

Case ID: 56

Decision

To	EU Pledge Secretariat	Date of mtg	11 May 2021
From	EASA Secretariat	Date sent	20 May 2021

First instance ruling – Mondelez

Description

Mondelez Prince Biscuits on Delhaize website and Mondelez website in Belgium

Complaint

a. Mondelez Prince Biscuits

An offer on the Delhaize supermarket website encourages consumers to purchase 4 packs of Prince biscuit so that you can personalize online your own mascot. After the four packets have been bought, the instructions tell the consumer to click on the Prince website luprince.be where the option to create the personalized character is available.

This is an incentive to buy the product, because with this purchase, you can go online and create and customize your own mascot.

The presence of the well-known brand mascot character 'Prince' which is already clearly created for a children's audience, the visible presence of the Prince biscuits on the Delhaize website as well as the luprince.be website, the premium offer (the offer to personalize your own 'Prince' character) which would not be of interest to adults or even teenagers, the premium offer of a free box of biscuits, the incentivization to purchase multiple packs of these Prince biscuits which arguably encourages over-consumption of product which is high in sugar and fat, demonstrate that this is an example of marketing to young children under the age of 12 years old.

a. Prince Biscuits Website Promotion

The Belgian Prince website offered users the opportunity to create their own Prince-themed character which can then be printed on boxes of Prince biscuits and bought by the user online. The website tells the user that the Prince has gone on some well-deserved holidays and asks if you will be his successor. It says that it is your chance to live the life of a real prince(ss). The user is invited to create their own Prince character (which can be edited and personalized to look like the user) to share the result and to buy Prince biscuits (with the offer of a free box after the purchase of 4). Even though there was an 'age gate' which required users to confirm if they were over 16, the very childish nature of the content of the story (becoming a prince or princess) as well as the general appearance of the website, the premium offer (personalised box of Prince biscuits) with the inclusion of the Prince cartoon brand characters show that the content was specifically designed for and intended to be engaged with by younger children, under the age of 12 years old.

A range of different Prince biscuits, high in fat and sugar are shown including one (Black and White Mini Stars) which has 37g of sugar per 100g.

Advertiser's response

Thank you for your request, which we would like to answer as follows:

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.

Promotions are not subject to the EU Pledge. Nevertheless, we take our own responsibility towards Marketing to Kids seriously and take great care to ensure that all of our own promotional activities comply with our Marketing to Kids policy. In addition, we encourage our retail customers and promotional partners to respect and adhere to it when promoting our products. There is no legal maximum amount set on products purchased in order to be able to participate to an activation. Purchases are done by gatekeepers that decide on amount of purchased products. Our Prince website is age-gated and directed to gatekeepers.

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 advertisement featuring on the third-party website of the Belgian supermarket Delhaize is promotional in nature – this was confirmed by the EU Pledge secretariat. As per the EU Pledge commitment, third-party promotional content is outside the remit of the EU Pledge. Consequently, the complaint regarding the promotional ad appearing on Delhaize’s website is not upheld.

The product (Prince biscuits) is also advertised on the company’s own website, and it 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 websites 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 Belgian Mondelez website for Prince.

The Panel noted that the company-owned website contains an age-gating mechanism barring anyone under 13 years old from accessing the webpage. Nonetheless, 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, although brand-characters are outside the remit of the EU Pledge commitment, the story of the Prince brand-character enjoying some time off and needing to find a suitable replacement could be appealing to children under 12 years old. This is particularly the case when the brand-character can be customised to resemble the consumer and even receive a personalised box. However, experts noted that apart from the personalised variation of the brand-character, the ad does not contain any other element that would attract the attention of young children under 12 years old. Colourful advertising material or animations are not an exclusive advertising method used only for targeting children. In fact, the colour palette for the website is neutral and limited in its diversity, rendering the website’s composition rather sober. The content of the website and the possibility to adapt the brand-character to one’s liking is appealing to children under 12 as much as it is to other demographics, and as such it is not appealing exclusively or primarily to under-12-year-olds.

Furthermore, the Panel also noted that the French version of the website makes use of the formal pronoun “vous”, which does not generally appeal to children under 12, as they would feel it does not target them but rather their parents. The choice for this pronoun also sets a certain respectable distance between the advertiser and the consumer, in accordance with what would feel comfortable for the latter. The Dutch version of the website makes use of the informal pronoun “jij” or “je”, but the distinction is less marked between pronouns than in French. Although important, this factor merely contributes to the overall assessment, and does not play a sine qua non role in the final judgement. The complaint regarding over-consumption is outside the scope of the EU Pledge commitment.

Based on the arguments and rationale outlined above, the Panel judged that the Prince Belgian website 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

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Appeal

To	EU Pledge Secretariat	Date of mtg	24 June 2021
From	EASA Secretariat	Date sent	29 July 2021

Appeal ruling – Mondelez

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

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 'the company-owned website contains an age-gating mechanism barring anyone under 13 years old from accessing the webpage'. However, the mere presence of an age-gating mechanism does not in itself actually 'bar' children under the age of 13 from creating profiles and suggestions that it does should be avoided. Indeed, the age-gating mechanism is incredibly easy to bypass – a user does not have to even enter a birth date, they simply have to click to confirm that they are above or below 12 years old (see below for a screenshot).

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 (or in this case simply click a button to confirm you are over 12 years old) to be granted access.

Appeal

We would like to appeal this decision.

