

Case ID: 43

Decision

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

First instance ruling – Mondelez

Description

Mondelez Chips Ahoy! TV YT

Complaint

<https://www.youtube.com/watch?v=P-gFI9rDIIM>

The TV ad which was shown on the 27th of January on Antena 3 in Spain shows children having fun together with their friends while playing video games on a games console and eating the advertised confectionery products.

The ad encourages viewers to access the company-owned website which is hosting a competition to win a game console. <https://www.chipsahoy.es/>

To participate, it is necessary to use the code inside the package and play an advergame where the aim of the game is to click as many times as possible on the Chips Ahoy biscuit within one minute.

The inclusion of children in the advert, the promotion of the Chips Ahoy cookie product (as well as its consumption by the children), the promotion of a competition to win prizes which would be very attractive to children (games consoles), hosted on the Chips Ahoy's website which requires the purchasing of a Chips Ahoy product to participate, the simplicity of the advergame which requires no advanced skills (simply clicking on a biscuit as much as possible within one minute), are all elements which will be very attractive to children, including young children. Arguably, the competition also encourages purchasing multiple packs of these cookies (and therefore over-consumption) as the website also encourages the users to submit and compete more than once 'The more codes, the more you can play! And the more chances you have to win!'.

Advertiser's response

At Mondelez International, we do not believe in advertising directly to children under 12 years of age, regardless of a product's nutritional profile. In 2005, we were the first company to announce global policies for advertising to children and we continue with our commitment today.

We believe that, in addition to our own global marketing to children policy, supporting pledges at both global and national level is just as important to create an industry-wide awareness for responsible marketing. Therefore, we are a founding member of the EU Pledge.

In the EU Pledge we have committed ourselves to not do any advertising where 35% or more of the total viewing audience is under the age of 12. After internal evaluation of the TV program on the day in question, we can confirm that we acted according our EU Pledge commitment. Moreover, we direct our advertising to gatekeepers – adults, parents, or guardians.

We may show children under 12 in our marketing communications if relevant to the marketing message, e.g., depiction of a family situation or activity. In such situations, a gatekeeper is shown controlling access to a product. In this particular case, however, none of the actors of the copy can be considered as “under 12” as they were much older when we recorded the ad.

Only people +18 years old can participate on our website. To play, people need to submit a complementary declaration of being +18. In addition, we have just posted an additional entry banner to re-confirm age and deleted the invitation to play several times.

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. The ad appears both on Spanish television and on YouTube, as per the complainant's account including the URL link to the video on the social media platform. As far as the ad appearing on TV, the company has confirmed with the EU Pledge secretariat that its advertisement is compliant with the commitment as children under 12 years old made up less than 35% of the audience at that moment in the day. The official audience metrics have been provided by the company directly to the EU Pledge secretariat – the Panel was not involved in that exchange. Therefore, the focus lies on the ad appearing on YouTube. Company-owned social media profiles fall under the non-measured media category, meaning that adequate audience metrics are unavailable. Consequently, the Panel was presented with the task to assess the overall creative execution of the advertisement at hand – in this case the YouTube video of the ad.

The Panel assessed that the overall composition of the ad does not target children under 12 years old nor does it appear to be appealing primarily to this demographic. In fact, the experts noted that the actors' ages were probably in mid to late teens and the ad doesn't feature any child nor any activity that would be considered childish or highly appealing to children. The visuals were thus not considered to be problematic with regard to the company's commitment.

Furthermore, experts noted that the online game to which the ad refers to is run by the company on an owned-website for the purpose of a competition with prizes to be won by participants. Although the online game is trivial and simplistic in its objective – i.e. to click as many times as possible on a button on the screen – the Panel feels that this is not a marker that would indicate the adverage to be appealing particularly to children under 12. The prizes that are offered to the winners are also not gifts that are considered to be appealing primarily to under 12-years-olds, but rather to teenagers and early adults, namely gaming consoles. Additionally, the Panel also took note of the fact that to access the adverage, participants must attest their age and only over-18-year-olds are allowed to play and win prizes.

Finally, the Panel did not consider the complaint's assertion that the ad calls for over-consumption, as this falls outside the remit of the EU Pledge commitment.

