

Case ID: 68		Decision	
To	EU Pledge Secretariat	Date of mtg	14 May 2021
From	EASA Secretariat	Date sent	20 May 2021

First instance ruling – Kellogg’s

Description

Kellogg’s Pringles Fortnite EU campaign

Complaint

This Instagram post on the 12th of March on the Pringles Italy account, on the 15th of March on the Pringles DE account, on the 11th of March on the Pringles FR account and on the Pringles Gaming Instagram Account on the 30th of March promotes the sponsored Pringles tournament in the Fortnite video game, with the chance of winning an Xbox console as well as the chance to play with popular young gaming influencers e.g. in Italy @twoplayeroneconsole -495K followers, in Germany @amartv – 183K followers, in France @thevic_c 133K followers, all of whom, given the incredible popularity of gaming, are likely to have significant amounts of children following them, including children under the age of 12 years old.

The fact that the Fortnite game itself is also well-known as being extremely popular with young children, including those under-age ([under 13 years old](#)), the premium offer to win prizes which would be very popular with children (games console or playing with well-known gaming influencers), the prominent featuring of the Pringles products within the themed ‘Flavour Run Map’ in the Fortnite game, the appearance of this game as very cartoon-like and would therefore be appealing to younger children too, as well as the interactive competitive element and the featuring of Pringles cans in the game itself demonstrate that this is marketing which will also reach and be affective for young children, including those under 12 years old.

Advertiser's response

The EU Pledge is a voluntary initiative by leading food and beverage companies to change food and beverage advertising to children under the age of twelve in the European Union. One of the main commitments is not to advertise for food and beverage products to children under the age of twelve on TV, print and internet, except for products which fulfil common nutritional criteria.

According to EU Pledge guidelines for influencer marketing, to determine if an influencer's primary target audience is under the age of 12, the same standard should be as used as for all marketing channels and communications.

Kellogg organised a marketing activation for the brand Pringles from 4/03/2021 to 17/03/2021. The activation consisted of a tournament on the platform Fortnite in which participants from different countries compete to win a selection of gaming products, including an Xbox series X console. The first round involved competitors completing the Pringles Flavour Run on Fortnite to get the fastest time. The fastest times for each of the competing countries won an invitation to participate in the Pop n Play European Showdown in a duo alongside a local influencer. The duo deemed winner of the Showdown was confirmed overall winner of the tournament.

The competition was promoted through a paid collaboration with Italian social media influencer, Two Players One Console, German social media influencer, Amar, and French social media influencer, Victor, on their Instagram pages. Additionally, the competition featured in organic posts on the Instagram page of Pringles Gaming, Pringles Italy, Pringles Germany and Pringles France.

The Pringles brand has an age target demographic of adults 18+, which is aligned with the audience targets of the social media influencers and Pringles Instagram pages. Over 85% of the Pringles Instagram followers are over the age of 18. In reflection of the age target of Pringles, over 80% of the influencer's Instagram followers are over the age of 18.

This further reflects the age targeting of the Pringles brand and the campaign to reach a significant amount of adults 18+ as the main audience.

In addition, the creative execution of the campaign was clearly aimed at a target audience over 12 years old.

The EU Pledge commitment states that marketing communications for products which do not meet the EU Pledge common nutrition criteria should not feature in interactive games primarily targeted at children under the age of 12. Computer and video games with the PEGI labels 3 and 7 fall under this definition. The game Fortnite has a PEGI rating of 12.

All influencers were over the age of 18 and entries to the competition were restricted to 18+. Entrants were shown and had to accept the full T&Cs upon registering on the competition website, and then entering the tournament. These state it is for over 18s only. Checks were in place to avoid people under 18 participating in the promotion. Only registered players of the Fortnite game were able to participate. Winners of the first round were checked by the agency for age and asked to provide photo ID, all participants in the final had provided photo ID to show they were over 18. Adult language was used and prizes to win were primarily appealing to an older audience.

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 product (Pringles) advertised on the third-party Fortnite game 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. Third-party online games qualify as non-measured media category, meaning that adequate metrics about the users and players are unavailable. Consequently, the Panel was presented with the task to assess the overall creative execution of the advertisement at hand – in this case the Pringles Fortnite campaign on the Fortnite game and Instagram.

1. Fortnite video game

Regarding the creative execution of the advertisement in the Fortnite game, the Panel considered the fact that Fortnite is rated at PEGI 12, meaning that is recommended to be at least 12 years old to play the online game. However, the PEGI rating of 12 is not sufficient to secure compliance with the EU Pledge commitment. Additionally, there is no actual age-gating system filtering players nor would this be sufficient to guarantee compliance.

