

Case ID: 47

Decision

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

First instance ruling – Ferrero

Description

Kinder Joy Instagram post Jurassic World

Complaint

Kinder Jurassic World

Kinder Spain posted an Instagram [video](#) on the 29th of March, promoting the new range of Jurassic Park-themed toys now available with their Kinder Joy products.

The caption reads:

¿Os imagináis un mundo en el que los dinosaurios estuviesen entre nosotros? ¡Ahora podréis descubrir un mundo lleno de aventuras y dinosaurios con vuestros pequeños adolescentes y Kinder Joy! Convertid a vuestros peques en pequeños exploradores y vivid grandes aventuras con las sorpresas de Jurassic World. ¿Estáis preparados, familia de exploradores? 🌍

In English: 🖱️ Can you imagine a world in which dinosaurs were among us? Now you can discover a world full of adventures and dinosaurs with your little teenagers and Kinder Joy! Turn your little ones into little explorers and live great adventures with the surprises of Jurassic World. Are you ready, family of explorers? 🌍 🖱️

The text on the video reads: *Esta sorpresa llegan pisando fuerte tan fuerte que dejaran huella explora la mundo de los dinosaurios y construye tu parque jurasico en familia*

In English: This surprise comes stomping so hard that they will leave their mark. Explore the world of dinosaurs and build your jurassic park as a family

The video shows the Kinder Joy product, including a visual with dinosaurs on the packaging, as well as the range of 5 different toys which are available to collect. A child's hand then enters the screen to select on of the dinosaurs toys.

The presence of the chocolate product, the link to a movie franchise extremely popular with younger children (Jurassic Park), the promotion of this licensing partnership between Kinder and Jurassic Park and the dinosaur toys which are available with the purchase of a Kinder Joy product (and are only available with the purchase of said product), the young child's hand on the screen showing the demographic this marketing/promotion is intended for, the tone of the caption 'Can you imagine a world in which dinosaurs were among us' as well as the emphasis on exploration and adventures (clearly relevant and popular themes for younger children under 12 years old), demonstrate that this is clearly marketing directed towards younger children under 12 years old, regardless of any wording about the 'family'.

Advertiser's response

All Ferrero's brands globally do not communicate directly to children. Ferrero has always believed in the crucial role played by parents in educating their children to a balanced and varied diet and an active lifestyle. Therefore, advertising and marketing communications concerning our food products are directed primarily to adults who make the household purchasing decisions and to young people, in compliance with local requirements, in terms of content, as well as of media purchasing.

As for all the marketing communications concerning our food products, the Kinder Joy Instagram post featuring our Jurassic Park collection has been designed and placed to target adults. We have taken all the available measures to ensure compliance with our commitment:

- The text of the posts and the wording embedded in the videos – *'con vuestros pequeños adolescentes', 'a vuestros peques', 'familia de exploradores', 'en familia'* – is clearly directed at adults.
- While toys that are an inherent part of the food product like the Jurassic Park line are excluded from the EU Pledge policy, we have ensured to portray them in a way (e.g. static, without animations) that show to parents the availability in our products and not as a 'hook' addressed to kids as an additional safeguard.
- The post mentioned in the complaints was placed in a 'age-gated' environment as Instagram requires users to be over 13yo to register to the platform. Please note that the demographic data of our Instagram profile shows that around 98% of our followers is above 18 years of age.

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 fall under the non-measured media category, meaning that adequate audience metrics are unavailable. The Panel also noted the fact that Instagram, as an online social media platform, bars anyone under the age 13 to set up 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.

Consequently, the Panel was presented with the task to assess the overall creative execution of the advertisements at hand – in this case the Instagram short video.

The Panel expressed some concerns regarding the creative execution of the video, as they consider that the visuals of the Jurassic World-themed video are likely to be of interest to children under 12 years old. They noted, however, that the language of the accompanying text was aimed more at parents than at children, with references to the family engaging in playful activities. Wording such as “[...] *Turn your little ones into little explorers [...]*” indicate that the ad is intended for parents. The Panel also noted that the toys and products displayed are static and presented in a neutral way, which mitigates the choice for a theme that might potentially appeal to children. The colour pallet is also not oriented to attract children's attention, with bland beige-based hues in the background.

