

Case ID: 38		Decision	
To	EU Pledge Secretariat	Date of mtg	23 April 2021
From	EASA Secretariat	Date sent	3 May 2021

First instance ruling – Nestlé

Description

KitKat Germany Instagram Posts

Complaint

KitKat Germany Instagram, 1st March

An Instagram story and an Instagram post were published by KitKat Germany on the 1st of March. It depicts a KitKat chocolate Easter Bunny dressed in athletic clothes in a brightly-coloured 3D cartoon landscape, with small Easter chicks in the foreground performing amusing athletic training activities. The bunny jumps onto a yellow box looking triumphant, after which the frame zooms out to show another four boxes stacked on each other. The bunny then looks defeated by the new 'challenge'. The next frame shows three KitKat chocolate bunnies (two covered in foil) with the text on the screen reading: 'Auch osterhasen verdienen mal ne' pause' (In English: Easter bunnies also deserve a break'. The two foil-wrapped bunnies wear childish accessories such as a hair bow.

The simplistic humour (the challenge of jumping on boxes as well as the chicks' activities), the bright and appealing colours and audiovisual aspects resembling young children's cartoons, the use of the Easter bunny (a character of clear attraction and relevance for younger children), the children's accessories on the foil-wrapped bunnies in the final frame,) as well as the promotion of chocolate products which would be especially appealing for children (Easter chocolate products), clearly demonstrates that this marketing is targeted toward younger children.

KitKat Germany Instagram, 10th March

An Instagram story and video was posted by KitKat Germany on the 10th of March. It depicts a KitKat chocolate Easter Bunny bouncing from the wrapper of the chocolate product into a brightly-coloured 3D cartoon landscape. Once the chocolate bunny 3D character has jumped into view a 'bite' from it's ear falls on the ground, after which it's expression changes to one of surprise. The next frame shows three KitKat chocolate bunnies (two covered in foil) with the text on the screen reading: 'Auch osterhasen verdienen mal ne' pause' (In English: Easter bunnies also deserve a break'. The two foil-wrapped bunnies wear childish accessories such as a hair bow.

The simplistic humour (the bite being taken out of the chocolate bunny's ear), the bright and appealing colours and audiovisual aspects resembling young children's cartoons, the use of the Easter bunny (a character of clear attraction and relevance for younger children), the children's accessories on the foil-wrapped bunnies in the final frame, as well as the promotion of chocolate products which would be

especially appealing for children (Easter chocolate products), clearly demonstrates that this marketing is targeted toward younger children.

KitKat Germany Instagram, 18th March

An Instagram story and video was posted by KitKat Germany on the 18th of March. It depicts a 3D KitKat chocolate Easter Bunny juggling several Easter eggs in a brightly-coloured 3d cartoon landscape until one knocks one of its ears and a 'bite' of chocolate falls on the ground.

The next frame shows three KitKat chocolate bunnies (two covered in foil) with the text on the screen reading: 'Auch osterhasen verdienen mal ne' pause' (In English: Easter bunnies also deserve a break'. The two foil-wrapped bunnies wear childish accessories such as a hair bow.

The simplistic humour (the bite being taken out of the chocolate bunny's ear), the child-attractive activity the bunny partakes in (juggling with easter eggs) the bright and appealing colours and audiovisual aspects resembling young children's cartoons, the use of the Easter bunny (a character of clear attraction and relevance for younger children), the children's accessories on the foil-wrapped bunnies in the final frame, as well as the promotion of chocolate products which would be especially appealing for children (Easter chocolate products), clearly demonstrates that this marketing is targeted toward younger children under 12.

KitKat Germany, 4th March

An Instagram story and an Instagram post were published by KitKat Germany on the 4th of March. It depicts a KitKat chocolate Easter Bunny dressed in athletic clothes in a brightly-coloured 3D cartoon landscape, with small Easter chicks in the background struggling to pick up 'weights' filled with brightly-coloured and decorated Easter eggs. The next frame shows three KitKat chocolate bunnies (two covered in foil) with the text on the screen reading: 'Auch osterhasen verdienen mal ne' pause' (In English: Easter bunnies also deserve a break'. The two foil-wrapped bunnies wear childish accessories such as a hair bow. The caption for the video reads: 'Muskeln aus Stahl... äh, Schokolade! Wer so fleißig für Ostern trainiert, der hat sich auch 'ne richtige Pause verdient, nicht wahr? 😊 #haveabreak #haveakitkat #kitkat #ostern' (In English: Muscles made of steel ... uh, chocolate! Anyone who trains so diligently for Easter deserves a real break, right?)

