
Case ID: 62

Decision

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

First instance ruling – McDonald's

Description

McDonald's Instagram Filter Stories

Complaint

The McDonald's Belgium account posted a two part Instagram story on the 22nd of March to promote their new Instagram filter. To use this filter, the user must press and hold on the camera button, which starts a video recording. The filter adds a virtual board to the users' head on which various McDonald's products are shown rapidly. Finally, one product is shown which is designated as the McDonald's product which you are.

The text of the stories says: 'Get to know yourself with our new Instagram filter. Are you more of Chicken McNugget boy or a Filet-o-Fish type of girl?' The second story then encourages the user to swipe up to use the new filter.

The presence of McDonald's products (in the second story where the filter is shown being used by a young woman), the filter itself which is an incredibly popular tool for children, including those under 12 years old, the tone of the post addressing the user as a 'boy' or 'girl' (clearly indicating that the post is talking to children), demonstrate that this is a marketing example targeting children, including young ones under the age of 12.

Advertiser's response

1. *The overall impression of the Instagram story does not demonstrate that the post is **primarily** appealing to children.*
 - The overall impression of the ad is directed to and designed for adults.
 - The filter is a popular Instagram tool that brands use to create excitement and engagement with audiences.
 - The use of “boy” and “girl” is in line with common social media practices and is meant to be appealing to the target age group, which was 15-25 years. The objective of the question and in using the language was to question what kind of person the audience was, not to target a younger age group.

2. *Actions were taken to restrict child access.*
 - Instagram is a social media platform that is age-gated for 13 years and older.
 - Age-range of the audience indicate that the majority of the audience, 62% was between 18 and 34 years old, with 10% ages 13-17, and 27% over 35.

3. *The target demographic based on the company's media plan was adults.*
 - The woman featured in the story using the filter was formally engaged to participate in the ad and as such, we can confirm her age, which is consistent with the target demographic.
 - The Instagram story was limited to a limited-time (stories disappear from Instagram after 24 hours) organic post, and was not boosted by paid media.

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 products are not compliant with the EU Pledge nutrition criteria, therefore marketing communications surrounding the promotions of the food products 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 McDonald's Instagram story for Belgium.

Experts took note of the fact that Instagram bars anyone under the age of 13 to set up an account on their platform. 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 story appearing on the company-owned Instagram profile does not contain any element that would be indicating that it is targeted at children under 12 years old. The graphic style and the general composition of the story is limited in its colour palette and the choice of animation is mostly targeting teenagers and young adults. In addition, the choice of colours reflect the general brand theme rather than an intention to appeal to a very young audience.

The online game that comes with the story – namely opening the front camera of one's smartphone and inserting the McDonald's filter on – is something that would be quite popular with teenagers who would perhaps play with the filter on their smartphone in the restaurant before ordering the product that has been shown on their story. The Panel judged that the general concept of the filter story and the possibility to use the filter in one's own stories is something that is appealing to a teenage audience. Combined with the lack of a childish theme or any elements that would be appealing to under-12-year-olds, the filter story ad is something that is oriented particularly toward adolescents and young adults. The latter would not use a filter that would be oriented to a very young audience. The woman that appears in the story is clearly around or above the age of 18 as well, signalling that that is the company's intended target audience.

Furthermore, the Panel also considered that the choice of English in the company-owned story further reduces the brand's appeal to a very young demographic. Children under 12 years old are unlikely to speak English in Belgium, let alone speak it fluently. What's more, the choice of the words "boy" and "girl" does not seem problematic in the context of this ad, given that it contains no factor or element that would appeal particularly to under-12-year-olds.

Based on the arguments and rationale outlined above, the Panel judged that the McDonald's Instagram filter story 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: 62

Appeal

To	EU Pledge Secretariat	Date of mtg	25 June 2021
From	EASA Secretariat	Date sent	30 July 2021

Appeal ruling – McDonald’s Instagram Belgian post

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 ‘Experts took note of the fact that the video appears on Instagram, which bars anyone under the age of 13 from creating an account’. 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.

Use of English in Belgium

As is well-recognised, English is the most widely-used language in the world and is often described as the 'global language'. Belgium is no exception where English is omnipresent in Belgian society, a country with an already complex language situation- in addition to the three official languages, there is a variety of languages spoken due to the multi-cultural diversity. The status and influence of the English language in Belgium has been clear for some decades and has only continued to grow.

