

Case ID: 41		Decision	
To	EU Pledge Secretariat	Date of mtg	23 April 2021
From	EASA Secretariat	Date sent	3 May 2021

First instance ruling – Nestlé

Description

Smarties website corner in Germany

Complaint

[The website for Smarties](#) has a ‘creative corner’ for children

The words on the website read (translated to English):

‘Lots and lots of colorful SMARTIES®. Lots and lots of colorful stories. With imagination, a garden hose suddenly turns into a licking snake and a green SMARTIES® chocolate lentil turns into a frog prince who experiences many colorful stories. The imagination knows no limits!;

The appearance of the Smarties product, the simple amusing arts and crafts activities shown in the picture, the simplistic drawing of a family obviously drawn by a child (emphasised by the fact that the hands in the photo are that of a child) in addition to the emphasis on themes of imagination and creating stories incorporating the Smarties chocolate product (the green Smarties lentil which turns into a frog prince) demonstrate the clear targeting of young children under 12.

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 smarties are parents and other gatekeepers, so clearly adults. It shall also be noted, there is an age gate on the website. Additionally, the German specific formal "Sie" form of address is used on the website. It all proves, that our intention is to communicate to adults only. The monitoring of the traffic on Smarties website confirms this policy and shows that the most prominent age group visiting Smarties Website is the 18-44 y.o. group representing 78.32% of the traffic. The remainder is related to older age groups.

This also holds true for the “creative corner”. It is explicitly not targeting children but gatekeepers. This is evident from expressions such as "We have put together a collection of coloring pages where the little ones can really express themselves in terms of color" or “Inspirations for spending time together with your children”. Thus, the idea behind the “creative corner” is to provide gatekeepers with creative handicraft ideas. In this light, from our perspective there should be a clear differentiation between the provided examples at the website which are directed to adults and the drawing or craft material that is eventually used by the gatekeepers together with children.

What is acceptable from our point of view:

- We recognize imagination is a very important part of children's development, and that is something we want to champion as a brand and provide support to gatekeepers on how they can encourage their kids to use their imagination. That imagination could come from talking with children on what they imagine when they see the colourful lentils (eg the yellow lentil could look like the sun), or providing crafting activities that the gatekeeper can do with their child, adding value beyond the product. This is the reason for the crafting examples and videos linked to this page on the website. We believe that authentic settings with a handcrafted and "touchable" look and feel, such as the image below, are a realistic way to provide gatekeepers with such creative ideas.

However, compared to the rules of the EU Pledge regarding the creative execution at company-owned websites, we recognize some of the images and wording could be interpreted as targeting more to children rather than adults.

Therefore, we appreciate you have shared this complaint, which helped us to improve our practices. We have already implemented the following:

- Deletion of the images below as well as the coloring section as such (including drawing 1), recognizing that drawing 2 contains children's hands
- Re-wording of the copy to ensure it is even more clearly directed to the gatekeepers and therefore referencing activities that can be done 'with kids'

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 websites 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 website.

The “creative corner” of the Smarties website contains simple amusing arts and crafts activities, drawings made by children, and it emphasises activities that make use of children’s imagination. These elements were deemed to be appealing to children below 12 years of age by the Panel. However, experts considered that the website’s language is targeting parents rather than children, with the use of phrases such as *“a collection of colouring pages where the little ones can express themselves”* and *“inspirations for spending time together with your children”*. The Panel also noted that the website contains crafts that children are not able to do themselves, and as such they would need parental help and guidance. The Panel welcomed the removal by the company of the 2 images that depicted drawings made by children possibly younger than 12 – these images represented activities that children would have been able to do alone.

Based on the above rationale, the Panel judged that the Smarties website is not primarily appealing to children under the age of 12, and therefore the complaint is not upheld.

Panel decision: complaint not upheld

Case ID: 41

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 this panel decision. The 'Creative Corner' website on the German Smarties website clearly includes many child-appealing elements in its creative execution such as; simple amusing crafting and arts activities, drawings by children and an emphasis on activities which make use of children's imagination. All of which were accepted by the Panel as appealing to children below 12 years of age. However, none of these elements, nor indeed the overall effect of the marketing post have been deemed sufficient to counter the two mentioned subtle textual references to parents such as 'your children' or 'the little ones'. We believe that this focus on such brief references in text does not take into account which elements are the central focus/most appealing aspect of the website nor what the overall effect is.

It is clear that the crafting activities which are appealing to children below 12 years old are the most attractive, powerful and attention-grabbing elements of this 'Creative Corner' and as can be seen from the various crafting activities listed on the website. It should also be noted that the Smarties products are frequently shown in the lead photos and the packaging of Smarties products are always included as an essential material for the crafting activity.

