

Case ID: 66

Decision

To	EU Pledge Secretariat	Date of meeting	7 May 2021
From	EASA Secretariat	Date sent	31 May 2021

First instance ruling – Coca-Cola

Description

Coca Cola Instagram KickShuffle dance in France

Complaint

These examples posted on the CocaColaFrance Insatgram Page in their Highlights from the 24th of March promote their latest advertising campaign ‘Open that Coca Cola’ or ‘Ouvre du Ahhhh’.

According to the CocaCola France website, ‘Pour l’occasion, Coca Cola s’est associé à Tyler, The Creator qui a créé une nouvelle musique originale pour donner vie et mettre en valeur cette expérience unique. Une nouvelle danse fun et facile à reproduire, la « Coca Cola Kick-Shuffle » a été également été développée pour mieux résumer les sensations unique d’un Coca Cola.’

Using young influencers with many young followers, including many who will be under 12 years old, such as @raphaelcurron_ (402K followers), @dontsmilesacha (295k followers), @louisergt (306K followers), @raf_cpl (529k followers) their highlights show these influencers consuming Coca Cola and then performing the ‘Coca-Cola Kick Shuffle’ to the specially-created ad music (by Tyler the Creator). They encourage the viewers to also reproduce the dance (‘Je compte sur vous’, ‘A vous de jouer’) and adding another step to it with the favourite of the influencer being re-posted on his Instagram.

The establishment of the association between drinking Coca Cola and dancing, the catchy music created by an artist popular with younger people, Tyler the Creator, the feature of a dancing challenge ‘CokeShuffleChallenge’ (as described by the company is fun and easy to reproduce), a marketing format which has been incredibly popular with young children in the past couple of years, especially on platforms popular with young children under 12 e.g. TikTok and the promotion of this marketing campaign with young French influencers with large follower counts (which will undoubtedly include many children under the age of 13 regardless of any age-gating measures for the platform) demonstrates that this marketing example should be considered as targeted towards young children, including those under 12.

Advertiser's response

The campaign aired in France in March 2021 on two social media channels: Instagram and Snapshat, which allow only users 13 and older.

The campaign shows social media influencers challenging their communities with “Kick Shuffle” dance moves, mimicking the moves shown in our new Coca-Cola TV copy.

The “Kick Shuffle” challenge encourages participants to share a video of themselves performing a set of complex moves. The challenge was launched by Raphael Curron, a professional dancer with a total of 2.2M followers (1.8M above 18 years old) and then replicated and shared by other skilled dancers and influencers.

The campaign is aimed to teens and young adults (age 16 and above) and all influencers in this campaign have been chosen specifically for their appeal to young adults (ages 18-24).

The viewer statistics of the influencers have been vetted and the influencers were chosen with the intent to reach an older audience. Coca-Cola previews related videos, posts, and other social media activities of the influencers to ensure continued compliance.

Below is age and audience information for the four influencers selected (see relevant attachment**):

1. Raphael Curron, age 20, age of audience: 18% 13-17/ 64% 18-24 / 17% 25-34
2. Sacha Sadok, age 16, age of audience: 21% 13-17/ 62% 18-24 / 15% 25-34
3. Louise RGT, age 22, age of audience: 8% 13-17/ 52% 18-24 / 34% 25-34
4. Rafael Caplan, age 19, age of audience: 18% 13-17/ 63% 18-24 / 18% 25-34

Based on the rather technical “Kick shuffle” moves, the age and skills of the selected influencers, and the largest viewership segment for each of them within the young adult and adult category (more than 80% of audience is 18-34) demonstrate that this activation is not targeted to children.

Based on the information and evidence shared for both cases, we assess the activations and content to be compliant with the EU Pledge.

We would like to reiterate our strong commitment to the EU Pledge..

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. Therefore, the Panel is presented with the task to assess the overall creative execution of the advertisements at hand – in this case the Coca-Cola Instagram stories.

The Panel noted that the influencers used by the company are popular with a young demographic, possibly including some children below 12 years of age. The Panel did not consider this as sufficient on its own to indicate that the stories are primarily targeting children under 12. Regarding the creative execution, the Panel found that the concept and the marketing format would more likely appeal to young adults and teens rather than young children. Such dancing activities could attract the attention of children under 12, but due to a lack of vivid animations and bright childish colours or any content that is the exclusive domain of children, the stories remain appealing to a larger audience. Even though children under 12 years old might also find it interesting, the concept is not primarily appealing to them as it would be to teenagers.

