

**Case ID: 63**

**Decision**

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<b>To</b>	EU Pledge Secretariat	<b>Date of meeting</b>	11 May 2021
<b>From</b>	EASA Secretariat	<b>Date sent</b>	31 May 2021

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**First instance ruling – Mondelez**

**Description**

Mondelez Milka ads on YouTube in Germany

**Complaint**

Milka advert Germany

This German advert for Milka chocolate products (available on Youtube) shows 2 young children waking up with excitement and urgency, then rushing to get ready and out of the house, grabbing their Easter egg baskets as they go out the door. Once in the garden, they proceed to find the hidden Milka chocolate products. They then tie string around these products after which they run to their neighbour's house to bring their neighbour (a young boy with impaired vision) to the egg hunt (which he can join in with because they have tied string to the different hidden chocolate products). The children consume the products and they are shown laughing and enjoying each other's company and the products as the parents watch on smiling, clearly proud of their children.

The presence of the chocolate products throughout the advert, the presence and central role of young children as the main characters in the ad, the consumption of said chocolate products by the children featured in the ad and the ensuing evident enjoyment expressed by them, the emphasis on an Easter egg hunt (a obviously popular activity for younger children, especially those under 12 years old), the presentation of the Milka products to children as something which can make other people happy and the activity involving these products being one for which parents would be proud, demonstrates that this example is marketing targeted towards children under 12 years old.

Milka Advert 2 Germany

The ad (<https://www.youtube.com/watch?v=GCyoaYvA170>) shows a young child, certainly younger than 12 years old, seeing an older man placing 'Lost Dog' posters around the neighbourhood. He pinches his dad's Milka bar as well as his sister's (using a rake to retrieve it while she's distracted) and presents the Milka bars to the old man. We then see the child writing on the posters 'Reward: Lots of Milka'. The dog then returns and the child and older man eat and enjoy the chocolate together.

The simple emotional story which would be easily understood and liked by young children, the importance placed on the Milka chocolate product (the product becoming the reward for finding the lost dog), the gentle humour with the child stealing his dad's and sister's chocolate bars, the presence of the young child under 12 and the presence and consumption of the Milka product by this child demonstrate this is an example of marketing to young children, including ones under 12.

### Advertiser's response

At Mondelēz 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.

We direct our advertising to gatekeepers – adults, parents, or guardians. We may show children under 12 in our marketing communications if relevant to the marketing message, e.g., depiction of a family situation or activity. In such situations, a gatekeeper is shown controlling access to a product. In addition, our advertisement always shows proper serving and portion sizes, as well as mindful consumption, in photography and TV imagery. We portray active and safe lifestyle choices and always in a safe environment for underage persons with 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 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 of age. 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 advertisements at hand – in this case the two YouTube videos in question.

Judging the creative execution of the first video, the Panel considered that the main theme of the video is an Easter egg hunt, an activity very much enjoyed by young children. Marketers should be careful in the way such activities are portrayed in adverts by including mitigating factors. In this case, the Panel found that the storyline of a visually impaired child being guided in their Easter egg hunt is not something children would feel particularly appealing nor understanding its deeper message. The video does not contain any childish colour animations or graphics that would appeal in any way to children under 12. In fact, due to its live action composition, and the inclusion of parents as gate-keepers of the game and the treats, the appeal to children is further diminished according to the Panel. Moreover, the children are overseen by their parents while consuming the products. The overall execution of the video may be appealing to some children, but its core values and the way it is produced and directed would not be appealing primarily to this demographic.

Judging the creative execution of the second video, the Panel also found that the overall impression of the video and its storyline of a child helping to find a lost dog are not primarily targeting children under 12 years of age. Similar to the previous one, this video is also live action and includes no animations or graphic childish content, nor does it incorporate any scene that would be especially appealing to a child. Moreover, the product is eaten when an adult is present. The global execution of the video and the core values that it reflects upon are elements that indicate to the Panel that the ad would not appeal primarily to under-12-year-olds, but rather to their parents.

The fact that the stories were found on a platform which has an age-screening mechanism was also taken into consideration by the Panel. However, this is not sufficient on its own to guarantee compliance.

Based on the above rationale, the Panel judged that both YouTube videos are not primarily appealing to children under the age of 12, and therefore the complaint is not upheld.

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

**Case ID: 63**

**Appeal**

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<b>To</b>	EU Pledge Secretariat	<b>Date of meeting</b>	02 July 2021
<b>From</b>	EASA Secretariat	<b>Date sent</b>	30 July 2021

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**Appeal ruling – Mondelez Milka ads on YouTube in Germany**

**Plaintiff'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 *'The fact that the stories were found on a platform which has an age-screening mechanism was also taken into consideration by the Panel'*.

### **Appeal**

We would like to appeal this Panel Decision.

