

**Case ID: 61**

**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 Pringles Instagram Belgium

**Complaint**

A post by @pringles\_be on Instagram promoting their limited edition New York Hot Dog and Buggalo Wings flavour crisps and a competition to win a gaming session pro gamers and games consoles. The video shows a zombie like character eating the crisps in an amusing animated manner. The text on the screen asks: *Quiz Special Zombie: Que mange Frank?*

In the caption the options are:

*A) Une galette de chair fraîche*

*B) Des épinaaaaaaaaaaards*

*C) Les délicieuses Pringles New York Hot Dog et Buffalo Wings en édition limitée*

(In English : A pancake with fresh flesh B Spinaaaaaach C The delicious limited edition Pringles)

Even though the competition is for those aged 18+ there is of course nothing stopping children from asking their parents to enter the competition on their behalf.

The presence of the crisp product, the advertised prizes which would be very appealing to children, including younger children under the age of 12 years old who frequently play video games with age ratings for much older children/adults, the presence of the amusingly animated Zombie partaking in an unusual activity for a Zombie character (eating crisps and appearing very non-threatening) which would be appealing to younger children, the silly, amusing and humourful options for the responses to the question ‘Que Mange Frank? Would be funny to younger children, including those under 12, demonstrates that this example should be considered to be marketing to children under the age of 12.

### **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.

Under the EU Pledge commitment, companies 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.

Kellogg Benelux organised a marketing activation for the brand Pringles from 08-02-2021 to 21-02-2021. The activation consisted of an Instagram competition in which the winners received 1 of the 10 Custom Pringles Xbox Wireless Controllers or a Halo multiplayer-training session with the 343 Pro Team.

The Pringles brand has an age target demographic of adults 18+, which is aligned with the audience of the Pringles Belgium Instagram social media page. Over 88% of the Instagram followers are over the age of 18.

This is further reflected in the fact that this campaign included sponsored Instagram ads for which the selected age target was ages 18-44 years.

The creative execution of the Instagram post was clearly aimed at a target audience 18+. The character used, Zombie Frank, is an adult-type horror character which is not designed to appeal to young children.

The competition took place on the Pringles Belgium Instagram account through an organic post on the page. Terms and conditions of the promotion clearly indicate that participants need to be at least 18 years old. Once a winner is picked by the agency, they request through private message that the winner accepts full T&Cs, FAQs and Privacy Policy before accepting the prize. In addition, an informal sense check of the Instagram profiles of winners is conducted, this is based on looks and if they have their age written on their profile.

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 advertised product (Pringles) 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 Pringles Instagram video for Belgium.

Experts took note of the fact that the mini-video appears on Instagram, which bars anyone under the age of 13 from creating 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.

The Panel noted that the composition of the video does not contain any element that would attract the attention of children under 12 years old. The brand-character Zombie Frank is outside the scope of the EU Pledge commitment, but it is nonetheless by definition a scary film-based character and would not appeal to young children. The character does not engage in any activity that would be deemed to be the domain of children. On the contrary, he is merely eating potato crisps whilst two versions of the product appear in front of him depicting possible prizes to be won by contestants. The prizes are more likely to appeal to teenagers and young adults rather than to children under 12 years old, as the former are generally more interested in console video games than the latter. Moreover, the video does not contain any 3D or 2D animations or any child-oriented graphic element. Consequently, the scary film-based brand-character zombie, the overall execution of the video's graphics, and the prizes to be won, together indicate that the ad is targeted more toward teenagers and young adults, rather than young children.

The Panel also noted that the video's accompanying text makes use of the informal French pronoun "tu", which is generally used when addressing children. The choice of the pronoun reduces the distance between the advertiser and the consumer and addresses the latter in a friendly and casual way. This could be problematic when the accompanying post or video is particularly child-oriented and contains childish elements, such as bright pastel-like colours and 2D animations featuring popular licensed or folk characters. In this case, the mini-video is void of any childish content. Although outside the remit of the EU Pledge commitment, the brand-character is nonetheless unappealing to children. The contents and style of the video, the action depicted, the inclusion of a zombie, all consistently indicate that the ad is not meant to target children under 12 years old, nor would its creative composition be appealing primarily to them.