In Brussels, the latest results from BRIO (2018) which has tracked the use and knowledge of languages in Brussels for 20 years, show that the number of people with a solid knowledge of English overtook those proficient in Dutch. Indeed, there have even been calls from Belgian Ministers to make English an official language in Brussels, such is the general level of proficiency.

Indeed, some academics have indicated that in the Flemish-speaking region it is even more popular than French for pupils, saying that there is 'a rich extra-curricular source of input for their language learning process,' making English "less of a 'foreign language' in Flanders than is French" (Housen et al. 2001b).

We would therefore disagree with the Panel's assertion that the choice of English neutralises the appeal to children under 12 years old in Belgium, especially given the uncomplicated phrases used in the post, including the names of the McDonald's food items which would not be translated in any case into French or Dutch and are well-recognised in their English form. Moreover, a child does not need to speak a language fluently to be able to have a good level of reading comprehension, especially in this case where the language used is very simplistic and easy to understand.

Appeal to Children

The company claim that the target audience was 15-25 years old which the Panel concurs with, stating that the post is targeting teenagers and young adults. However, if this was the case, it would be highly unlikely that the terms 'boy' or 'girl' would be used. It is inconceivable that a company targeting someone in their twenties would refer to them as children (boy/girl) but nor is it likely that older teenagers, at a stage of development where they are keen to disassociate themselves from younger children, would find being referred to as a 'boy' or 'girl' very appealing.

The Panel judged that the general concept of the filter story and the possibility to use the filter in one's own stories is something that is appealing to a teenage audience and the 'filter story ad is something that is oriented particularly toward adolescents and young adults'. However, the Panel does not explain how or why these filter story ads or the other elements contained in the marketing post would be more appealing to older children/adults than children under 12 years old (especially older children in this age bracket). 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 online games and animations such as this filter as appealing (if not more) as their teenage peers.

Company's response to the appeal:

As the Panel stated in its Decision, marketing on social media platforms must consider the overall creative execution of the advertisement to determine whether the promotion of food products are primarily appealing to children under 12. As such, McDonald's supports the Panel's findings that the use of the graphic style and limited color palette to brand colours, lack of childish theme or any elements appealing to children under 12, and that the use of the words "boy" or "girl" in English taken together demonstrate that the Instagram filter store is **not** appealing primarily to children under 12 and is compliant with the EU Pledge. References to additional policy frameworks and international commitments are outside the scope of the EU Pledge and should not be considered in reviewing the complaint, the Panel's decision, or the appeal.

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 62 for the Belgian McDonald's story.

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 Instagram story, the Appeal Panel found that the McDonald's filter advertised in the story did not feature any childish themes, bright vivid colours, or child-oriented content. The story is not inherently childish and would likely be less appealing to children than to teenagers or other age-groups. Whilst social media-style stories may be appealing to children, their appeal depends on the content of the story, much like any other advertising video. In this case, the story is void of any feature that would be appealing to children under 12 year olds. It does not include any facial changes or filters that distorts the person's physical appearance in humorous ways, nor does it include filters that transport the person into a different magical universe. The filter merely adds a square at the top of the head of the user with the product best suited for them. Finally, the colours used in the filter reflect that of the brand and are not bright, vivid, or pastel-like which would perhaps more likely have appealed to younger audiences.

The Appeal Panel also considered that the linguistic aspect of the filter was not targeting young children any more than it was targeting other age-groups. Whilst the linguistic element is an important feature in the assessment of the advert's compliance with the commitment, it must still be considered in combination with all the other elements that are just as crucial to the composition of the ad. In this case, the use of English does largely target a much older audience than under-12-year-olds. English is indeed widely used in certain parts of Belgium and simple words such as 'boy' and 'girl' can be easily understood even by young children. However, one would still need to understand the rest of the text, and Belgian children are unlikely to speak the English language at a level to feel comfortable interacting with such an advertisement. Finally, the use of 'boy' and 'girl' does not indicate that the ad is aimed at children – these expressions are also employed by teenagers and also, in some circumstance, by older

audiences. In general, the use of these two key words does not, on their own, indicate that the ad is meant to appeal or target children under 12 years old.

The Appeal Panel found that the creative composition of the advert, combined with the linguistic aspect, and the colour palette reflecting the brand colours, indicates that the advertisement would have a very limited appeal to children. The inclusion of a teenage girl in the filter story further consolidated this assessment for the Appeal Panel.

Based on the arguments and rationale outline 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.