The simplistic humour (the challenge of lifting weights made up of Easter eggs as well as the chicks' gym activities), the bright and appealing colours and audiovisual aspects resembling young children's cartoons, the use of the Easter bunny (a character of clear attraction and relevance for younger children), the children's accessories on the foil-wrapped bunnies in the final frame,) as well as the promotion of chocolate products which would be especially appealing for children (Easter chocolate products), clearly demonstrates that this marketing is targeted toward younger children.

KitKat Germany Instagram Competition

An Instagram [post](#) was posted by KitKat Germany on the 7th of March promoting a competition to win Kit Kat Easter chocolate products. It shows these products in the background of a brightly-coloured 3D landscape and in the foreground are two Kit Kat chocolate bunny products jumping. The two foil-wrapped bunnies wear childish accessories such as a hair bow.

The bright and appealing colours and audiovisual aspects resembling young children's cartoons, the use of the Easter bunny (a character of clear attraction and relevance for younger children), the children's accessories on the foil-wrapped bunnies in the final frame, the presence of unhealthy food products in the video, as well as the promotion of a competition to win these chocolate products

which would be especially appealing for children (Easter chocolate products), clearly demonstrates that this marketing is targeted toward younger children.

Advertiser's response

We consulted our internal stakeholders involved in this activity and wanted to provide the below clarifications to the allegation of non-compliance raised in the complaint.

We never had the intention to target children below the age of 12. Our desired target group for KitKat are adults. An analysis of the actual Instagram-Followers of our KitKat Instagram account shows, that almost all of them are ≥ 18 years old. Only 5,1 % of users are between the ages of 13 and 17. It shall also be noted, that Instagram's usage guideline only allows users 13 years of age and older. It all proves, that our intention is to communicate to adults only and that it is very unlikely that our KitKat posts on Instagram will be seen by children below 12 years of age. Furthermore, for paid social media, we have the target group of 18-35 year old people, thus clearly targeting only adults.

Compared with the rules of the EU Pledge regarding the use of animation and sound effects, we came to the conclusion that the following aspects are not in line with the rules:

- The executions in question are not reflecting adult-specific contexts and can be interpreted as playful and child-oriented
- The adult -oriented humor was not expressed clearly enough by the overall setting and could be perceived as appealing to children

What is acceptable from our point of view:

- Appearance of the KitKat 'bunny' characters: As the bunny products are what we sell in store, it is ok for us to include the product in the videos. It shows that the product is the perfect fit for the season.
- The post regarding the competition is clearly targeting adults, as the prerequisite for taking part is to be aged 18 years and older.

The complaint helped us to improve our practices. We have already implemented the following:

- - Deletion of the first four questioned KitKat posts.
- - Going forward, we are reviewing an appropriate style for the future Icon social posts and align closely based on this specific complaint to ensure compliance.

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 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 the five Instagram posts in question.

Judging the creative execution of the first four posts, the Panel found the brightly coloured cartoon landscape visuals and the simplistic storyline are appealing primarily to children under 12 years old. The presence of the product itself is not against the EU Pledge commitment, and as such the Panel did not find it problematic. The presence of an age-screening mechanism barring anyone under 13 years of age from registering on the platform is not sufficient on its own for compliance, and therefore care should still be taken when developing creatives for food advertising that is not compliant with the EU Pledge nutrition criteria.

The Panel welcomed the action taken by the company to remove the first four posts in question. Indeed, the posts were appealing primarily to children under 12, but the fact that the company acknowledged it and deleted the posts before the Panel was convened, was deemed sufficient by the panel to consider this complaint as solved.

Concerning the 5th post, the Panel took note of the fact that the product lies in a brightly coloured landscape without any element that would indicate it to be appealing primarily to children under 12. The text accompanying the post concerns a competition that is not aimed at children, and the terms and conditions (which can be found in the highlights) clearly state that the competition is only open to users over 18 years old.

Based on the above elements and rationale, the Panel assessed that the first four posts were appealing primarily to children under 12. However, the case is solved by self-regulation due to the company withdrawing the creatives once the complaint was filed. The Panel considered that the 5th post is not appealing primarily to children under 12 years old and is as such compliant with the EU Pledge commitment. The complaint for the 5th post is not upheld.

Panel decision:

- **posts 1-4: case solved;**
- **post 5: complaint not upheld**

Case ID: 38

Appeal

To	EU Pledge Secretariat	Date of mtg	11 June 2021
From	EASA Secretariat	Date sent	28 July 2021

Appeal ruling – Nestlé

Complainant's appeal

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 the Panel's decision for this case. We would disagree with the finding of the panel that, '...the product lies in a brightly coloured landscape without any element [emphasis added] that would indicate it to be appealing primarily to children under 12.' The brightly coloured landscape which is seen in this marketing example (vivid green hills, bright blue sky and Easter eggs appearing on the grass) is the same brightly coloured landscape which is found in the four other posts which were withdrawn by the Pledge member. Moreover, the Panel, in reference to the four other posts, found that they were primarily appealing to children under 12 years old because of the brightly coloured landscapes. Indeed, it is one of only two elements of the creative execution cited by the Panel to explain why they believe the posts to be appealing to children under 12 (with the other being the simplistic storylines).

