

**Case ID: 53**

**Decision**

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| <b>To</b>   | EU Pledge Secretariat | <b>Date of mtg</b> | 11 May 2021 |
| <b>From</b> | EASA Secretariat      | <b>Date sent</b>   | 20 May 2021 |

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**First instance ruling – Kellogg’s**

**Description**

Kellogg’s Trésor Belgian TV ad and Facebook video

**Complaint**

An advert for Kellogg’s Tresor chocolate-filled breakfast cereal was broadcast on the Belgian TV channel VTM in the morning, during a youth program. The advert shows animated Tresor chocolate-filled cereal pieces on action-filled adventures in a virtual world, using graphics and visuals similar to popular kids’ TV shows and films, where the primary focus of the advert is also on the chocolate element of the cereal.

*“Les vrais chocovores sont prêts à tout pour du vrai chocolat fondant”.*

The advert has also been shown on [Facebook](#) where the caption also encourages consumption of the chocolate cereal for breakfast: *‘Rien de tel que du chocolat fondu dès le matin !’*

The presence of the chocolate-cereal in the adverts, the strong focus on the chocolate aspect of the cereal in the advert, the use of cartoonish versions of the cereal pieces, the graphics and visuals similar to young children’s TV shows and films, the adventure and action-filled theme in the adverts which would obviously appeal to younger children as well as the time of the TV advert when many young children are likely to have been watching TV demonstrate that this example is marketing to children under the age of 13.

### **Advertiser's response**

The EU Pledge is a voluntary initiative by leading food and beverage companies to change food and beverage advertising to children under the age of twelve in the European Union. One of the main commitments is not to advertise for food and beverage products to children under the age of twelve on TV, print and internet, except for products which fulfil common nutritional criteria.

The EU Pledge common nutritional criteria are a key driver for recipe improvement and innovation. Our Trésor Brand for example, will be reducing sugar on the core range by end of Q2 2021 bringing the full Trésor range within EU Pledge compliance. Innovations under the brand name already take care to comply with the EU Pledge Common Nutrition Criteria from their conception. The challenge is finding a balance with consumer preference and acceptance as this is key to driving sustainable recipe improvement.

The advert for Kellogg's Trésor breakfast cereals broadcasted on the Belgian TV channel VTM, shows the product Trésor chocolate, caramel and peanut which is a recent innovation and this product is compliant with the EU Pledge common nutrition criteria.

Under the EU Pledge commitment, companies also need to ensure that they are not designing company owned websites and company-owned social media profiles that promote products which do not meet the EU Pledge common nutrition criteria in a way that appeals primarily to children under 12, in accordance with the Guidance on Creative Execution.

The Facebook post on the French Trésor Facebook page shows the product Trésor chocolate nuts, which is currently not compliant with EU Pledge common nutrient criteria, but as we stated, the recipe improvement will be arriving soon in market. Kellogg does not target children under the age of 13 on online platforms.

In line with these marketing practices, the Facebook page of Trésor France and this post are targeting a 13+ audience. This is reflected in the ages of the followers, which are even skewed heavily towards 18+.

This is further reflected in the fact that the Kellogg Trésor Best Melts Q1 campaign also included sponsored Facebook post ads for which the selected age target was ages 13-19 years.

The creative execution of the Facebook post was clearly aimed at a target audience 13+. The post is an adult-type "war movie" style shown in a comic fashion. The video game style characters alone do not make this appealing to kids.

We hope you appreciate the steps taken to respect the EU Pledge guidelines when planning and activating this campaign. To facilitate compliance with the EU pledge commitments, we have developed detailed internal training and guidelines which we believe we have followed in this instance.

### 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 product (Trésor chocolate, caramel and peanut) advertised on the Belgian TV channel VTM is compliant with the EU Pledge nutrition criteria, as this was confirmed ahead of the Panel session by the EU Pledge secretariat. Consequently, the complaint regarding the ad appearing on the Belgian TV channel VTM is not discussed by the Panel.

The advertised product appearing on the company-owned Facebook profile (Trésor chocolate nuts) 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. Consequently, the Panel was presented with the task to assess the overall creative execution of the advertisements at hand – in this case the Trésor chocolate nuts product promoted on the Trésor Facebook page for France.

Experts took note of the fact that Facebook is a social media platform that bars anyone under the age of 13 to set up an account. 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.

Regarding the creative execution of the advertisement, the Panel considered that the video's colour palette and theme does not contain any element that would be appealing primarily to children under 12 years old. Although the video's composition is 3D-based animation, experts believed it is more likely to target teenagers and young adults rather than children under 12, as the creative execution and the story depicted relates closely to console video games, which are more popular with adolescents than children under 12 years old. Colourful animations are not an advertising method used only for targeting children; it can be used to target a wide audience, depending on its execution. They also noted that the video is only 10 seconds short and as such would not attract the attention of young children but would rather catch the eye of older teenagers who often play war-based video games and would find the depicted scene involving a war helicopter more familiar and appealing than under-12-year-olds. Finally, the brand characters depicted in the video are out of remit of the EU Pledge commitment.

