

Case ID: 35		Decision	
To	EU Pledge Secretariat	Date of mtg	30 April 2021
From	EASA Secretariat	Date sent	04 May 2021

First instance ruling – Ferrero

Description

Ferrero Kinder Spain Instagram Marvel

Complaint

1. **Kinder Spain Instagram Spiderman**

This example is an Instagram [video](#) posted by Kinder Spain on the 1st of March promoting their Kinder Surprise chocolate product and the Marvel character Spiderman, a toy version of which can be found within this product. These toys are only available with the purchase of a Kinder Surprise chocolate egg.

The text on the video reads: *Kinder Sorpresa presenta Marvel. La recompensa de los superhéroes. Os presentamos a uno de los heroes mas valientes de marvel, spiderman, el y kinder sorpresa, estan aqui para hacer algo bueno por vuestros peques y para seguir contruyendo historias con applaydu. Dale vida a tus sorpresas en applaydu.* (In English: Kinder Surprise presents Marvel. The reward of the superheroes. We present one of the bravest heroes of marvel, spiderman, he and kinder surprise, they are here to do something good for your little ones and to continue building stories with applaydu. Bring your surprises to life in applaydu.).

The chocolate Kinder egg product is shown in the video throughout including next to the ‘Spider-man’ toy, a licensed media character which has clear interest and appeal for younger children. Even though there is a reference to ‘your little ones’ it is obvious that the creative execution of this advert is targeted towards young children under 12 with the bright, appealing colours, the emphasis on the popular Spider-man character, the premium offer of a toy within the chocolate product, a child’s hand picking up this toy, as well as the encouragement to bring the surprises ‘to life’ by using the child-targeted Kinder app intended for users aged 4-9 (also demonstrated with a smart phone in the video).

2. **Kinder Spain Marvel Instagram**

This example is an [Instagram video](#) posted by Kinder Spain on the 11th of March promoting their Kinder Surprise chocolate product and the range of Marvel-themed toys e.g. 'Groot' which can be found within this product. These toys are only available with the purchase of a Kinder Surprise chocolate egg.

The text on the video reads: *Kinder Sorpresa presenta Marvel. Deja que tus peques se conviertan en los heroes de la casa con kinder sorpresa y groot. Dale vida a los sorpresas de tus hijos.* (In English: Kinder Surprise presents Marvel. Let your little ones become the heroes of the house with kinder surprise and groot Bring your children's surprises to life).

The chocolate Kinder egg product is shown in the video throughout including next to the 'Groot' toy, a licensed media character which has clear interest and appeal for younger children. Even though there is a reference to 'your little ones' it is obvious that the creative execution of this advert is targeted towards young children under 12 with the bright, appealing colours, the emphasis on Marvel characters, the premium offer of a toy within the chocolate product, a child's hand picking up this toy, as well as the encouragement to bring the surprises 'to life' by using the child-targeted Kinder app (intended for users aged 4-9).

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.

1. **Kinder Spain Instagram Spiderman**
2. **Kinder Spain Marvel Instagram**

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 (see last screenshots on app playability below).

As for all the marketing communications concerning our food products, the Kinder Surprise Instagram posts featuring our Marvel collection have been designed and placed to target adults. We have taken all the available measures to ensure compliance with our commitment:

- The text of the posts and the wording embedded in the videos – 'igual que nuestros peques lo hacen por nosotros', 'que llevan tus peques dentro', 'formad el mejor equipo en familia con vuestros peques', 'los héroes favoritos de vuestros hijos' – is clearly directed at adults. See supporting screenshots below.
- While toys that are an inherent part of the food product are excluded from the EU Pledge policy, we have ensured to portray them in a way, e.g. static, without animations, that show 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 around 98% of our followers is above 18 years of age.

The link to the Applaydu section of the website can be found here:
<https://www.kinder.com/es/es/applaydu>

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.*

Initial 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 old. Company-owned social media profiles fall under the non-measured media category, meaning that adequate audience metrics are unavailable. The Panel also considered the fact that Instagram, as an online social media platform, bars anyone under the age of 13 to set up a profile. However, as per the EU Pledge commitment, an age-gating system is not sufficient on its own to guarantee the ad's compliance with the commitment

Consequently, the Panel was presented with the task to assess the overall creative execution of the advertisements at hand – in this case the Kinder Surprise Instagram posts and the linked online game app Applaydu.

The Panel expressed some concerns regarding the creative execution of the two posts, as they considered the colourful visuals and Marvel-based theme of the promotion are likely to be of interest to under 12 years old. They noted, however, that the language of the accompanying text was aimed more at parents than at children, with references to the family engaging in playful activities. Inclusions such as “[...] *something good for your little ones* [...]” indicate that the ad is intended for parents. The Panel also noted that the toys and products displayed are static and presented in a neutral way, which mitigates the choice for a theme and colour pallet oriented more towards children than parents.