Based on the arguments and rationale presented above, the Panel judged that the advertisement appearing on YouTube is not appealing primarily to children under 12 years old. Therefore, the Panel did not uphold the complaint.

Panel decision: complaint not upheld

Case ID: 43

Appeal

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

Appeal Ruling – Mondelez Chips Ahoy! TV YouTube

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

Age-screening mechanisms are well-recognised as unreliable tools to prevent children under 13 years old from online platforms 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'.

Nevertheless, the Panel stated that it ‘took note of the fact that to access the adverggame, participants must attest their age and only over-18-year-olds are allowed to play and win prizes.’ As we have mentioned above, attestation of age is extremely easy to misrepresent by simply entering a different older birth date and regardless of the terms and conditions children under 18 would indeed be able to play this adverggame. Moreover, 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/prizes which we believe targets children.

Furthermore, with regard to actually entering the competition a child is in any case easily able to ask a parent or guardian to enter a competition on their behalf. Moreover, even if a viewer of the Youtube video were not to enter the competition at all (nor ask someone else to enter on their behalf), the promotion in the Youtube video of an HFSS product (not in line with the Pledge criteria) in a way which is appealing to children is still a powerful element which is not negated by the competition terms and conditions.

Child-appealing Elements

We disagree with the assertion that the competition prize offered to winners – games consoles- are appealing primarily to teenagers and early adults, but not children under the age of 12. Young children are a key demographic for video games. Indeed, as OFCOM found in 2020, ‘Ofcom’s media literacy research indicates that four in ten (39%) UK adults and three-quarters of children (75%) played video games of some kind in 2019’. Indeed, within this demographic of children who play video games, 83% of children play on TV-connected games consoles (the same kind as shown in the advert). Moreover, amongst all age groups children were by far the most common age group to play games consoles (see below). These figures are likely to be replicated across Europe.

Figure 3.6: Percentage of the UK adult and 8-15 game-playing population who play games, by device, age and gender: 2020

65+	16%	23%	28%	7%	4%	19%	21%	25%	5%	3%
55-64	27%	29%	31%	21%	6%	34%	31%	19%	15%	10%
45-54	60%	47%	46%	48%	20%	54%	47%	34%	28%	18%
35-44	77%	56%	63%	69%	30%	71%	48%	39%	50%	32%
25-34	79%	51%	68%	71%	42%	82%	54%	47%	55%	35%
18-24	87%	49%	65%	79%	39%	81%	44%	59%	57%	40%
Children	86%	79%	72%	90%	52%	90%	81%	70%	75%	45%
	Mobile	Tablet	PC	Console	Handheld	Mobile	Tablet	PC	Console	Handheld
	Male					Female				

The Panel’s decision to not uphold the complaint states that the ages of the actors included in the ad ‘were probably in mid to late teens’. However, this does not take into account the appeal for younger children of the presence of such a demographic for whom children will regard as older peers to look up to (who are in any case clearly not much older than the Pledge age cut-off), and that it is not only adverts which feature very young children which are appealing to children.

We further disagree that the assertion by the Panel that the ‘ad doesn’t feature any activity that would be considered childish or highly appealing to children’. As mentioned above, it is clear that playing video games consoles is highly appealing to children, as the main demographic of users of this kind of video games. Moreover, the childish humour of the advert has not been addressed. We see two groups of friends playing against each other. One friend consumes a Chips Ahoy! Cookie and a chocolate chip

falls on the On/Off button of the games console. When he goes to retrieve the chocolate chip with his fingertip he accidentally turns off the game his friends are playing which illicit an exaggerated and humorous reaction by his friends who are outraged that their game has been interrupted. This simple and silly humour would be clearly appealing to younger audiences including those under the age of 12 years old.

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 43 for Mondelez Chips Ahoy YouTube video.

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 overall composition of the ad. The Appeal Panel agreed with the plaintiff that playing video game consoles can be appealing to children below the age of 12, but it would not be primarily appealing to them. The type humour used in the ad is one meant to address a much broader audience and was not seen as primarily targeting children under 12.

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 Mondelez Chips Ahoy YouTube video is compliant with the EU Pledge commitment.

Decision regarding the appeal: admissible.

Decision regarding the complaint: not upheld.

