

Case ID: 42

Decision

To	EU Pledge Secretariat	Date of mtg	23 April 2021
From	EASA Secretariat	Date sent	3 May 2021

Ruling – McDonald’s

Description

McDonald’s Slovenia Billboard Ad

Complaint

In Slovenia, a poster advertisement in Ljubljana for McDonald’s depicting a double cheeseburger, portion of fries and large CocaCola drink is situated on a bus-stop billboard near a busy shopping centre and children’s playground. There will be a new location of the McDonald’s in the city center so they have on the different locations (bus station, shopping center...) these jumbo posters inform people about this. Below, the photo indicates the close proximity of this ad to a children’s playground (approximately 30m).

Advertiser's response

McDonald’s has been a member of the EU Pledge since 2011 and is a longstanding leader in the area of responsible marketing to children. In addition to our external commitments in Europe and globally in this area, we also hold ourselves accountable to our own internal standards that go above and beyond what is expected of us externally.

The following information demonstrates that the McDonald’s ad in Slovenia (case #42) was neither directed toward nor designed to appeal primarily to children under 12 and is therefore outside the scope of the EU Pledge.

1. The ad in question was designed for and targeted towards adults.
 - This is evidenced by the adult menu items featured, which include a Big Mac meal. The Big Mac is targeted toward adult consumers and exclusively featured on our adult menu.
 - The Big Mac is not designed for nor sold as part of the Happy Meal menu.
 - This ad also promotes McDrive, which is intended to appeal to adult drivers. As such, it does not appeal to children.
2. The location of the ad makes it clear that the ad was intended to be seen by adults.
 - The ad appeared at a bus stop on an important city artery and was designed to target a “mobile population” (drivers, transit operators, and transit users, etc.), not children.
 - The bus stop is located near the shopping center Hipermarket Mercator Siska, which includes a playground. The ad is not visible from the playground, as it is not facing the playground and is obscured behind a concrete barrier.

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. Outdoor marketing falls under the non-measured media category and therefore the Panel is presented with the task to assess the overall creative execution of the advertisement at hand.

Judging the creative execution of the billboard advertisement, the Panel deemed that the ad did not contain any element that would suggest it to be aimed at children. The Panel also found that the location of the advert in a bus stop on a busy street of Ljubljana near a shopping centre, indicated that it was directed at a broad audience of commuters regardless of age. The ad also faced inward in the bus stop, and not outward, meaning that it would mostly be bus users who would see the ad. The presence of a playground in the surrounding area was not judged to be a sufficient factor to consider this advertisement as appealing primarily to children under 12 years old.

The complaint is thus not upheld.

Panel decision: complaint not upheld

Case ID: 42

Appeal

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

Appeal ruling – McDonald's

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 decision.

While the Panel judged the creative execution of the billboard advertisement to be compliant with the Pledge, we do not believe that the increased exposure of children to this advert has been adequately taken into account. Moreover, even when the creative execution is not directed at children and regardless of whether a product is on a Happy Meal Menu or an adult menu (which is in any case, not something which is underlined in the advert) it would not have any meaningful impact on the exposure of children to an HFSS product advertisement which would clearly be increased due to it being situated right next to a playground for very young children (as shown in the photograph provided).

The Panel found that the location of the advert ‘in a bus stop on a busy street of Ljubljana near a shopping centre, indicated that it was directed at a broad audience of commuters regardless of age’ and that the presence of a playground just 30m away from the bus stop was not judged to be a ‘sufficient factor’ to uphold the complaint. It is clear however that the presence of an advert in the immediate vicinity of a children’s playground will clearly have exposed many more young children to HFSS product advertising than average. Moreover, the Panel has claimed that it will be mainly bus users who would see the ad (because the ad faced inward in the bus stop). This doesn’t take into account that families and children passing by the bus stop to get to the playground (or vice versa) will clearly be exposed to this HFSS advertisement nor that bus users will also include a high number of children too. Finally, as the Panel notes, this advert was located on a ‘busy street’ near a shopping centre where the number passers-bys, including young children, will be higher than normal. The busyness of the street coupled with the location next to a playground will clearly have exposed a great number of children to this advertisement.

Advertiser’s response to the appeal

As the Panel stated in its Decision, outdoor marketing under the EU Pledge is non-measured media, and therefore, an assessment of the creative execution of the advertisement had to be evaluated to determine if the overall impression of the ad was appealing primarily to children under 12 years of age. As such, McDonald’s supports the Panel’s findings that the ad does not contain any element that would suggest it is appealing primarily to children. Further, the placement of the ad supports that the advertisement was directed towards adults. References to additional policy frameworks and international commitments are outside the scope of the EU Pledge and should not be considered in reviewing the complaint, the Panel’s decision, or the appeal.

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.

The appellant's arguments are based on the fact that an advertisement for a non-compliant product appeared within 30 metres of a playground. However, the EU Pledge commitment is that advertisements for non-compliant products near schools are not permitted. When out-of-home ads appear elsewhere, such as near playgrounds, it is the content of the advertisement that must be assessed to ensure that it does not appeal primarily to children under 12. In this case, the First Instance Panel found that the content was not primarily appealing to children and the appellant arguments' were focused on exposure and not the creative execution. As such, the appeal is dismissed.

Based on the text and evidence provided by the plaintiff, the Appeal Panel judged that the arguments were insufficient to point towards a possible substantial flaw of adjudication. The Appeal Panel finds the appeal not admissible.

Decision regarding the appeal: not admissible.