account the overall creative execution of the post.

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, in compliance with local requirements, in terms of content, as well as of media purchasing.

Kinder Appplaydu Portugal

Appplaydu 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 (see last screenshots on app playability below).

As for all the marketing communications concerning our food products, the Instagram story 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 embedded in the story - “Descubram”, “Suas surpresas”, “Vossos filhos” – is clearly directed at the adults.
- The ‘paid’ reach of the story targeted 100% users over 25yo (65% between 25 and 34, 23% between 35 and 44 and 12% between 45 and 54).
- It was placed in a ‘age-gated’ environment as Instagram requires users to be over 13yo to register to the platform. Please also note that the demographic data of our Instagram profile shows that more than 98% of our organic followers is above 18 years of age.

You can find below the link to the Applaydu section of our website
<https://www.kinder.com/pt/pt/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 28 for the overall creative execution of the Instagram stories.

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 also took into account the language in the stories, which is clearly targeting parents.

The Appeal Panel looked into the creative execution of the Instagram story. The first part of the story (first three screenshots provided) appears to show the Kinder egg (the product) and the different personalities which can be used by someone who wishes to play the online Applaydu game. The second part of the story (last two screenshots provided) depicts a unicorn emerging from a chocolate egg to follow a vividly coloured path through colourful rainbows. The bright vivid colours of the toys and the background by themselves do appeal to young children below the age of 12. The Appeal Panel also considered that the story incorporated dynamic cartoon-like audiovisual elements rather than just presenting the product or the different personalities of the online game in a static way. The fact that toys become alive and move within such a colorful and childish environment makes the creative execution particularly appealing to children under 12.

The Appeal Panel has considered all aspects of the ad, ranging from its placement and the language used to the creative execution and weighted all these factors before reaching a decision. The Appeal Panel finds that there are sufficient elements to consider the second part of the story to be predominantly targeting children below the age of 12 regardless of certain mitigating factors such as the language used and the age-gating mechanism of the social media platform.

Based on the arguments and rationale outlined above, the Appeal Panel overturns the original decision of the First Instance Panel. The complaint is upheld, and the advert is in breach of the EU Pledge commitment.

Decision regarding the appeal: admissible.

Decision regarding the complaint: upheld.