

Case ID: 36

Decision

To	EU Pledge Secretariat	Date of mtg	30 April 2021
From	EASA Secretariat	Date sent	04 May 2021

### First instance ruling – Coca-Cola

#### Description

Fanta Denmark influencer promotion

#### Complaint

A collaboration between Fanta Denmark and a 21 year old Youtube Influencer (302k Followers on Youtube) with mostly younger fans promoting the latest 'mystery' green-tinted lemonade from the brand which is accompanied by the #WhatTheFanta campaign. The posts on Instagram by both Fanta Denmark (9th February) and the influencer kender du Ket @kenderdudetc (February 13th) feature the influencer (as well as his younger teenage brother in the influencer's post) and bright attractive colours and graphics.

The accompanying caption for the Fanta Instagram post reads:

*Følg med når drengene undersøger de mystiske smage 🥑🥒🥗🥑🗨️ Hvad gætter du på der er i flaskerne? 😊 Tast dit gæt ind og deltag i konkurrencen om lækre præmier ☆❤️ Se linket i bio'en 😊*  
In English (Watch as the boys examine the mysterious flavors 🥑🥒🥗🥑🗨️ What do you guess is in the bottles? 😊 Enter your guess and enter the competition for delicious prizes ☆❤️ See the link in the cinema)

The Kender du Ket post acknowledges that it is paid advertising with the hashtag '#reklame for Fanta' and promotes a Youtube 'Prank' video he has recorded as part of this campaign in which he blindfolds his little brother and gets him to taste the 'mystery' #WhatTheFanta green drink 10 times, with the joke/prank being that the brother thinks he is trying a different soda each time but is in fact trying the same drink on 10 occasions. The Youtube post includes a link to the What the Fanta promotion website where you can enter a competition to win prizes such as cinema tickets. The young following of the influencer (increasing the likelihood of younger children being exposed to such marketing), the emphasis on simple uncomplicated humour and pranks or jokes which will be appealing to teenagers and young children, the bright colours and bold graphics within the post, the promotion of competitions with prizes to be won attractive to children, demonstrate a clear targeting of children with this marketing.

Links: <https://www.instagram.com/kenderdudetc/>  
<https://www.instagram.com/p/CLMTjglgEiv/>  
<https://www.youtube.com/watch?v=OXh9XYsuyEU>

### Advertiser's response

Coca-Cola places great importance on its compliance toward the EU Pledge as well as its own Global Responsible Marketing Policy and, of course, the national regulations for marketing products to children, in this case, the Danish Marketing Practices Law (Markedsføringsloven). Coca-Cola wishes to emphasize that it exercises due care to ensure that all of its marketing activities are always in compliance with the relevant laws, company policies and industry pledges.

The “What The Fanta” campaign went live in Denmark on 01 February 2021. The campaign has been adapted to the Danish market and includes local social media influencers as part of the marketing activities.

The campaign is aimed at teens (age 16 and above) and young adults. All influencers in this campaign have been chosen specifically for their appeal to the young adult (ages 18-24) segment. The viewer statistics of the influencers have been vetted and the influencers were chosen with the intent to reach an older audience (see attached industry and agency ethical guidelines). As a result, the largest viewership segment of each influencer falls well within the young adult category, with some followers on either side of that segment. Coca-Cola previews the related videos, posts and other social media activities of the influencers to ensure continued compliance.

The complaint concerns a specific video produced by YouTube influencers @kenderdudet, featuring Danish twin brothers Elias and Oskar Hole. We respectfully draw your attention to the following:

- Segmentation statistics showing that the main group of their followers consist of 18-24-year-olds (see attachment). The specific video in question features the 21-year-old twin brothers along with their 16-year-old brother (born 30 April 2004). The younger brother is not an influencer.
- The collaboration is disclosed as paid advertising with the hashtag “#reklame” in accordance to Danish legislation and good marketing practice.
- The posts include a link to the “What The Fanta” promotion website where only users 16 and older can enter a competition to win prizes such as cinema tickets and amusement parks that have broad age appeal (see attached Terms & Conditions in Danish).
- We have reviewed the content carefully and assess that the video and posts, including subject matter and visual elements, are not aimed primarily at children under the age of 13, which is the age threshold applied voluntarily by the Danish soft drink advertisement board (Læskedrikreklamenævnet). Rather, we consider it to be aimed at the intended target group of teens and young adults. The video aligns with the twin brothers’ reputation of producing light-hearted entertainment for their own age group.
- Viewer statistics for the YouTube video (attached) confirms that the largest share of viewers fall in the main category intended, i.e. 18-24-year-olds (42.2%) with smaller viewer segments found in the adjacent categories of 25-34 age category (15.3%) and the 13-17 age category (14.5%). In addition, only the social media platforms prohibiting users below the age of 13 are used to amplify the material.

Based on the information and evidence shared, we assess the activation and content to be compliant with the EU Pledge. We would like to reiterate our strong commitment to the EU Pledge.

### 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 and company-recognised influencer social media profiles both fall under the non-measured media category, meaning that adequate audience metrics are unavailable. Consequently, the Panel is presented with the task to assess the overall creative execution of the advertisements at hand – in this case the YouTube video of the influencer promoting the new Fanta product and the Instagram's promotion of the video.

The Panel considered that the video's colour pallet and theme do not contain any element that would be appealing primarily to children under 12 years old. Experts believe it is more likely to target teenagers, as the participants' ages are all around the mid to late teens.

