

**Case ID: 49**

**Decision**

---

<b>To</b>	EU Pledge Secretariat	<b>Date of meeting</b>	7 May 2021
<b>From</b>	EASA Secretariat	<b>Date sent</b>	31 May 2021

---

**First instance ruling – Mondelez**

**Description**

Mondelez Principe Instagram story and post in Spain

**Complaint**

Principe Galletas Catch the Biscuit Instagram Story

On the 4th of March the @principe\_es account posted an Instagram story which showed a biscuit rapidly moving from one side of the screen to the other. The challenge posed by the account was to 'Catch the biscuit' at the moment it passes the shaded template of a biscuit shape. 'If you think that you are the fastest, try to catch the biscuit!'

The presence of the biscuit product, the attractive bright colours, the simplicity of the game as well as the likelihood that a viewer would try repeatedly to achieve the stated goal (catching the biscuit), would be attractive to children, including younger children under 12 and should be considered as a marketing sample for children under 12 years old.

Principe Instagram Football Sponsorship

An Instagram [post](#) from Principe biscuits in Spain was posted on the 23rd of March and announces that it is a new sponsor of the Spanish national football team and that they are the new 'Official Cookie of the National Team',:

A ES OFICIAL! 📣 Unimos nuestras fuerzas y pasión por el deporte con la @sefutbol ⚽ para convertirnos en la Galleta Oficial de La Selección ❤️. Orgullosos de formar parte del mejor equipo. 🙌 ¡A por todas! #NosMueveLaRoja #GalletasPrincipe

In English: IT IS OFFICIAL! 📣 We join forces and passion for sports with @sefutbol ⚽ to become the Official Cookie of the National Team ❤️. . Proud to be part of the best team. 🙌 Go for all! #NosMueveLaRoja #GalletasPrincipe

The announcement post shows the Prince character in the centre surrounded by Spanish international soccer players, while Prince biscuits fall down around them.

The featuring of the cartoon brand character 'Prince', especially positioned to look like part of the Spanish football team, the presence of the chocolate biscuit, and given the clear appeal with the link to sport, and specifically the national football team, will be to children, including young children under 12, means this example should be considered to be marketing to children including those under 12.

### Advertiser's response

At Mondelēz 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.

Instagram has an age verification system in place and the platform is for users 13+ years old. Nevertheless, we take our own responsibility towards Marketing to Kids seriously and our online games are always geared to gatekeepers and persons over age 12. The biscuit, the colours and the game mechanics mentioned here are directed to adults as well as people over age 12.

We think, those who exercise and do sports are allowed to eat a cookie or a piece of chocolate. Of course, always in moderation and with a mindful mindset. That is the message behind this commitment. Our advertisement always shows proper serving and portion sizes, as well as mindful consumption, in photography and TV imagery. We portray active and safe lifestyle choices and always in a safe environment for underage persons with gatekeeper

### 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 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 two Instagram posts in question.

Judging the creative execution, the Panel found that the game presented in the first Instagram post is a very simplistic one that a child under 12 could find amusing. However, the overall impression of the post was that it did not primarily target children under the age of 12. The panel stated that the presence of the product itself was not against the EU Pledge commitment, and as such it was not considered problematic. The colour palette is limited and there is little else that could really attract the attention of young children. The Panel found that the story was not appealing primarily to under-12-year-olds.

The Panel then discussed the second post, depicting the brand character 'Prince' as a part of the Spanish football team. It was not considered as primarily appealing to children under 12 years old as the appeal of the national team is much broader and the colours and graphics used do not seem to be addressing children. The presence of the product (the chocolate biscuit) in association with the Spanish football team was not considered to be an element of distinct appeal to children under 12. Moreover, the wording of the language used in the post as well as the slogan were deemed to not be targeting children under 12, rather it was deemed to be the sort of language aimed at adults.

The fact that both posts were found on Instagram, a platform which has an age-screening mechanism barring anyone under 13 years of age from registering on the platform, was taken into consideration by the Panel. However, it is not sufficient on its own to guarantee compliance.

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

### **Panel decision: complaint not upheld**

**Case ID: 49**

**Appeal**

---

<b>To</b>	EU Pledge Secretariat	<b>Date of mtg</b>	9 July 2021
<b>From</b>	EASA Secretariat	<b>Date sent</b>	29 July 2021

---

## **Appeal ruling – Mondelez Principe Instagram Spain**

### **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.

#### **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. Instagram itself has acknowledged that it is an issue as 'young people can lie about their date of birth'. While the Panel acknowledges that age-gating is indeed insufficient to guarantee compliance, it also states that 'The fact that both posts were found on Instagram, a platform which has an age-screening mechanism barring anyone under 13 years of age from registering on the platform, was taken into consideration by the Panel'. It is important to clarify that Instagram does not 'bar' anyone under the age of 13 years old. It has an age-gate which is theoretically meant to prevent those younger than this age from using the platform but which, as acknowledged by Instagram itself, does not work.

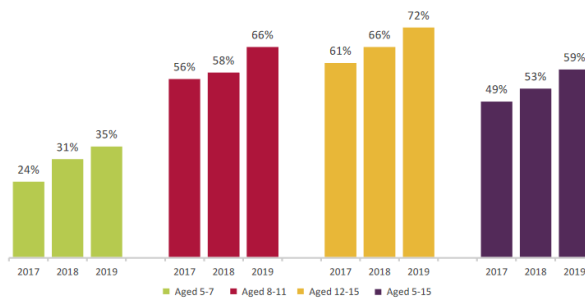
**Appeal**

We would like to appeal this Panel Decision.