The fact that the stories were found on Instagram, a platform which has an age-screening mechanism barring anyone under 13 years of age from registering on the platform, was also taken into consideration by the Panel but it is not sufficient on its own for compliance.

Based on the above rationale, the Panel judged that both posts 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: 66

Appeal

To	EU Pledge Secretariat	Date of meeting	02 July 2021
From	EASA Secretariat	Date sent	30 July 2021

Appeal ruling – Coca-Cola Instagram KickShuffle dance in France

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.

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 welcome the Panel's acknowledgement that the use of such young influencers popular with a young demographic can include children under 12 years old. Indeed, the ages of the influencers featured in the complaint are very young and would naturally appeal, not only to teenagers and adolescents but also to children under the age of 12 years old.

We believe that the Panel has underestimated the appeal of such dance challenges for adolescents *and* children under the age of 12 years old, especially those older children in this age bracket. While the dance may not appeal to very young children such as 3-4 year olds, children under 12 years old are not a homogenous group and what will appeal to children aged 8-12 for example will not be the same as these much younger children.

We would therefore disagree with the Panel that '*the lack of vivid imaginations and bright childish colours*' demonstrates that the advert is not appealing to children under the age of 12 years old. The Panel has not identified what would be considered as 'bright childish colours' and it would be useful to clarify what this means (previous Panel decisions have described childish colours as having a pastel palette). In any case, as mentioned above, the interests of older children in the under 12s demographic will be very similar to young teenagers and an advert does not necessarily have to have '*bright childish colours*' or be use 'animations' to be appealing to such children. The catchy music, amusing dance and possibility to copy it and share a video with friends would be very appealing to children in this demographic.

Indeed, if one looks at the CocaColaKickShuffle challenge hashtag on Instagram, it is clear that it is not only teenagers who are participating, indeed of the only non-sponsored content in the 'Top' Instagram posts using this hashtag is of a young girl, clearly under the age of 12 performing the dance challenge. This is unsurprising given the widespread popularity with pre-teen children, especially in the past year, of social media challenges which were first made popular on the Tik Tok app (and also replicated now on Instagram).

Advertiser's Response

Our response letter and evidence provide show that our influencer campaign was not targeting children but rather, a much older audience. In addition to the information we provided in our letter, we would like to provide the following information:

Age-screening :

- The content was posted only on Instagram, which only allows users above 13.
- The influencers' audience profile shows a strong appeal to communities who are 17+.
- 16% of the influencers' followers are age 17 and below

Appeal to children:

- When assessing primary appeal to children, we evaluate many different elements and their impact when used collectively. This includes: the people involved (what they wear, how they act, their follower profiles if they are an influencer) and also, the content (music, messages, visuals, whether activities shown are primarily appealing to children). For this campaign, we assess the dance moves as appealing to a broad age group and have taken the necessary measures so that content does not directly target children.
- The topics addressed by the influencers and their interests on social media are not directed to children. Rather, they are geared toward older audiences as they address careers, grocery shopping, traveling abroad with friends and work-related events.
- The example provided in the Appeal was not created by our company or one of the influencers with whom we work. It is a post created by another user and hence, content referred to as "user generated content" (UGC), which appears to be posted from an account owned by a person age 18+ in Finland.

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 66 for the Coca Cola Instagram KickShuffle dance in France.

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.

The Appeal Panel reiterated that the use of young influencers popular with a young demographic can lead to children below the age of 12 to also feel drawn to the adverts. However, the appeal of the creative execution spans a broader audience and is not seen as primarily appealing to young children. The Appeal Panel agreed with the First Instance Panel that even though children under 12 years old might also find the video of dancing influencers interesting and perhaps funny, the concept, the background, the environment in which the advert was shot did not indicate that it would be appealing primarily to children below 12 years of age. Similarly, the colours and the dress of the influencer all together suggest that the ad is targeting a wide age group. In essence, the comical scenes depicted are as much appealing to other age groups as they would be to children under 12.

Based on the arguments and rationale outlined above, the Appeal Panel does not overturn the original decision. The complaint remains not upheld and the Coca Cola Instagram KickShuffle dance in France is compliant with the EU Pledge commitment.

Decision regarding the appeal: admissible.

Decision regarding the complaint: not upheld.