

Case ID: 64		Decision	
To	EU Pledge Secretariat	Date of mtg	11 May 2021
From	EASA Secretariat	Date sent	20 May 2021

First instance ruling – Ferrero

Description

Ferrero Kinder Schokobons Instagram game in France

Complaint

Kinder Schokobons Clap Game Competition

This [post](#) on the 15th of March on the Kinder.FR Instagram page posts a ‘Jeu-Concours’ for the Kinder Schokobons product which encourages the users to play a game on their website and tap in time to make Schokobons sweets appear to win a bag of said products.

The caption reads :

*JEU-CONCOURS : Jouez en famille sur [minijeu-kinderschokobons.fr](#) (lien dans la bio)
Tapez en rythme pour faire apparaitre des Schoko-Bons et tentez d’en remporter un sachet à partager ! 😊
Pour votre santé, évitez de manger trop gras, trop sucré, trop salé. www.mangerbouger.fr*

The presence of the chocolate product in the post, the brand cartoon character, the simple and easy way of entering the competition, the premium offer of free chocolate sweets as a prize, the childish ‘challenge’ posed by the game demonstrates that this example should be considered to be marketing to children, including under the age of 12 years old, regardless of any wording on ‘family’.

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.

As for all the marketing communications concerning our food products, this Kinder Schokobons post has been designed and placed to target adults. We have taken all the available measures to ensure compliance with our commitment:

- The post and the website promoting this activity use wording that is clearly directed at families e.g. '*relevez le défi en famille*', '*jouez en famille*', etc.
- While company-owned brand characters such as Mr. Bon are excluded from the EU Pledge policy, we have ensured to use them in a family context as an additional safeguard.
- The post mentioned in the complaint was placed in a 'age-gated' environment as Instagram requires users to be over 13yo to register to the platform. Please note that the demographic data of our Instagram profile shows that around 94% of our followers is above 18 years of age.

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 promotions 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 Ferrero Kinder Schokobons Instagram post and adverage for France.

1. Instagram post

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 post features a screenshot of the online game accessible by clicking on the link in the accompanying text. The colours of the post reflect the colour palette of the product and does not contain any bright or vivid colours. The setting of the post seems to be a homely scene in a living room, which complements the text that accompanies it, as it is oriented towards families. There are no extra graphics, other factors or elements or any choice of colour that would particularly attract children's attention. The living room setting does not invoke any childish themes and colourful animations are not an advertising method used only for targeting children; it can be used to target a wide audience, depending on its execution. In this case, the 3D animation may be appealing to children under 12, as the brand-character could be attracting the attention of young social media users. However, the post is static and does not contain any other childish element or general theme that would indicate to the Panel that it is appealing primarily to an audience that is under 12 years old. Overall, experts assessed that the contents of the post are appealing to a wide audience, ranging from young children to older adults, but not primarily to any particular demographic.

Furthermore, the Panel also noted that the post's accompanying text 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. As such, the Panel deemed that the text is oriented more toward gate-keepers, namely parents, and advising them on an online activity to play in with their children. The contents of the post combined with the accompanying text indicate that the target audience is much wider than only or primarily for children under 12 years old.

2. Advergame website

Experts have also considered the ease with which users can access the website where the online game is offered. They found that there is no age-gating system filtering access to the webpage, but there is one when launching the online game. Though, as per the EU Pledge commitment, this is insufficient on its own to guarantee compliance with the commitment.

The website contains a similar colour palette to the Instagram post and features the same wording and language targeting family gate-keepers, such as parents rather than young children. The Panel found no obvious elements or a combination of factors that would indicate the advergame to be appealing primarily to children under 12 years old. The setting for the game is still a virtual living room and not an exclusive or primarily childish location or background. Moreover, animations and colourful graphics are not by default used only for the purpose of targeting young children. In this instance, although the website is colourful and contains 3D animations, the choice of hues reflects the product's colours and are not any more appealing to children under 12 as they are to other demographics. Combined with the language oriented towards gate-keepers, experts deemed the advergame to be appealing to under-12-year-olds as much as to parents.

Based on the arguments and rationale outlined above, the Panel judged that both the Kinder Schokobons Instagram post and the linked advergame are not appealing primarily to children under 12 years old, and are thus compliant with the EU Pledge commitment. Therefore, the Panel did not uphold the complaint.

Panel decision: complaint not upheld

Case ID: 64

Appeal

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

Appeal ruling – Ferrero Kinder Schokobons Instagram post in France

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.

Child-Appealing Elements

We would disagree with the Panel's assertion that 'There are no extra graphics, other factors or elements or any choice of colour that would particularly attract children's attention'. The most attractive and eye-catching elements of the post (the 'clapping' game, the large bowl of Schokobons and the animated cartoon brand character's expression as well as the words 'jeu-concours' in red and yellow in the corner) are clearly of an appeal to children.

The Panel's decision cites the 'static' nature of the post as one of the elements to uphold their decision. We disagree with the Panel's assertion that in general merely because a marketing post is 'static' means that it would not be appealing to child, especially given that the central element of this post – playing a very simple game with their family is clearly child-appealing.

Once again, the Panel have used the use of a formal pronoun – 'vous' in their decision to not uphold a complaint stating that, 'the Panel deemed that the text is oriented more toward gate-keepers, namely parents, and advising them on an online activity to play in with their children'. However the activity which it references, is something that parents engage in with their children and not the other way around (as has been cited by an other Panel decision to uphold a complaint). Not only is it extremely unlikely that any adult would ever be partaking in such an activity alone or only with other adults but the participation of parents with their children in this activity as a family would not lessen the appeal to children. In fact, it is much more likely to enhance it. We do not believe this has been taken into account in the Panel decision.

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 64 for the French Instagram Ferrero Kinder Schokobons 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 Instagram post, the Appeal Panel found that it was largely aimed at parents inviting them to play the online game with their young children. However, the advergaming itself, as portrayed in the post, is innately childish and would likely primarily interest children. In fact, the Appeal Panel noted that young children between the ages of 3 to 5 who are likely to find the game appealing, would also be unable to navigate the web to find the game on their own. Parental guidance is thus required to set up the online game and parents would be keen to play alongside them. Similarly, the post is advertising mostly to parents, as children at such a young age are unlikely to be on Instagram without parental guidance, let alone find their way to the advergaming.

The Appeal Panel noted the initial complaint related to the Instagram post promoting the game and that the advergaming is in fact no longer accessible via the links provided in the post's caption or in the profile's bio. The Appeal Panel was thus unable to fully assess the advergaming. However, based on the First Instance decision, the Appeal Panel disagrees with the initial assessment that the advergaming would not be appealing to children. It is likely that the game is appealing and largely enjoyed by children under the age of 12, if not much younger. However, as complaint did not apply to the game, and as it is no longer available, the Appeal Panel did not comment further on this matter.

The Appeal Panel noted that, whilst the ad features some elements that could be appealing to children, it is unlikely for the ad to be primarily appealing to them. Combined with the language used in the post and in its description, as mentioned in the original decision, the Appeal Panel deemed the ad not to be appealing primarily to children under 12 years old.



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.