The Panel also assessed the online game app that is linked to the ad video. Although the app game is designed for children aged from 4 to 9 and that it displays vibrant colours with music and gameplay that is childish and appealing to a young demographic of children, the Panel found it important to note that there was no mention of the product in the game and it requires parental guidance and approval to download, access, and play the online game.

Based on the arguments and rationale presented above, the Panel judged that the two Instagram posts are not appealing primarily to children under 12 years old. Therefore, the Panel did not uphold the complaint.

Panel decision: complaint not upheld

Case ID: 35

Appeal

To	EU Pledge Secretariat	Date of mtg	14 June 2021
From	EASA Secretariat	Date sent	30 July 2021

Appeal Ruling – Ferrero Kinder Spain Instagram Marvel

Complaint

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.

Appeal

We would like to appeal this decision.

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 ‘*Instagram, as an online social media platform, bars anyone under the age of 13 to set up a profile.*’ However, the mere presence of an age-gating mechanism does not in itself actually ‘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’.

Child-Appealing Elements

While the Panel's decision does acknowledge that it had some concerns regarding the creative execution of the complaint (*the colourful visuals and Marvel-based theme of the promo are likely to be of interest to under 12 years old*), these concerns have been overridden because, the Panel says, the language in the accompanying text '*was aimed more at parents than children*' and the fact that the toys are 'static' in the video and '*presented in a neutral way*' which, according to the Panel, '*mitigates the choice for a theme and colour pallet oriented more towards children than parents*'.

When considering whether a marketing example is marketed to children or not, it is important to assess the overall effect of the advert and which elements are the most powerful and eye-catching. Indeed the EU Pledge commitments states that 'the overall impression of the marketing communication' should be taken into account, a consideration we believe has not been undertaken in the Panel's decisions. It is clear that the most attractive and attention-grabbing element of the posts is the vivid and engaging video and not the textual caption. As detailed further below, the quick transition between graphics (not to mention the child-appealing movie franchise content) is much more captivating than the textual caption to the right.

Moreover, the decision in this case is largely based on the parental-focused language in the textual caption. At the same time, another Panel decision has upheld a complaint where they found that even when the accompanying text is not appealing to a young child but rather parents as gate-keepers, the activity referred to is something that parents engage in with their children and not the other way around. Clearly, the Marvel toys and the Applaydu app promoted in this Instagram post would fall into this category and would be played with by children primarily under the age of 12 years old.

We furthermore disagree with the Panel's assertion that merely because the Marvel toys featured in the adverts are static means that it would not be appealing to children or that they are presented 'in a neutral way'. The presence of a toy (Spiderman and Groot, both of which belong to movie franchises very popular with younger children) which is strongly and clearly emphasised in these short video ads is child-appealing whether they are animated or not. In any case, the Panel has also not addressed the non-static animated interaction showing the child's hand picking up one of the toys, further emphasising for whom this ad is targeted.

Furthermore, the animation throughout the advert is in any case not static: the quickly changing animations are clearly designed to attract and maintain attention in a dynamic and engaging manner. While the Panel acknowledges that the online game app 'Applaydu' is designed for children aged 4-9 it also '*found it important to note that there was no mention of the product in the game and it requires parental guidance and approval to download, access and play the online game*'.

However, the Applaydu app is clearly promoted as bringing the Marvel toys to life – with the phone held over the toy to show its digitised form. As the toys are only available with the purchase of the Kinder Surprise product the app is clearly being promoted in conjunction with the chocolate products. To further emphasise the connection between the chocolate products and the app, QR codes are available with the purchase of products which can be used in the app. Finally, the app does not in fact require parental guidance and approval to download, access or play the online game. In fact, the app is actually easier to access than other age gating mechanisms which require a birth date to be entered. With the Applaydu app, you simply confirm that you are over 18 years old by pressing the 'accept' button. A video demonstrating the weakness of this age-gating mechanism will be sent separately.

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 35 for the Kinder Instagram videos in question.

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 post, the Appeal Panel agreed with the concerns stated by the First Instance decision about the use of the colourful visuals and the Marvel-based theme princesses and colourful visuals, which can be appealing to children below 12 years old. The Appeal Panel also took into account the fact that the ad is focussed on the product itself with no music or extra animations and is rather static. The Appeal Panel reiterated that the language of the accompanying text was aimed more at parents than at children, with references to the family engaging in playful activities with inclusions such as "[...] something good for your little ones [...]" indicating that the ad is aimed more at parents than at children.

Similarly to the First Instance Panel, the Appeal Panel has considered all aspects of the ad, ranging from its placement to the creative execution and the language used. 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 Kinder Instagram videos in question are compliant with the EU Pledge commitment.



Decision regarding the appeal: admissible.

Decision regarding the complaint: not upheld.