Experts assessed that the Fortnite online video game contains various elements, such the colourful graphics, the 3D animations, the actual gameplay and storyline, the temporary prizes and competitions, and generally the video game in itself, which could be appealing to children under 12 years old. However, experts believed it is more likely to be appealing to teenagers rather than children, as the target audience of the game is set at between 14 and 18 years old and the video game animations used are the type that appeal to teenagers and are similar to other teenage-oriented video games. In general, colourful animations are not an exclusive advertising method used only for targeting children; it can be used to target a wide audience, depending on its execution. In this case, the video game is primarily appealing to a teenage audience between 14 and 18 years of age, though advertisers generally need to be careful not to include their products in video games that contain childish animations.

Furthermore, the display of the product appearing next to popular European landmarks is an element that could be appealing to under-12-year-olds. However, similar to the game itself, it is more likely to appeal to adolescents who are more familiar with these architectural attractions than young children would be.

2. Instagram posts

Experts took note of the fact that Instagram as a social media platform bars anyone under the age of 13 to set up an account. 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 found that the Instagram posts did not contain any childish element or factor that would indicate that the posts would be appealing in any way to children under 12 years old. Both posts contain the logo of the brand and licensed characters of the Fortnite game, but these are not portrayed in any particularly childish manner – on the contrary, they are rather targeting teenagers between 14 and 18 years old, as these are featured in a video game popular with that demographic. The posts are also static and do not contain the actual product. Although both posts contain a coloured background, this on its own is insufficient an element to consider the posts to be appealing primarily to young children.

Based on the arguments and rationale outlined above, the Panel judged that the Pringles Fortnite European campaign on Fortnite and Instagram is not appealing 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: 68

Appeal

To	EU Pledge Secretariat	Date of mtg	24 June 2021
From	EASA Secretariat	Date sent	30 July 2021

Appeal ruling – Kellogg’s Pringles Fortnite EU campaign

Complaint

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’. Moreover, as highlighted in the Panel’s decision, that whilst age-gating is an insufficient mechanism for guaranteeing compliance in any case, the Fortnite game in question has no such age-gating and any child is freely able to play the game without even having to declare their age.

Appeal

We would like to appeal this decision.

We do not believe that the Panel has adequately taken into account the significant general appeal of the Fortnite game to children under 12 years old (particularly the ‘tween’ sub-demographic) nor the specific elements of this marketing promotion which are child-appealing. Moreover, the Panel’s decision fails to adequately explain how the Pringles Fortnite is more targeted at children aged 14-18 years old as it claims.

Fortnite is one of the most popular online games in the world with, as of May 2020, over 350 million registered players worldwide, many of whom are children and teenagers. The game has in fact been highlighted in academic literature as being particularly popular with children aged 8-12, in spite of the PEGI age rating of 12 years old¹.

It is unsurprising that Fortnite would be particularly popular with this age group as, notwithstanding the appealing elements of the game in general (more below), this demographic is already significantly participating in online gaming. A recent OFCOM report on UK children’s media use highlighted the increasing popularity of this type of gaming for children and found that for the age group 8-11 years old, 79% played computer games (with 66% playing online games) with boys aged 5-15 years old playing on average 14 hours 36 minutes a week. This latter group even cited Fortnite as an example of the game they play. These figures are of course likely to be replicated across Europe. Furthermore, the game is free to play on many platforms and contains cartoon qualities.

This article highlights that an 8 year-old (who had been training to play Fortnite competitively since the age of six) has become the youngest professional player of the game (while it is clear that other young children are being scouted by eSports organisations). Where there are role models so young, there will clearly be enthusiastic younger players too. Also, and importantly, the article also highlights how the average age of Fortnite players is 16-17 years old. To have such an *average* age there must be many younger players (as indicated in the article). There are even online Fortnite classes directed towards children aged 6-10.

Moreover, during the Covid-19 pandemic (also a period when this Pringles/Fortnite collaboration was created) and the accompanying lockdowns have seen online game use rise astronomically, including by children who have turned to such games as a social outlet while physical meet-ups with friends have been restricted.

There are many elements of this Pringles Fortnite marketing post/game which make it of particular appeal to children, including those under the age of 12 years old. Indeed, the Panel lists them extensively: colourful graphics, the 3D animations, the actual gameplay and storyline, the temporary prizes and competitions, the characterisation of the product appearing next to popular European landmarks, and generally the video game in itself. However, it seems that this broad and extensive range of child-appealing elements has been outweighed by the ‘target audience’ being set at between 14 and 18 years old and the animations used which are of other video games ‘similar to other teenage-oriented video games’. However, the Panel does not explain how or why these animations or the other elements contained in the marketing post would be more appealing

¹ https://www.researchgate.net/publication/340281681_Situating_the_Appeal_of_Fortnite_Within_Children%27s_Changing_Play_Cultures

to 14-18 year olds than children under 12 years old. 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 therein as appealing as their teenage peers.