With regard to the use of 'vous' in the French version of the website, while the Panel decision states that, 'Although important, this factor merely contributes to the overall assessment, and does not play a sine qua non role in the final judgement' it is clear that this is in fact a significant deciding factor in Panel decisions on whether marketing examples are considered to be breaches of the Pledge rules (and has been cited as such in previous Panel decisions e.g. Cases 24, 34, 33). We are therefore concerned that a clear loophole and worrying precedent have been created whereby Pledge members may create marketing which is clearly targeted at children, including children under 12 years old, but, by simply using a formal tense in textual elements of the marketing, they are able to continue to do so according to Pledge rules and Panel decisions.

Indeed, while the promotion on the Delhaize website was deemed out of scope, in spite of it clearly being conducted under the direction of Mondelez and with infographics created by the company, the wording there also uses the 'tu' form. Although it is out of scope, it is interesting to note that Mondelez are willing to allow the use 'tu' on platforms which they are aware are not subject to the Pledge accountability mechanism.

In any case, we would disagree that the impact of simply using 'vous' or language deemed to be for parents negates the overall impact of the marketing and its creative execution, which is clearly of appeal to younger children under the age of 12 years old. Indeed, the Panel accepts that the story of the Prince character wanting some time off and needing a replacement would be appealing to children under the age of 12 years old, especially given the fact that the brand character can be customised to resemble the consumer and receive a personalised box of biscuits. However, apart from the aforementioned element, the Panel judges that the 'ad does not contain any other element that would attract the attention of young children under 12 years old'. Given that the entire promotion and focus of the website page is on the possibility to personalise the product, we are concerned that the Panel has dismissed this as not significant enough. Moreover, we do not feel that the Panel have adequately taken into account the overall creative execution of the advert or other elements of the ad which are also child-appealing.

For example, we disagree with the Panel's argumentation that 'Colourful advertising material or animations are not an exclusive advertising method used only for targeting children. In fact, the colour palette for the website is neutral and limited in its diversity, rendering the website's composition rather sober.' While colours and animation can indeed be used to target older children and adults, it is obvious that the animations used in this instance are designed to appeal to younger children, certainly those under the age of 12 years old, appearing very cartoon-like and childish (and very similar to animations common and popular with younger children, not teenagers or adults). We have included an example below (Paw Patrol) to demonstrate the clear similarities with such children's animations. The presence of these vividly designed high-quality 3D animated, and child-appealing characters means that the website can not be considered to be 'sober' or 'neutral'. Indeed, the 'Maak zelf jouw eigen Prince Character' infographic itself contains an animation with very child-like features itself.

We would also disagree with the Panel's assertion that the website content and the opportunity to adapt the brand character to ones liking would be as appealing to teenagers/adults as it is to children under the age of 12 years old. It is extremely unlikely that these demographics would be interested in becoming a personalised version of a Prince-themed brand character for a child's biscuit brand. This is all the more unlikely given the pretext (the childish story of a Prince needing a holiday and looking for someone to stand in for him during this time) as well as the phrases such as: *'Merci à plus de 38,000 princes et princesses d'avoir repris le boulot de prince pour un petit temps !'* or, *'C'est votre chance de vivre la vie d'un(e) vrai(e) prince(esse).'* It is unrealistic to believe that the *'chance to live the live of a real prince(ss)'* is something which would be appealing to any teenagers/adults.

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 evidence of similarities between the modulated brand characters and children's cartoon animated film characters was not considered valid by the Appeal Panel, as this evidence was not accompanied by a valid reason as to why this information was not provided before the First Instance Panel. However, based on the rest of 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 56 for the Mondelez Prince website in Belgium.

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 may not stand on its own for the advert's compliance, and must be considered in combination with all other factors.

As the First Instance Panel rightfully noted, the brand characters displayed on the company-owned website are outside the scope of the EU Pledge commitment. However, whilst the actual product is outside the scope of the EU pledge, the product's interaction with other elements in the ad and its behaviour can be assessed by both the First Instance and Appeal Panels.

In this sense, whilst the initial brand character of the Prince is outside the remit of the Appeal Panel, its modulation to fit the consumer's physical facial appearance is an element that both Panels may consider when discussing the advert's appeal to children. As such, the Appeal Panel deemed that this element should be taken into consideration when assessing the website's compliance. The Appeal Panel noted that the website's choice of colours largely reflects the colour palette of the brand and does not pose an issue within this context, since the colours are neither bright nor vivid in ways that it would primarily attract the attention of children.

The Appeal Panel deemed that the ad campaign's story of the brand character Prince having gone on an adventure and leaving the consumer in charge as the new Prince character, is something that would effectively appeal to a young audience, if not primarily. Moreover, the possibility to modulate the character based on one's physical appearance is also an aspect that would more likely appeal to children than to teenagers or adults. In addition, the creative execution of the characters, with their big wide eyes and oval-shaped heads, is inherently childish and aimed at grabbing their attention. The

idea of personifying a prince or princess is generally deemed to be within the realm of children and not of teenagers or young adults.

Inversely, the Appeal Panel deemed the linguistic aspect of the advert as targeting largely parents. This element, however, does not outweigh all other factors that the Appeal Panel has taken into account. All factors must be considered together in order to render a holistic assessment of the advertisement at hand. In this case, whilst the use of 'vous' in French targets more parents than children, it does not alleviate the inherently children-oriented ad campaign. The Appeal Panel deemed that, due to the innately appeal of the ad campaign's story to children, its creative composition, and notwithstanding the linguistic element, the overall presentation of the website is more likely to appeal to children under 12 years old than to any other demographic.

Based on the arguments and rationale outlined above, the Appeal Panel overturns the original decision of the First Instance Panel. The complaint is upheld and the advert is in breach of the EU Pledge commitment.

Decision regarding the appeal: admissible.

Decision regarding the complaint: upheld.