**Instagram Game**

While the Panel acknowledges in its decision that the advertgame is shown is ‘a very simplistic one that a child under the age of 12 could find amusing’ it dismisses the complaint because it doesn’t believe that there are specific elements of the post which are child-appealing. We believe that it fails to take into account the popularity of online games with children compared to adults. In the UK for example, in 2019, games were played online by 19% of adults while 59% of children aged 5-15 played such games<sup>1</sup>. Statistics such as this, which are likely to be replicated across Europe, demonstrate the particular appeal for online games for children. Indeed, Among children who play games, mobile is also the platform with the highest reach (88%). In this case, it would be especially appealing for this demographic considering that the Prince biscuits are well recognised as a children’s biscuit brand and the game is clearly designed to play on a mobile.

Figure 3.5: Playing games online (children)



Source: Ofcom Parents’ and Children’s Media Literacy Tracker 2019. QC42 – Many games can now be played online, either through games consoles, other games players or through other things like computers, laptops, tablets, mobile phones and smart TVs. Examples of popular games that can be played online include FIFA football games, Minecraft, Fortnite, and Roblox. Do you ever play online games? Base: Parents of children aged 5-7 (764) and children aged 8-15 (817 aged 8-11, 762 aged 12-15).

While the Panel stated that the presence of the chocolate cookie product was not against the EU Pledge rules itself, it does not address the eye-catching and dynamic audiovisual components (the biscuit flying past the screen at speed) or the addictive nature of the game (trying to ‘catch’ the biscuit) which would be appealing to younger children, especially given the simplicity and low-skill level required, which would be possible to be played even by younger children.

**Prince Biscuits and Spanish National Football Team**

We would disagree with the Panel’s assertion that this post is not primarily appealing to younger children under the age of 12 years old. While we agree that the appeal of the national football team is broader than this demographic this particular post, – promoting a chocolate biscuit which is well-recognised as a children’s brand alongside sporting heroes to whom children will naturally look up, in a colourful and dynamic manner (biscuits falling from the sky), means it should not be considered to be compliant with the Pledge. Moreover, the inclusion of a cartoon brand character Prince front and centre (which is obviously of appeal to younger children and not older children or adults) standing alongside these football heroes (indeed appearing to lead them) further underlines the child-appealing nature of the post.

Indeed, on Principe's dedicated webpage (<https://www.nosmuevelaroja.principe.es/>) for their collaboration with the football team the brand outlines how children are the central focus of this partnership:

*'At Príncipe we have one purpose: to help the little ones in the house live their childhood to the fullest. For this reason, we are now the Official Cookie of the National Team. To enjoy sport, invite you to practice it and that we all live it together as a family as we have always done.*

...

*From the earliest years, girls and boys need to feel motivated to stay active. For this reason, we believe that it is important to promote sport in their lives, because it combines fun and enjoyment with some of the highest values of our society, because it helps them in their development and because it can awaken within them that desire to be active. and positively influence future hobbies beyond childhood and adolescence.'*

While we would of course disagree that a children's chocolate biscuit brand have entered into such a partnership for the well-being of children, it is nevertheless clear whom they are targeting with such an action, which we believe is corroborated by the nature of the Instagram post. It is interesting to note that the brand has since deleted this post from their Instagram account.

### **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 49 for Mondelez Principe Instagram posts in Spain.

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 adverts' compliance, and must be considered in combination with all other factors.

Firstly, the Appeal Panel assessed the Instagram stories that included a small advergaming involving catching the product at the right time on the screen. The Appeal Panel considered the statistics provided by the appellant about gaming practices amongst children aged 5-15 years old as relevant and indicative. However, the Appeal Panel deemed that the figures outlined in the graph provided are more relevant for console, computer, and online video games rather than to small, short, and simple advergaming as created on Instagram stories.

Regarding the creative execution, the Appeal Panel deemed that the colour palette used in the stories is quite simple and monotonous. Whilst colourful animations are not an advertising practice exclusively used for targeting children, the inclusion of bright and vivid colours of multiple hues would attract their attention more than more mundane and monotonous creatives. In this case, the story is not enriched with any childish themes or animations. The simplicity of the game and the ease with which one can play the advergaming would not automatically render the stories primarily appealing to the demographic. In fact, whilst it is indeed a very simple game, it is also something that users from other age groups could also be very well wanting to play. Its simplicity does not infer a high appeal to children. Consequently, the Appeal Panel did not find the Instagram stories to be primarily appealing to children under 12.

Secondly, the Appeal Panel assessed the Instagram post that included the brand character alongside the Spanish national football team. Based on the appellant's indication that the post has been removed from the profile, which was also confirmed by experts, the Appeal Panel cannot admit the appeal, as

there is no advertisement to judge. The case regarding the Instagram post with the Spanish football team is therefore dismissed.

The Appeal Panel's assessment thus only pertained to the Instagram stories. Based on the arguments and rationale outlined above, the Appeal Panel does not overturn the original decision of the First Instance Panel. The complaints remains not upheld and the advert is compliant with the EU Pledge commitment.

**Decision regarding the appeal:**

- **admissible for the first section regarding the Instagram stories;**
- **dismissed the second section regarding the Instagram post.**

**Decision regarding the complaint: with concern to the Instagram stories, not upheld.**