

**Case ID: 59**

**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 – Ferrero**

**Description**

Ferrero Kinder Maxi

**Complaint**

In this [post](#) by @milki\_schoki\_be, the two brand character for KinderMaxi ‘Milki’ and ‘Schoki’ are seen dressed up in a colourful amusing way – Schoki is wearing a red fuzzy wig (reminiscent of a clown’s wig) and Milki is wearing a colourful flower necklace.

The caption of the post reads:

*Même confinés, avec Milky on a décidé de célébrer la fête la plus colorée de l'année ! 🇧🇪 Et vous, pour ou contre le lancer de confettis à la maison ? 🍌 #milkyschoki #kindermaxi #love #carnaval #athome #cosybubble*

The presence of the chocolate product, the use of cartoon brand characters, the theme of Carnaval and dressing up (a pastime very popular and well-known for young children during this time across Europe), the emphasis on fun and simple humour demonstrate that this example should be considered to be marketing towards young children, including those under 12.

### **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.

The Kinder Maxi Instagram post has been designed and placed to target young adults. While company-owned brand characters such as Milky & Schoki are excluded from the EU Pledge commitment, we have taken the following measures to ensure compliance:

- In Belgium, Carnival is a festive occasion that is celebrated intensively by young adults and adults overall. The asset of Milky & Schoki is depicting a day-to-day moment from the perspective of young adults in order to be recognizable for the target.
- The post mentioned in the complaints was placed in a 'age-gated' environment, Instagram, where users are required to be over 13 years of age to be able to register to the platform. Please also note that the demographic data of our Instagram profile show that over 98% of our followers is above 18 years of age. The demographic evolution of our follower-base is assessed regularly to ensure we always comply with our commitment, and especially when we notice an increase in the number of followers.

### 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. Consequently, the Panel is presented with the task to assess the overall creative execution of the advertisement at hand – in this case the Belgian Ferrero Instagram post for Kinder Maxi.

The Panel noted that the post appears on Instagram, which bars anyone under the age of 13 to create 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.

Regarding the creative execution of the post, experts considered that the scene displaying a Carnival-themed party with bright colours and dressed-up brand-characters could be appealing to children under 12 years old. However, the Panel did not believe it to be appealing primarily to this audience, as colourful animations are not an advertising method used only for targeting children. They noted that Carnival festivities in Belgium are widely popular across all ages and are celebrated by children as much as they are by adults, contrary to other folk traditions such as Easter Egg Hunts, which are primarily popular with young children. Carnival festivities in Belgium include a diverse array of costume parties, city parades, and folk traditions that are popular across all age demographics. Additionally, the Carnival party depicted in the post is taking place in a classic and sober living room, with only the two brand-characters appearing in a small photograph in the background, indicating the characters to be young adults sharing an apartment rather than children. The setting can also be interpreted as a fun activity to try out for a young adult couple, in lieu of conventional Carnival celebrations whilst pandemic lockdown measures are in place. As such, the theme of a Carnival costume party that the post invokes is appealing to a wide audience, and not primarily to children under 12.

Furthermore, the Panel also noted that the post's description makes use of the formal French 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 text makes use of the informal pronoun "*jij*", but the distinction is less marked between pronouns than in French. The text seems to be targeting children's parents, and inviting them to set up a party at home with their children to celebrate Carnival, and asking them whether throwing confetti is allowed in their homes. Although important, this factor merely contributes to the overall assessment, and does not play a sine qua non role in the final judgement.

Based on the arguments and rationale outlined above, the Panel judged that the Kinder Maxi Instagram post 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: 59**

**Appeal**

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<b>To</b>	EU Pledge Secretariat	<b>Date of mtg</b>	25 June 2021
<b>From</b>	EASA Secretariat	<b>Date sent</b>	30 July 2021

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## **Appeal ruling – Ferrero Kinder Instagram in Belgium**

### **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 'Instagram ... bars anyone under the age of 13 to create 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.

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**

The Panel asserts that, 'The setting can also be interpreted as a fun activity to try out for a young adult couple, in lieu of conventional Carnival celebrations whilst pandemic lockdown measures are in place'. However, we believe that it is wholly unrealistic to suggest that dressing up (especially in the style depicted in the advert) and throwing confetti around a living room would be an activity which a young adult couple would partake in or find appealing, lockdown or not.

Once again the Panel have cited the use of 'vous' as important to the decision not to uphold the complaint. 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. In this case, the most appealing and attractive element of the marketing post is the picture of the two cartoon brand characters partaking in a celebration of Carnaval, the effect of which is not offset by the use of one word 'vous' in the caption.

The Panel also cites the fact the characters are meant to be adults rather than children in its decision to not uphold the complaint. We would underline that children are not only attracted to cartoons/content where the protagonists are children of a similar age but to content where adults/older children are the central characters. It is rather the creative execution of the characters which matters more than the age. Indeed, as the Panel decision acknowledges, 'the scene displaying a Carnival-themed party with bright colours and dressed-up brand-characters could be appealing to children under 12 years old.' Moreover, these characters are a cartoon glass of milk and a cartoon chocolate bar, which are in any case not obviously of a certain age (irrespective of the small photo of the two characters in the background).

As the Panel decision states, Carnaval festivities are celebrated by children and adults alike. However, the activity portrayed in the advert – dressing up at home in a low-key manner and throwing confetti around in a playful manner- would clearly be recognised as an activity that children would participate in rather than two young adults by themselves.

Indeed, the question posed is not, as the Panel asserts, whether they would allow throwing confetti in the home (which it uses to argue that this is a parent-targeting ad) but whether the viewer is 'for or against' such an activity which could clearly appeal 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 59 for the Ferrero Kinder Instagram post 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 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 noted that it gave off an overall childish impression due its colourful composition and inherent festive dimension that viewers are immediately confronted with. The post's bright colours and 3D rendition of the brand characters are largely aimed at a young audience, due to its similarity with some animated cartoons for children. The brand characters celebrating Carnival is likely to appeal to a wide audience, given Carnival's popularity with not only children and teens, but also adults of all ages. The background room featured in the post is neither stylish enough to suggest it is that of a young couple, nor is it filled with toys or drawing that would indicate it to be a children's room. In this sense, the background is rather neutral. The Appeal Panel also noted that the Instagram post is static, though the action depicted is suggestive of making a mess in the room.

As the First Instance Panel noted, the brand characters of Milky and Schoki are outside the scope of the EU Pledge commitment. However, this does not mean that marketers have free range to present the characters in a way that is innately childish. The Appeal Panel has, however, noted that the characters have their own dedicated Instagram profile for multiple countries. The profile features multiples posts of their adventures as a couple, from travelling to exotic destinations, to a barbeque in the garden. Given this wider context and the content displayed in these posts, the Appeal Panel found that the profile is unlikely to appeal more to children under 12 more than to other demographics. The profile is mimicking a couple's personal and fun lifestyle, and is not something that would particularly appeal to children under 12. In essence, when taken together with the whole profile and the lack of any flagrant childish element, the post is likely to appeal to a broad demographic and not primarily children under 12



Finally the Appeal Panel also noted that the language used in the description of the post is largely targeting parents, due to the use of the formal pronouns in French. However, this cannot be said to be the element that set the case to be compliant with the commitment. Whilst it is an important aspect, the linguistic element is discussed and considered in combination with the other elements as defined above.

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.**