Moreover, while the Panel state that the presence of the product itself is not against the EU Pledge commitment, it is clear that the products shown in the marketing post do not appear as they would in the supermarket but have been embellished to appear more appealing to children (wearing childish hair bows or sunglasses for example or holding an Easter egg or flowers, not to mention the simplistic jumping action of the Easter bunnies).

We would also disagree with the Panel's assertion that the competition is not aimed at children simply because the terms and conditions state that only users over 18 years old can apply. While the rules only permit someone who states their age to be 18 or over to enter the competition, this does not necessarily follow that the competition is not primarily appealing to children, especially given the overall creative execution as mentioned above. Furthermore, the terms and conditions, are not found in the post itself (but in a separate Instagram Story Highlight). A child in any case is easily able to ask a parent or guardian to enter a competition on their behalf. Moreover, even if a viewer of this post were not to enter the competition at all (nor ask someone else to enter on their behalf), the promotion in the post of an HFSS product (not in line with the Pledge criteria) in a way which is clearly appealing to children under 12 years old, using creative execution which has been found to be primarily appealing to children in other posts is not negated by the competition element.

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 38 for the KitKat Germany Instagram post.

The Appeal Panel noted that the First Instance Panel assessed all posts, videos, and stories published on Instagram but deemed that the case was partly solved since 4 of the posts were withdrawn by the advertiser. As such, the First Instance Panel assessed the final 5th video that feature chocolate bunnies slightly jumping up and down. Consequently, the Appeal Panel only assessed this final 5th video.

As a social media platform, Instagram contains an age-gating mechanism that prohibits anyone under the age of 13 from creating an account. This factor is not a *sine qua non* element in terms of compliance, as under the rules of the EU Pledge commitment, an age-gating mechanism cannot guarantee conformity on its own. When considering placement of the advert, the Appeal Panel considered that the age-gating mechanism has nonetheless a deterring effect on children from creating an account on the platform.

Regarding the creative execution of the 5th video, the Appeal Panel noted that the colour palette contained bright vivid colours that were not linked to the product's colour palette. In addition, the brightly lit landscape in the background of the video was also found to be quite childish and reminiscent of children's cartoons. The video also features Easter eggs, in line with the theme of the advertising campaign and the new chocolate bunny product. The inclusion of Easter elements in an advert is not a factor that automatically renders the ad primarily appealing to children under 12. Religious and local folk celebrations, such as Christmas, Halloween, and Easter, are festivities that are popular with a wide audience ranging from young children to older generations. However, specific traditions, activities, or moments within each of these festivities may be more popular with young children than with other generations. In this case, the inclusion of colourful Easter eggs does have a certain appeal to children under the age of 12. In addition, the Appeal Panel differs with the original decision and finds little to no difference between the creative composition of the 5th video and all the other ones that the company has withdrawn. All the 5 videos feature the same brightly lit background landscape composed of pastel-like colours.

Furthermore, the Appeal Panel also considered the animations that are incorporated in the ad. The chocolate bunny products are the only animated elements of the video as they are gently jumping up

and down. Whilst the actual product is outside the scope of the EU pledge, the product's interaction with other elements in the ad and its behaviour can be assessed by both the First Instance and Appeal Panels. As such, the gentle hop of both products have a certain childish allure to them that would inherently attract the attention of young children and that would most probably only appeal to children rather than to parents. Displaying the product and having it interact or behave in any way is allowed as per the EU Pledge commitment, but care should be taken when developing an ad that contains an animation that may appeal to children. In this case, in the context of this advert, the Appeal Panel considered that the gentle hop of the chocolate bunny product was primarily attractive to children and would attract their attention.

The Appeal Panel considered that the language used in the video and in the caption was largely targeting a wide audience, indiscriminate of age. The accompanying text in the caption may in fact be targeting slightly more parents rather than their children due to it being quite long and small script. The sentence in the video would probably not be attractive to children or in any case would be appealing in any way to them and would likely to targeting parents interested in the promotional aspect of the advertisement. However, the Appeal Panel deems that the creative execution of the ad is heavily childish and oriented toward attracting the attention of children rather than any other demographic and as such primarily appealing to children under 12.

While the terms and conditions of the promotion may state that only over-18-year-olds may participate, the Appeal Panel did not consider that this mitigated the fact that the creative execution was primarily appealing to children under 12.

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