
Case ID: 34

Decision

To	EU Pledge Secretariat	Date of mtg	26 March 2021
From	EASA Secretariat	Date sent	13 April 2021

Ruling – Ferrero

Description

Marvel Toy Instagram post in France

Complaint

This complaint regards an Instagram post from the 16th of February by Kinder France promoting their Kinder Surprise chocolate product and the new range of 8 Marvel-themed toys which can be found within this product (<https://www.instagram.com/p/CLWp8NcoKLE/>). These toys are only available with the purchase of a Kinder Surprise chocolate egg.

The chocolate product is shown in the picture and is surrounded by three Marvel characters, licensed media characters which according to the complainant have clear interest and appeal for children. The text in the photo announces that ‘The Marvel Superheroes are here!’ (in French: Les super-héros MARVEL arrivent!). The caption says that ‘They have superpowers and save the world...They’re the Marvel superheroes! 8 surprises to discover with your child’. Even though there is a reference to ‘your child’ it is obvious to the complainant that the creative execution of this advert is targeted towards children with the bright, appealing colours, the emphasis on superheroes, superpowers and saving the world as well as the premium offer of a collectible toy appealing to young children within the chocolate product.

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 food products, the Kinder Surprise post featuring the Marvel collection has been designed and placed to target adults. They claim to have taken all the available measures to ensure compliance with their commitment:

- The post uses wording clearly directed at adults ‘à découvrir avec vos enfants’.

- While toys that are an inherent part of the food product like the Marvel line are excluded from the EU Pledge policy, Ferrero has ensured to portray them in a way that shows to parents the availability in their products and not as a 'hook' address to kids 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 years old to register to the platform. They added 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 fall under the non-measured media category where adequate data are unavailable, the Panel assessed the overall creative execution of the Instagram post.

The Panel deemed that the Instagram post features small toys of the licensed Marvel© film characters, which are widely popular with children under 12 years old and thus appealing to the demographic. However, the Panel noted that the text of the Instagram post is 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 with children.

The social media platform also contains a built-in age-screening mechanism, barring anyone under 13 from creating an account. 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.

Having taken into account all the above evidence and information, the Panel judged that the post is 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: 34

Appeal

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

Appeal ruling – Ferrero

Complainant's appeal

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)

While the panel accepted that the post would be appealing to the under-12 demographic because of the inclusion of the licensed Marvel film characters 'widely popular with children under 12 years old', the complaint was not upheld, with the main argument being that 'vous' instead of 'tu' was used. We would again highlight that the overall impression of the advert should be considered and in particular, which elements were most highlighted, attractive and emotively powerful. Here, the brightly coloured visual of the Marvel superheroes, the chocolate product itself as well as the large font on the picture announcing that 'The Marvel Superheroes are coming!' (emphasizing a sense of excitement which would only be felt by young children) are all clearly the most prominent elements of this post and we believe the complaint should not be dismissed because the accompanying (much smaller font) textual caption (not incorporated into the most eye-catching element of the post – the picture) mentions that there are '8 surprises to discover with your children'. Moreover, even the content and tone of the rest of this caption, if it were to be read by children would be most appealing to younger children under 12

'They have superpowers and save the world...They're the Marvel superheros!'. The use of the 'vous' form should be assessed within the context and tone of the overall post – clearly the announcement of Superhero toys available in Kinder Surprise chocolate egg is not directed towards adults. Indeed, the parent-addressing phrase itself is actually used in reference to children 'discover with your children' demonstrating who the target audience are.

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 Surprise post featuring our Marvel collection has been designed and placed to target adults. We have taken all the available measures to ensure compliance with our commitment:

- The post uses wording clearly directed at adults 'à découvrir avec vos enfants'.
- While toys that are an inherent part of the food product like the Marvel line are excluded from the EU Pledge policy, we have ensured to portray them in a way that shows to parents the availability in our products and not as a 'hook' address to kids 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 whether the appeal lodged by the complainant was admissible. As per the EU Pledge commitment rules, 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 of the appeal lodged by the plaintiff, the Appeal Panel judged that the advertiser's appeal is admissible, considering that there may evidence of a substantial flaw of adjudication. Consequently, the Appeal Panel reassessed case 34 for Marvel Toy Instagram toy in France.

The Appeal Panel considered the appellant's arguments on the age-gating mechanism as relevant considering that it is an important aspect that marketers take into account when designing their creatives. However, this aspect is one of many factors that the Panel considers when assessing the compliance of an advertisement.

The Appeal Panel also took note of the appellant's argument that the language used in the post's description should not be a major factor in assessing the ad. The language used in the post and its description is only one factor among the many that the Panel considers when assessing an ad. It is not a *sine qua non* condition of compliance. However, given the linguistic French context, the use of pronouns has a much more important effect on the ad than in other languages. Whilst not a conditional element, this aspect nonetheless factored in the assessment of the First Instance Panel as it is an unavoidable element of the advertisement at hand.

Regarding the creative execution of the advert, the Appeal Panel noted that the ad is static and displays the toys next to the product. The ad does contain bright vivid colours that could appeal to a young audience. However, the main purpose of this ad is to merely inform viewers of the new sort of toys that can be found inside the product. It is also important to note that, in this case, the toys in question are outside the scope of the EU Pledge since they are part and parcel of the product. Naturally, the Marvel cinematic universe to which the ad campaign is connected remains an element that appeals to a broad audience.

The Appeal Panel did not agree that the statement "The Marvel Superheroes are coming!" emphasized a sense of excitement which would only be felt by young children, as they considered that it was the type of statement used in advertising for all demographics.

The Appeal Panel considered that there is a difference between an advert appealing to children under 12, and appealing primarily to them. Whilst this creative may be appealing to children under 12, it is not aimed primarily or exclusively at them. It is an ad that is designed to be informative more likely for parents than any other demographic.

The Appeal Panel understands concerns regarding the use of licensed characters, toys, and bright colours when addressing a wide audience and, while not upholding the complaint, considered that advertisers should be mindful of such concerns.

Based on the arguments and rationale outlined above, the Appeal Panel did not overturn the original decision. The complaint remains not upheld and the Marvel Toy Instagram post is compliant with the EU Pledge commitment.



Decision regarding the appeal: admissible.

Decision regarding the complaint: not upheld.