Experts also took note of the fact that both YouTube and Instagram as social media platforms bar anyone under the age of 13 to create 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.

The Panel noted that the composition of the video and of the Instagram thumbnail picture do not contain features that would attract children's attention as they scroll on YouTube or Instagram. Although the thumbnail displays a colourful picture, the hues and content of the latter are not likely to appeal to children under 12. Due to the creative execution of the video and the thumbnail and the participants' ages, experts judged that the video is not intended to target a young demographic. Furthermore, the content of video was not deemed to be in any way appealing to under-12-year-olds, as the promotional video is slow-passed and lacks any childish element that would act as a hook for the demographic.

Based on the arguments and rationale presented above, the Panel judged that the YouTube influencer video and the Instagram thumbnail 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: 36**

**Appeal**

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<b>To</b>	EU Pledge Secretariat	<b>Date of mtg</b>	14 June 2021
<b>From</b>	EASA Secretariat	<b>Date sent</b>	30 July 2021

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### **Appeal Ruling – Coca-Cola Fanta Denmark influencer promotion**

#### **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 '*both YouTube and Instagram as social media platforms bar anyone under the age of 13 to create 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.

Indeed, kids-themed Youtube channels have been identified as among the most popular types of content on the platform demonstrating that this demographic are in fact keen users (regardless of the age gate). A recent UK report by OFCOM on the media use of children found that Youtube is used by three-quarters of 5-15s and *'remains a significant player in the panorama of children's viewing'*. They also found that YouTube is now also used by half of children aged 3-4; up from 45% in 2018, a figure that is likely to be replicated right across Europe.

In any case, 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**

One of the key elements in the Panel's decision which led them to consider the marketing example as compliant with the Pledge was the participants' ages stating that, *'Experts believe it is more likely to target teenagers, as the participants' ages are all around the mid to late teens.'* However, it is clear that children are very attracted to content produced by older children/teens who they can look up to as role models. One only has to look at the popularity of older teen/young adult pop stars/pop groups for whom a large proportion of their fans are much younger children. Children are not only influenced or attracted to content with children of the same age as them. We would disagree with the Panel's assertion that the Instagram or Youtube thumbnail does not contain features that would attract children's attention and believe it would merit re-examination to consider the elements mentioned below.

All of the following would be of appeal to children; the thumbnail picture features the bright green #WhatTheFantaproduct whose unusual and vivid colour would be appealing to children, pictures of the influencer and his little brother with overtly exaggerated facial expressions – one covering his mouth with hands to suppress laughter, one holding the Fanta product with his finger over his mouth to 'shush' the viewer (emphasising that a joke is being played) and the amusing blindfolded face of his little brother with a disgusted look. Moreover, the word 'PRANK' is highlighted to viewers in a bold, bright colour as well as being capitalised. Playing pranks and jokes on peers/siblings is clearly a childish activity and would be appealing to children, including those under 12 years old. Furthermore, using terms such as 'little brother' emphasise further the childish nature of the prank and appeal to children.

### **Advertiser's Response**

**Children's Rights:** Our initial response letter shows that our influencer campaign was not targeting children but rather, a much older audience. Segmentation stats show that followers of the influencers selected are 18-24-year-old. The video features 21-year-old twin brothers with their 16-year-old brother in a video with an overall look and feel that is not primarily appealing to children under the age of 12.

**Age-screening:** The video and posts were published on platforms that allow only users age 13 and older, while the competition guidelines specifically state that persons younger than 16 years of age will be automatically disqualified. Regarding YouTube, in line with our Coca-Cola guidelines, we always select “age unknown” in the age demographics to reduce the risk of targeting users under the age of 13. This means that we are addressing ages 18 and older on YouTube. In addition, in August 2020, Google and YouTube banned all adverts for foods high in fat, salt and sugar to under-18s.

**Appeal to Children:** When assessing primary appeal to children, we evaluate many different elements and their impact when used collectively. This includes: the people involved (what they wear, how they act, their follower profiles if they are an influencer) and also, the content (music, messages, visuals, whether activities shown are primarily appealing to children). Regarding the emojis used, they have broad age appeal and are not primarily appealing to children. Use of the word ‘prank’ also has broad age appeal and is not limited to use with children only. Our assessment remains that the video is appealing to a teen+ audience.

### **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 36 for the Danish Fanta Denmark influencer promotion.

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. In this case, the fact that the participants' ages are all around the mid-to-late teens was again considered but was by no means a decisive factor, as, indeed, younger children can be attracted to content produced by older people, if this is clearly and predominantly appealing to them in the way it was designed and produced.

The Appeal Panel looked into the creative execution of the promotion. The thumbnail picture featuring #WhatTheFanta product in an unusually vivid green colour and pictures of the influencer and their brother with exaggerated expressions, as well as the word "PRANK" highlighted as a reference to pranks and jokes on peers or siblings, are all elements which could be, as mentioned in the Appeal complaint, appealing to children including to those under 12 years old. The word "including" here is key, as the Panel needs to judge whether the content of the video is *primarily* appealing to children under 12 years old. In this case, all these creative execution elements clearly appeal to a much broader demographic, which would include some children of the age group in question but do not primarily target it.

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 Danish Fanta Denmark influencer promotion is compliant with the EU Pledge commitment.

**Decision regarding the appeal: admissible.**

**Decision regarding the complaint: not upheld.**