

Case ID: 65

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 post in France

Complaint

System Scolaire Kinder Schokobons

This [post](#) on the 22nd of March on the Kinder.FR Instagram page posts a graphic of the solar system with the sun replaced by a Schokobon chocolate 'Moi qui ouvre un paquet de kinder-schokobons!' confectionary and where the planets have been tagged with various different names (Prof, Pote, Pas Pote).

The caption reads:

Quand vous êtes le centre du système scolaire. 🌟

Taguez un pote (ou un faux pote) qui tourne toujours autour de vous quand vous avez un Kinder sur vous !

Pour votre santé, mangez au moins cinq fruits et légumes par jour. www.mangerbouger.fr

The presence of the chocolate product in the post, the use of informal words like 'pote', the humourful assertion that once you open a packet of Schokobons you become very popular with friends (also implying that the chocolates will make you popular because they are tasty), the clear intention that this post is for children as it is describing a school setting e.g. 'prof', the phrase 'systeme scolaire' instead of 'solaire' (which young children would be likely to be studying in school too) as well as the fact that generally, the theme of space is one which is very popular with younger children, demonstrates that this example should be considered to be marketing to children, including under the age of 12 years old.

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 Schokobons post has been designed and placed to target young adults. We have taken the following measures to ensure compliance with our commitment:

- The post uses wording that is directed at young adults e.g. use of the 'vouvoiement', "pote" and 'prof' are expressions usually used by high school students or adults.
- 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 also 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 for France.

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 depiction of a solar system with the sun replaced by the product and each orbiting planet has a different tag. The post is not colourful and does not contain any element that would attract children's attention. Experts noted that the post is static and the animation is void of any childish material. What's more, colourful animations are not an exclusive advertising method only for targeting children. The post's graphics may be appealing to a young audience as much as it would be a teenagers or young adults.

Furthermore, the Panel also noted that the tags in the post refer more to teenage French slang rather than vocabulary used by young children. References such as "*pote*" referring to a pal or mate and "*le prof*" referring to the professor would only be meaningful to teenagers, as such slang is used in high schools or *collèges*, and not in elementary or primary schools for under-12-year-olds. Such language style would thus be appealing primarily to teenagers between 14 to 18 years old and possibly also young adults. Additionally, the 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 or older generations in general. 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.

Based on the arguments and rationale outlined above, the Panel judged that the Kinder Schokobons 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: 65

Appeal

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

Appeal ruling – Ferrero Kinder Schokobons Solar System 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.

We would strongly disagree with the assertion by the Pledge that the post 'does not contain any element that would attract children's attention'. The solar system theme of this post is clearly something that would be much more interesting to younger children than teenagers not to mention the appeal of the central joke of the post and the informal manner of the slang used. Moreover, the Panel's decision is inconsistent, saying on the one hand that 'The post is not colourful' but on the other arguing that 'What's more, colourful animations are not an exclusive advertising method only for targeting children'.

A post does not have to be brightly coloured to be attractive to children under 12 years old – the 3d graphics of a theme (the solar system and its planets) which is popular to children in this age bracket and the joke contained within the post are still child-appealing, regardless of which colours are used. 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 not a moving image means that it would not be appealing to child, especially given that the central element of this post -the joke that opening a packet of chocolate sweets at school makes you very popular and the 'centre of the solar system' – is of clear appeal to children.

Once again, the Panel cites the use of 'vous' in the textual caption as one of the reasons not to uphold the complaint stating, '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'. However, at the same time the most attractive and eye-catching element of the post (the picture) uses slang popular with young people which could not be argued to fulfil the meaning of this statement. It is once again important to highlight that the use of 'vous' once or twice in a textual caption should not be sufficient to negate clear child-appealing elements e.g. images which are highlighted much more strongly in marketing posts.

The Panel does not explain how or why this marketing post would be more appealing to teenagers 14-18 years old than to children under 12 years old (especially older children in this age bracket). It is 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 clearly understand and find such 'slang' as appealing to their teenage peers.

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 65 for the French Instagram Ferrero Kinder Schokobons Solar System 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 post, the Appeal Panel found that it contained a limited colour palette and that it is static with no implication of movement or sound attached to it. Whilst this does not automatically render it not appealing primarily to children under 12 years old, it nonetheless indicates that other audiences would find the content of the ad just as appealing if not more. The feature of the solar system is an element that would also appeal to children that are interested in space exploration. However, it may also just as much appeal to teenagers and young adults. Combined with the linguistic component, as outlined in the First Instance decision discussing the use of French slang words popular with teenagers rather than with children, the Appeal Panel considered the ad to not only be largely targeting 14 to 18-year-olds who attend schools in the French secondary system, but

to also be mostly appealing to the latter audience. The slang used in the post is not used by children under the age of 12, but rather by teenagers.

It is important to note that both the First Instance and Appeal Panels have considered all aspects of the ad, ranging from its placement to the creative execution, from the language used to the references made to topics and subjects that children or other audiences might be interested in. There is no one component in the assessment made by both Panels that is a major decisive factor. All elements are assessed individually and then evaluated holistically to judge whether the advert would likely be more appealing to children under 12 than to any other age-group.

Based on the arguments and rationale outlined above, the Appeal Panel does not overturn the original decision. The complaint remains not upheld and the Instagram advertisement for the Ferrero Schokobons is compliant with the EU Pledge commitment.

Decision regarding the appeal: admissible.

Decision regarding the complaint: not upheld.