Based on the arguments and rationale outlined above, the Panel judged that the Pringles Instagram mini-video 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: 61**

**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 Pringles Instagram post 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**

We would strongly disagree with the Panel’s claim that the advert ‘does not contain any element that would attract the attention of children under 12 years old’. Describing the Zombie Frank as a ‘scary film-based character that would not appeal to young children’ does not bear relation to the visuals used in the advert. The execution of the character is clearly not scary but humorous instead and the character partakes in no actions which could be reasonably be described as frightening: looking at the two different flavours of Pringles he holds in each hand, munching the crisps in an animated and amusing manner. Indeed, these non-threatening actions which as mentioned are more humorous than anything would be clearly understood and liked by young children.

The Panel further asserts in its decision that the ‘inclusion of a zombie’ indicates that it is not meant to target children under the age of 12 years old. We believe that this takes a naive view of the interests of children under the age of 12. Indeed, Zombies are not exclusively used in teenager/adult media with some very popular young children’s shows specifically centered on this type of character. For example, on the Netflix Kids Channel, the Last Kids on Earth which is about zombies and monsters invading an orphan’s hometown is age rated as 7+ while the kids’ show ‘Zombie Dumb’ (also completely Zombie-themed) is age rated as 8+.

A recent campaign in the UK ‘Veg Power’, further demonstrating these ‘scary’ themes being so central and effective to children, chose these themes for the hugely successful UK Veg Power Campaign, persuading children to eat more vegetables. The theme was ‘Eat Them to Defeat Them’, and showed vegetables rising up from the ground monster and zombie-like. The campaign is designed for primary school-aged children.

We furthermore strongly disagree with the assertion by the Panel that ‘the prizes are more likely to appeal to teenagers and young adults rather than to children under 12 years old, as the former are generally more interested in console video games than the latter’ which fails to take into account the reality of the demographics who use these games consoles.

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. So, in fact, games consoles are not only appealing to children but they are the demographic for which these prizes would be the most relevant. Moreover, the prizes offered in the competition would be of clear appeal to children (the chance to play with peers who are ‘Pro’ Halo players and whom children are likely to look up to more than adults or a wireless Xbox controller).

Figure 3.6: Percentage of the UK adult and 8-15 game-playing population who play games, by device, age and gender: 2020

Age Group	Male					Female				
	Mobile	Tablet	PC	Console	Handheld	Mobile	Tablet	PC	Console	Handheld
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%

While the Panel asserts that, ‘the video does not contain any 3D or 2D animations or any child-oriented graphic element’ it is clear that the Zombie character is indeed the result of 3D animations which are extremely common in children’s TV shows and movies. In fact, the top 20 highest grossing animated films globally are all children’s films demonstrating the clear child-appealing nature of using such animation in this advert.

Moreover, it is also important to note that 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. We do not believe that the Panel has adequately taken this into account as it cites as examples of childish elements, ‘bright pastel-like colours’ and ‘2d animations featuring popular licensed or folk characters’ which may indeed apply to much younger children but ignores the interests of older children under 12 years old who will find content which is attractive to teenagers as appealing for them.

Finally, the Panel decision does not take into account the quiz question posed for the competition. The text on the screen asks: Quiz Special Zombie:

*Que mange Frank?’*

*In the caption the options are:*

*A) Une galette de chair fraîche*

*B) Des épinaaaaaaaaaaards*

*C) Les délicieuses Pringles New York Hot Dog et Buffalo Wings en édition limitée*

(In English : A pancake with fresh flesh B Spinaaaaaaach C The delicious limited edition Pringles.)

Notwithstanding the easiness of the question which would clearly be answerable even to very young children, the silly and childish humour of the question would undoubtedly be appealing to children with its preposterousness (asking if Frank is eating fresh flesh, spinach or ‘delicious Pringles’ when it is very obvious what Frank is eating). The humour is underlined with the extended spelling of spinach – to emphasise the amusing Zombie elements of the post.

## 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 61 for Kellogg's Pringles Belgian Instagram post.

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 advertisement, the Appeal Panel agreed with the arguments of the First Instance Panel and concluded that there are no childish elements. In fact, the Appeal Panel found the ad was not targeting at all a young audience. The ad contains only very little animation in the Zombie Frank, but it is in no way a childish animation or a child-oriented 3D animation. Some children may find the content of the ad appealing, but it does not appeal primarily to this demographic over other age-groups that are more likely to be interested in the advert.

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 who are more likely to play video game than teenagers. In this sense, it 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.

The Appeal Panel also considered the linguistic factor of the ad, though it was not a deciding element in the Panel's assessment. The advert makes use of a formal language pronouns, indicating that the ad is largely aimed at parents or young adults.

Based on the arguments and rationale outlined above, the Appeal Panel concluded that the ad was compliant with the EU Pledge commitment. The complaint remains not upheld.



**Decision regarding the appeal: admissible.**

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