Based on the arguments and rationale outlined above, the Panel judged that the Facebook video ad for Trésor chocolate nuts is not appealing primarily to children under 12 years old and is thus compliant with the EU Pledge commitment. Therefore, the Panel did not uphold the complaint.

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

**Case ID: 53**

**Appeal**

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|-------------|-----------------------|--------------------|--------------|
| <b>To</b>   | EU Pledge Secretariat | <b>Date of mtg</b> | 24 June 2021 |
| <b>From</b> | EASA Secretariat      | <b>Date sent</b>   | 29 July 2021 |

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## **Appeal ruling – Kellogg’s Trésor FB FR**

### **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.

#### **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 ‘Facebook ... bars anyone under the age of 13 to set up an account’. However, the mere presence of an age-gating mechanism does not in itself actually ‘bar’ children under the age of 13 from creating profiles/setting up an account.

In any case, 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**

We would strongly disagree with the Panel’s assertion that, ‘Regarding the creative execution of the advertisement, the Panel considered that the video’s colour palette and theme does not contain any element that would be appealing primarily to children under 12 years old.’ The Panel fails to address the child-appealing nature of the humour which is the central component of the advert which shows two Tresor cereal pieces conducting a ‘Choco attaque’ on pieces of chocolate from a helicopter then licking their lips with the melted chocolate.

The Panel states that, ‘experts believed it is more likely to target teenagers and young adults rather than children under 12, as the creative execution and the story depicted relates closely to console video games, which are more popular with adolescents than children under 12 years old.’

This statement firstly fails to take into account the reality of demographics of those who use these console games. Young children are in fact 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 |        |     |         |          |

Again, we do not believe that the Panel has adequately taken into account the interests of older children under 12 years old who will find content which is attractive to teenagers as appealing to them. The interests of children under the age of 12 years old are not homogenous. What a 3-4 year old may find appealing will be very different from older children in this age bracket who are likely to find certain activities, content or animations therein as appealing as their teenage peers.

In any case the graphics, animations and colours used in this short ad do not mirror those used in video games which are recommended for adults or older teenagers (although children younger than the age

recommendation do indeed still play such games). See for example this list of top 10 war-based games where it is clear that the animations are much more life-like, the subject matter much more serious and the colours very muted (as would be expected in such games). The advert on the other hand appears to be much more cartoonish and humourful than any such war-based games. Indeed, the humour itself, as mentioned above, is very child-appealing and would not be replicated in such war-based games.

The Panel also fails to explain why a shorter video of ten seconds would be more appealing to teenagers than to children.

### **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 53 for the Kellogg's Trésor French Facebook 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.

Regarding the creative composition of the video, the Appeal Panel noted that the advert does contain certain elements that may be considered to be childish, but that the overall impression and allusion to a war-style video game tends to appeal to a broad audience rather than specifically to children under the age of 12. The appellant's newly provided evidence issued by Ofcom in the UK provides context and detailed statistics as to the usage of video-game consoles and computer games. The table displays that the age-group more likely to play video games are minors. This was not disputed by the First Instance Panel, as minors include both teenagers and children under 12. The report does not indicate whether it is children under 12 who are more likely to play video game than teenagers. In this sense, the Appeal Panel agrees with the First Instance Panel that the ad may appeal to both children, teenagers, and perhaps even young adults, but it would not appeal primarily to under-12-year-olds.

Furthermore, while the video 3D animation may also be appealing to children under 12, it does not a *sine qua non* element that automatically renders the ad to be primarily appealing to them. In this case, the colour palette is also largely reflecting the brand's colour scheme and does not contain a choice of hues aimed at attracting the attention of children.

The Appeal Panel also considered the point made by the First Instance Panel that a 10-second video would not attract the attention of children any more than that of other demographics. Having viewed and analysed the short video in a way that a consumer would, such as appearing on Facebook, the Appeal Panel considered that it is unlikely for the ad to be appealing more to children under 12 than other age-groups.



Finally, the Appeal Panel emphasises that the analysis of the advert covers multiple aspects and elements that must be taken together when considering the compliance of the ad against the EU Pledge commitment. There can not be only one element that renders the ad compliant or not, but rather multiple reasons that, when taken together, holistically indicate whether the ad is likely to appeal primarily or not to children under 12 years old. In this case, due to video games being popular with a large audience, ranging from children to teenagers, due to the colour palette not containing any bright, vivid, or childish colours, nor any scene that would be inherently childish, and due to the way consumers are likely to view the ad, the Appeal Panel finds the ad to be compliant.

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 advert is compliant with the EU Pledge commitment.

**Decision regarding the appeal: admissible.**

**Decision regarding the complaint: not upheld.**