### **Mondelez Easter Egg Hunt**

#### **Easter**

The Panel acknowledges that an Easter egg hunt is *'an activity very much enjoyed by young children'*. We do not believe however that the Panel has taken into account the significance of the appeal of including such an activity which is an *'exclusively child-oriented activity'* as has been recognised in a previous Panel decision. The advert is not just alluding to a seasonal celebration which can be enjoyed by all demographics – Easter- but to a specific activity – an Easter Egg Hunt - which is clearly undertaken primarily by younger children under the age of 12 years old.

The Panel seem to consider that the storyline is unappealing to children. We disagree. The storyline shows young children full of excitement on Easter morning (a feeling which would be shared by young audiences of a similar age watching the ad), racing past their parents to undertake an activity independently of their parents – finding chocolate treats and creating a guided hunt for their friend with the result being strings (and hidden chocolate everywhere) – all themes which would be of interest and appeal to children. Indeed, the approving looks of their parents watching on at the end would be something that young children would also find desirable.

#### **Live Action**

The Panel argue that as the advert uses live action composition instead of childish colour animations or graphics the appeal for children under 12 years old is diminished. It is important however to note that an advert/entertainment content does not have to be a cartoon to be of interest or appeal to children under the age of 12 years old and there are plenty of popular children's TV shows which use live action composition too.

#### **Parents as Gate-Keepers**

We disagree with the Panel's assessment that the parents in the advert act as gate-keepers of the game and the treats. At no point in the advert do they interact in any meaningful way with the children and are in fact passive throughout. Indeed, the children act completely autonomously from their parents (also an appealing act to children) as can be seen when they rush past their parents at breakfast time who react with puzzled and confused expressions (as they are not aware of what their children are going to do). These puzzled expressions are shown again when the parents watch their children in the garden from an upstairs window, again stressing that it is the children who are in charge of the game as the parents have no idea what is going on and do not step in as 'gate-keepers' at any point during the game.

Moreover, at no point are the parents seen being 'gate-keepers' with the chocolate product as they are never seen with said product or controlling the amount their children interact with or consume. When the children consume some of the Easter bunny-themed chocolate treats in the final scene, the parents look on with approving expressions but from a distance.

### **Mondelez Youtube Lost Dog Advert**

#### **Live Action**

We disagree with the Panel's assumption that because a video is live action and does not contain 'animations or graphic childish content' it automatically means that children will not find it appealing. As mentioned above, an advert/entertainment content does not have to be a cartoon to be of interest or appeal to children under the age of 12 years old and there are plenty of popular children's TV shows which use live action composition too.

#### **Child-Appealing Elements**

We would disagree with the Panel's assertion that the advert does not '*incorporate any scene that would be especially appealing to a child*'.

The Panel has not taken into account the child-appealing aspect of a child acting autonomously to pinch chocolate from his family members in amusing and innovative ways (for example stealing chocolate from his sister with a toy rake) for a 'good deed' (providing an award for a lost dog). This theme of a young child helping an older adult with a worthy task would also be appealing to young children.

#### **Adults as Gate-Keepers**

As with the example above, we disagree with the implication of the Panel that because an adult is present when the chocolate is being consumed, that the advert portrays sensible parent/gate-keeper-guided consumption. The child is clearly an autonomous protagonist who is able to steal many bars from his family members (who all have a bar – suggesting that consumption of chocolate in the family surrounding is in any case commonplace) and is not stopped at any point from accessing the chocolate. It is the child who gives the chocolate to the older man, not the other way around.

## 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 63 for the Mondelez Milka ads on YouTube.

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.

Judging the creative execution of the first video, the Appeal Panel considered that the Easter egg hunt is an activity which is very much enjoyed by young children. Therefore, they reiterated the First Instance Panel's opinion that marketers should be careful in the way such activities are portrayed in adverts by including mitigating factors. In the case of this particular video, the presence of the parents who have actually bought and hidden the products and are overlooking the children while they are playing is a very important mitigating role. What the children are doing has the permission of the parents. The emotional music and the addition of the blind child that goes to join the other children for the Easter egg hunt adds up to the melancholy atmosphere of the video.

Judging the creative execution of the second video, the Appeal Panel found that in terms of style, picture, and music it follows a similar pattern to the previous video. The product is enjoyed by both the child and the parent in the video. The video is actually focusing in the emotions of the characters, focusing on the display of empathy in front of a sad event that is the missing of a dog. The fact that the child is picking up the chocolate and that there is less parental oversight over the fetching and consumption of the product is indeed problematic. However, the Appeal Panel found that even though some children would find it appealing, the video is not primarily appealing to them, but rather to a much broader audience. Whilst certain elements are indeed problematic, they do not indicate that the ad would be appealing predominantly to children.

Based on the arguments and rationale outlined above, the Appeal Panel does not overturn the original decision. The complaint remains not upheld and the YouTube videos are compliant with the EU Pledge commitment.





**Decision regarding the appeal: admissible.**

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