Indeed, as identified in this academic article which looked at children aged 9-14 years old who played Fortnite, there are many elements of the game in general which will be of particular interest to this age group such as: *'its intersections with YouTube and game livestreaming, the way the game acts as a vehicle for social capital and the performance of identity, and the rich sociality of play'*.

Finally, it is important to point out that online advertising such as advergaming can be even more powerful than traditional advertising – children are subconsciously targeted for longer periods of times and are actively engaging with the brand (compared to the more passive, yet still powerful, watching of a TV ad). The line between commercial and non-commercial messaging is significantly blurred and research has shown that children as old as 15 years old do not recognise that advergaming are adverts².

Advertiser's Response

The grounds for appeal are limited to due grounds such as:

- 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.
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We do not have new information or evidence of substantial flaw with procedure or adjudication. So, unless the complainant has additional evidence they were unable to provide earlier, which we don't believe they do from the information you shared, we will reiterate that the ad in question was targeted at an audience over 18.

The Pringles brand has an age target demographic of adults 18+, which is aligned with the audience targets of the Pringles Instagram pages used in this promotion. Over 85% of the Pringles Instagram followers are over the age of 18. In addition, Instagram may not be used by kids under 13.

The Fortnite game has a PEGI 12 rating which is in line with the EU Pledge implementation guidance which recommends avoiding PEGI 3 and 7.

The complainant refers to the average age of Fortnite players being 16-17 but is basing this claim on data of e-sports players in the Fortnite Solo World Cup Qualifiers. In addition, they infer from this average age that "there must be many younger players" but refrain from noting that the minimum age for participation in these competitions is 13. This disproves the complainants' statement that "young role models" such as an 8-year-old are being used in E-sport but rather supports the panel's

² Nairn, A. and Hang, H. (2012), Advergaming: It's not child's play. A review of research. London: Family and Parenting Institute

previous statement that the target audience of the Fortnite game is set at between 14 and 18 years old.

Pringles, being conscious of our target audience for this ad campaign, only collaborated with influencers over the age of 18 who had a vast majority (>80%) of online followers over the age of 18.

The Pringles branded Fortnite “flavour map” was only available to registered users. Registration is only possible from the age of 18. As we said before, we had an additional layer of ID verification for winners of the first round and participants in the final to confirm that they were 18+.

While animation was used, the panel confirmed in their decision that colourful animations are not an exclusive advertising method used only for targeting children; it can be used to target a wide audience, depending on its execution. The complainant argues that some children under 12 may find content intended for older ages appealing, however the EU Pledge commitment states that the overall creative execution should not be primarily appealing to children.

Finally, the complainant states that advergames may not be recognisable as advertising. The Pringles PopNPlay Showdown content was clearly branded both with the Pringles logo and name Pringles PopNPlay Showdown – Fortnite in its assets and did not conceal the collaboration with the brand in any way.

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 68 for the Pringles Fortnite campaign on the Fortnite game and Instagram.

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 discussed the appeal of Fortnite to children below the age of 12. The Appeal Panel took note of the fact that the game has a PEGI age rating of 12. Although the PEGI rating is important, the game may still be popular with children under 12 years old who do engage in online gaming, even more so in times of lockdown and quarantine. These facts were taken into consideration while shaping the final decision, with the remark that children engaging in online gaming and Fortnite being popular to children below 12 does not mean that Fortnite is primarily appealing to children below 12.

The First Instance Panel had already touched upon the colourful graphics, the 3D animations, the actual gameplay, and the storyline, as well as the temporary prizes and competitions and the characterisation of the product appearing next to popular European landmarks. These are elements that the Appeal Panel took into consideration, however, they were not judged as being primarily appealing to children. Once again, here an emphasis should be given on the concept of primarily appealing to children. The Appeal Panel did not believe that this part of the game was designed in such a way in order to appeal primarily to children under 12 years old, but to a much broader age range which can include a part of the non-homogenous group of children under 12, but is not primarily appealing to them.

Regarding the Instagram posts, the Appeal Panel agreed with the First Instance Panel that they did not contain any childish element or factor that would indicate that the posts would be appealing in any way to children under 12 years old. Both posts contain the logo of the brand and licensed characters of the Fortnite game, but these are not portrayed in any particularly childish manner. The posts are also static and do not contain the actual product. Although both posts contain a coloured background,

this on its own is insufficient an element to consider the posts to be appealing primarily to young children.

Similarly to the First Instance Panel, the Appeal Panel has considered all aspects of the post and the part of the game in question. There is not any one component in the assessment made by both Panels that is a major decisive factor in concluding that the ads are appealing primarily to children under 12. 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 Pringles Fortnite campaign on the Fortnite game and Instagram are compliant with the EU Pledge commitment.

Decision regarding the appeal: admissible.

Decision regarding the complaint: not upheld.