Based on the arguments and rationale presented above, the Panel judged that the Instagram post 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: 47

Appeal

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

Appeal Ruling – Ferrero Kinder Joy Instagram post Jurassic World

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 ‘*Instagram, as an online social media platform, bars anyone under the age of 13 to set up 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.

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'.

Child-Appealing Elements

While the Panel's decision does acknowledge that it had some concerns regarding the creative execution of the complaint (they considered that *'the visuals of the Jurassic World-themed video are likely to be of interest to children under 12 years old'*), these concerns have been set aside because, the Panel says, the language in the accompanying text *'was aimed more at parents than children'* and the fact that the toys are 'static' in the video and *'presented in a neutral way'* which, according to the Panel, *'mitigates the choice for a theme that might potentially appeal to child'*.

When considering whether a marketing example is marketed to children or not, it is important to assess the overall effect of the advert and which elements are the most powerful and eye-catching. Indeed, the EU Pledge commitments state that 'the overall impression of the marketing communication' should be taken into account, a consideration we believe has not been undertaken in the Panel's decision. As can be seen below, it is clear that the most attractive and attention-grabbing element of the post is the vivid and engaging video and not the textual caption. As detailed further below, the quick transition between graphics (not to mention the child-appealing movie franchise content) is much more captivating than the textual caption to the right, not to mention that the post is clearly much larger than the small textual caption.

We furthermore disagree with the Panel's assertion that merely because the 5 dinosaur toys featured in the advert are static means that it would not be appealing to children or that they are presented 'in a neutral way'. The presence of a toy (in this case multiple toys), belonging to the Jurassic World franchise which is strongly and clearly emphasised in this short ad (with obvious appeal for young children) is child-appealing whether they are animated or not. In any case, the Panel has also not addressed the non-static animated interaction showing the child's hand picking up one of the toys, further emphasising for whom this ad is targeted.

Moreover, while bright colours are indeed attractive to children, it does not mean that the 'camouflage' tones of this advert negates the other striking child-appealing content (as explained above and below) and audiovisual elements. Indeed, the colours have evidently been carefully chosen to be in line with the colours of the dinosaur toys and the movie franchise itself (movie trailer here) which is being promoted with the chocolate product.

Furthermore, the animation throughout the advert is in any case not static: the quick dynamic animations (the Kinder Joy product flashes up on the screen first, quickly changing to the Jurassic World symbol followed by another quick transition to the Kinder Joy product, this time with a Jurassic World dinosaur on the packaging, and then finally to a dinosaur footprint, after which the toys are shown, followed quickly by a child's hand picking one of them up) is clearly designed to attract and maintain attention. All these 'scenes' quickly occur in just a 12 second advert demonstrating the dynamic and engaging nature of the advert.

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 47 for the Kinder Joy Instagram post regarding Jurassic World.

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.

Regarding the creative execution of the post, the Appeal Panel agreed with the concerns stated in the First Instance decision about the visuals of the Jurassic World-themed video. These are, indeed, likely to appeal to children below 12 years old. The Appeal Panel also took into account the fact that the ad is focussed on the product itself and that the toys are a part of the product. The Appeal Panel reiterated that the language used was aimed more at parents than at children, but agreed that the text is small in comparison to the post, and would likely not be read by children. The Appeal Panel found that the animation is quite static when it comes to the dinosaur games, which just appear in the ad with no extra movements or sounds. In essence, whilst there are some elements that are likely to appeal to children under 12, the overall impression of the ad in its creative execution would not appeal primarily to them. This is due mainly to the limited animation and movement in the ad, and the fact that the Jurassic World theme is not an exclusive domain of children.

Similarly to the First Instance Panel, the Appeal Panel has considered all aspects of the ad, ranging from its placement to the creative execution and the language used. 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 the Kinder Joy Instagram post regarding Jurassic World is compliant with the EU Pledge commitment.

Decision regarding the appeal: admissible.

Decision regarding the complaint: not upheld.