

Case ID: 33		Decision	
To	EU Pledge Secretariat	Date of mtg	26 March 2021
From	EASA Secretariat	Date sent	13 April 2021

Ruling – Ferrero

Description

Ferrero Kinder Schokobons Instagram post in France

Complaint

The KinderFrance Instagram page posted on the 8th of February a promotion for its Schoko-bons chocolate confectionary product (https://www.instagram.com/p/CLBncM5ho1i/?utm_source=ig_web_copy_link) which featured a brand cartoon character holding a packet of said product and a microphone. The text on the picture reads 'Rise to the challenge to try to win Kinder Schoko-bons'. The caption encouraged users to click the link in the bio of the Instagram account which led to its company-owned website which was hosting the competition to win Kinder Schoko-bon products (www.minijeu-kinderschokobons.fr). The competition challenged the user to sing badly for long enough in order to fill a 'gauge' onscreen (around 20 seconds). As the user sings, Kinder Schoko-bons fall from the sky. Packets of Schoko-bons are also seen in the background of the webpage.

According to the complainant, the creative execution of this advert would be very appealing to young children under 12. The inclusion of a child-friendly brand cartoon character who encourages the user throughout the exercise enhances the element of fun and interaction of the game. According to the complainant, the concept of singing badly as an objective to win is simple and silly would be attractive to younger children. Moreover, premium offers such as competitions can be a powerful and influential allure for children.

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.

As for all the marketing communications concerning the Ferrero products, the Kinder Schokobons post has been designed and placed to target adults. Ferrero claimed to have taken all the available measures to ensure compliance with our commitment:

- Post and website mentioning this activity use wording clearly directed at families e.g. 'jouez en famille', 'chantez en famille', etc.

- While company-owned brand characters such as Mr. Bon are excluded from the EU Pledge policy, Ferrero has ensured to use them in a family context as an additional safeguard.
- The post mentioned in the complaints was placed in a 'age-gated' environment as Instagram requires users to be over 13 year old to register to the platform. They also note that the demographic data of their Instagram profile shows that more than 94% of the followers are 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 online game.

Both the Instagram post and the online game on the linked website were considered by the Panel to contain rather childish content and the creative execution was assessed as being generally appealing to children under 12. However, the Panel deemed the text above the photo and the text in the Instagram post itself as clearly addressing parents through the use of the formal second person singular French pronoun “*vous*” instead of the informal “*tu*”, which would be used to communicate to children under 12.

In addition to the preliminary age-screening assessment conducted in order to create an Instagram account, the website containing the online game also features an age-screening mechanism prompting users to clear their age before granting access to the game. Even though the presence of an age-screening mechanism is not sufficient by itself for compliance, it has been considered by the Panel together with the other criteria and factors.

Having taken into account all the above evidence and information, the Panel judged that both the Instagram post in question and the online 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: 33

Appeal

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

Appeal ruling – Ferrero Kinder Schokobons Instagram 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 childish content of the Kinder Schokobons post was recognised by the panel as well as the creative execution being assessed as being generally appealing to children under 12. The competition and game are, in our opinion, unquestionably appealing to younger children and are clearly the central and most powerful components of this example. A competition to sing out-of-tune is of a humour level for this demographic. This, with the cartoon brand characters actions in the game, as well as the visual graphics of the chocolate products falling from the sky whilst the user sings badly demonstrates a powerful creative content of clear appeal to children, which is not negated by the simple use of 'vous' or 'en famille'. Moreover, for young children the prospect of undertaking a funny and simple challenge with their family, is actually likely to be even more appealing and likely to induce pester power not only for

their parents to eventually buy the product but to participate in the childish game with them and enter the competition on their behalf.

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.

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

- Post and website mentioning this activity use wording clearly directed at families e.g. 'jouez en famille', 'chantez en famille', etc.
- While company-owned brand characters such as Mr. Bon are excluded from the EU Pledge policy, we have ensured to use them in a family context as an additional safeguard.
- The post mentioned in the complaints 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 94% of our followers is above 18 years of age.

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 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 33 for the French Instagram Ferrero Kinder Schokobons 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.

Regarding the creative execution of the Instagram post, the Appeal Panel agreed with the First Instance Panel that the post and the online game on the linked website contained rather childish content and that the creative execution was generally appealing to children under 12. .

The Appeal Panel also noted however that the language used both in the text above the photo and in the caption in the Instagram post itself clearly addressed parents through the use of the formal second person singular French pronoun "vous" instead of the informal "tu". In addition, while the concept of the game may be appealing to children, the Appeal Panel did not consider that the colour scheme of the post was likely to be appealing to children. They noted in particular the absence of any bright or vivid colours. Therefore, while the game may be appealing to children under 12, the Appeal Panel considered advertising post for it was not primarily appealing to children and was instead directed to their parents.

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 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 Instagram Ferrero Kinder Schokobons post is compliant with the EU Pledge commitment.

Decision regarding the appeal: admissible.

Decision regarding the complaint: not upheld.