Youtube video embedded in the page: <https://youtu.be/XD4woK4FF5M>

The two examples are just a snapshot of such crafting activities on the website, as there are many more. We also disagree that a crafting activity, which is clearly still targeted at young children, but which requires some parental assistance means that it no longer primarily appeals to children under the age of 12 years old. The presence of an adult during a crafting activity would have no impact on the appeal to a young child either when viewing such posts or during the activity itself, which also always requires a Smarties product to be purchased as a material. Indeed, the interaction between a parent and child during such an activity would be particularly appealing to younger children. Furthermore, this requirement for Smarties products (often more than one product) for each activity would clearly encourage children to pester their parents to ask that they purchase these products as materials for the crafting.

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 section 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 41 for the Nestlé Smarties creative corner website in Germany.

Advertising content appearing on company-owned websites is classified as non-measured media. This prompts the Appeal Panel to assess the overall creative execution, its placement, language used in the advertising campaign, and the video and animations that appear on the website. The Appeal Panel found that the website did not contain any age-gating mechanism, granting free access to all online users. 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.

Regarding the creative execution of the subsection of the website named "*Kreativecke*", the Appeal Panel found that the dark blue background and general impression of the website was potentially appealing to children, though not only to them. The website does not contain any bright and vivid colours that would be particularly appealing to young children and in fact, the colours reflect more the colour palette of the product. The content of the website, ranging from pictures and videos depicting arts and crafts activities to cooking recipes, are likely to be generally appealing to children under 12 years old as well as to their parents. When analysing the content of the videos and the sort of crafts activities that are illustrated, the Appeal Panel assessed that children would not be able to follow all the necessary steps to create the toy without parental guidance. This is especially the case as the activities necessitate not only empty Smarties products, but also other household material that children are unlikely to have readily available without parental help. In addition, the use of scissors in the activity confirms the necessity of parental guidance. Whilst a child's hand can be seen manipulating objects during the activity in the video, this does not automatically entail that the advertisement is by definition aimed at children. In other words, the advertising campaign of this activity can still target a different audience and appeal to a distinct demographic all while the aim of the activity is to be mostly enjoyed by children under 12. In fact, the Panel noted that the video features both an adult and a child manipulating various objects, with most of the activity being performed by the adult.

Furthermore, the Appeal Panel considered that the language style used on the website was largely aimed at parents with sentences such as "*Ihre Kinder wollten schon immer einmal zaubern lernen?*" (Your children have always wanted to learn magic?). The linguistic element is an important factor in any advertising campaign and the First Instance Panel took into consideration the local context,

cultural particularities, and how the German audience would receive the advert. These factors are important when assessing the compliance of an advertisement, but the linguistic aspect on its own is not a *sine qua non* condition for compliance. As such, the text is mostly aimed at parents and invites them to try out these activities with their children. Further to this, the website does not contain a lot of text and could be read by some older children who are able to read. In doing so, they would inevitably feel that the content is directed at their parents.

Additionally, the Appeal Panel also noted that the background music was a gentle melody combined with an intro that included what would be children's voices. Similar to the inclusion of a child in the video, the background music does not automatically render the video to be appealing primarily to children under 12. The background music may appeal to children, but it is not a song or a melody that children would recognise or would be quickly attracted to. However, the Appeal Panel wishes to underline that extra care should be taken by marketers when creating such advertising content to be absolutely clear and conspicuous in directing advertising towards the intended demographic, which in this case are the parents.

The Appeal Panel concurs with the First Instance Panel in welcoming the company's decision to withdraw a series of photographs that depicted childish drawings. Those pictures would most likely have been appealing primarily to children under 12, due to the child-oriented content, and the fact that children could easily relate to such drawings.

Whilst this advertising campaign on the Smarties website contains elements that would probably appeal to children under 12 years old, the Appeal Panel finds that the subsection of the website is not appealing primarily to this demographic. The video is clearly indicating the need for parental guidance when engaging in the suggested arts and crafts activities and the language used is also largely aimed at the same audience. Some elements of the video and the activities themselves may be appealing to young children, and marketers need to ensure that it remains largely and evidently aimed at parents rather than children. Nonetheless, the content of the videos as they are presented on the website, and the subsection of the website itself, would not appeal primarily to children under 12 years old.

Based on the arguments and rationale outlined above, the Appeal Panel does not overturn the original decision of the First Instance Panel. The complaint remains not upheld and the website and video are compliant with the EU Pledge commitment.

Decision regarding the appeal: admissible.

Decision regarding the complaint: not upheld.