

**Case ID: 71**

**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**

Chips Ahoy post on Instagram in Portugal

**Complaint**

This Instagram post by popular gaming personality @ricfazeres promotes the Chips Ahoy product and was posted on the 15/03/2021. The advertising was paid for by Mondelez as it is clearly marked that it is a 'Paid Partnership with chipsahoy\_portugal'.

The post says: "GANHA UMA CONSOLA DE NOVA GERAÇÃO TODAS AS SEMANAS

Zeocas porque não deliciarem-se com as deliciosas @chipsahoy\_portugal com pepitas de Chocolate e habilitarem-se a ganhar uma consola de nova geração? Usa o código no interior das embalagens e vai já jogar em chipsahoy.pt Boa sorte a todos #CHIPSAHOY #CHIPSAHOYPT #JOGAEGANHA #AD #pub"

In English: "WIN A NEW GENERATION CONSOLE EVERY WEEK

Zeocas why not indulge in the delicious @chipsahoy\_portugal with Chocolate chips and enter a draw to win a new generation console? Use the code inside the packages and go play on chipsahoy.pt Good luck everyone #CHIPSAHOY #CHIPSAHOYPT #JOGAEGANHA #AD #pub"

The presence of the chocolate biscuit product in all three posts, the excitement shown by the gaming personality about the product (even hugging them in a humourous way which would be amusing to younger children), the presence of the gaming influencer himself (a hobby very popular with young children), the premium offers (a competition to win prizes (gaming console) which would have obvious appeal to children, including younger ones), the competition itself being very easy and simple (you just have to click on a biscuit as many times as possible) and therefore likely to be enjoyable to young children, the popularity of the gaming influencer mostly popular with young people/teenagers, including children, as well as the incitement to purchase the product in order to be able to enter the competition (a code is found in the packaging of the biscuit product), demonstrate that this is a marketing example which would be relevant for young children, including those under 12 even if the terms and conditions only allow those over 18 to play and enter (this can be easily by-passed by asking a parent to fill in their details or by inputting false birthdate data).

### 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.

Instagram has an age verification system in place and the platform is for users 13+ years old. Nevertheless, we take our own responsibility towards Marketing to Kids seriously. Through the EU Pledge, we have committed to ensuring that companies should not use influencers whose primary target audience is children under the age of 12. After internal review, we can confirm that we have complied with our Pledge commitment. Only people +18 years old can participate on our website. To play, people need to submit a complementary declaration of being +18. In addition, we have just posted an additional entry banner to re-confirm age and deleted the invitation to play several times..

### 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, and therefore the Panel is presented with the task to assess the overall creative execution of the advertisements at hand – in this case the Chips Ahoy! Instagram post.

Judging the creative execution of the posts, the Panel found that the presence of the chocolate cookie next to a gaming personality is not as such against the EU pledge commitments. The way the posts are produced, even the one with the personality hugging the product, was not considered to appeal primarily to children younger than 12. The Panel noted the reach that this gaming personality has among young ages and deemed that the personality mainly targets teenagers. Whilst some children may know of the gaming celebrity, the Panel deemed that the age of the influencer and his behaviour were not elements that would indicate it to be primarily aimed to young children. This can also be deduced by the comments under the posts which mostly belong to teenagers. The Panel also noted that the tone of the language is informal and can be seen as addressing young people, but not primarily young children below 12 years but rather a teenage audience. This may increase the appeal to a younger audience, but as the post's target demographic is teenagers, it would be counter-productive to use a more formal tone. Additionally, marketers should be careful when using such informal language, as the adverts' appeal may be broader than they intended to. In this case, the post's content was not deemed to contain any childish element, animation, graphic design, or character, that would indicate that children would feel drawn to the advert.

The fact that both posts 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 taken into consideration by the Panel. However, it is not sufficient on its own to guarantee compliance.

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

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

**Case ID: 71**

**Appeal**

<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

**Appeal ruling – Mondelez Chips Ahoy post on Instagram in Portugal**

**Paintiff'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 both posts 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 taken into consideration by the Panel'. 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 disagree that the post does not contain 'any childish element'. Indeed, the appeal to children of the prize highlighted in the advert– a gaming console – would be very appealing to children. Young children are a key demographic for video games. Indeed, as OFCOM found in 2020, 'Ofcom's media literacy research indicates that four in ten (39%) UK adults and three-quarters of children (75%) played video games of some kind in 2019'. Within this demographic of children who play video games, 83% of children play on TV-connected games consoles (the same kind as implied in the advert). Moreover, amongst all age groups children were by far the most common age group to play games consoles (see below). These figures are likely to be replicated across Europe. So, in fact, games consoles are not only appealing to children but they are the demographic for which this prize would be the most relevant.

**Figure 3.6: Percentage of the UK adult and 8-15 game-playing population who play games, by device, age and gender: 2020**

65+	16%	23%	28%	7%	4%	19%	21%	25%	5%	3%
55-64	27%	29%	31%	21%	6%	34%	31%	19%	15%	10%
45-54	60%	47%	46%	48%	20%	54%	47%	34%	28%	18%
35-44	77%	56%	63%	69%	30%	71%	48%	39%	50%	32%
25-34	79%	51%	68%	71%	42%	82%	54%	47%	55%	35%
18-24	87%	49%	65%	79%	39%	81%	44%	59%	57%	40%
Children	86%	79%	72%	90%	52%	90%	81%	70%	75%	45%
	Mobile	Tablet	PC	Console	Handheld	Mobile	Tablet	PC	Console	Handheld
	Male					Female				

Moreover, the over-exaggerated, silly and humourous actions and facial expressions of the gaming influencer are common with entertainment for younger children than for teenagers. At the same time, the advergaming competition which is promoted (clicking on a chips ahoy biscuit as many times as possible within an allotted timeframe) with its easiness, simplicity and low-skill level required has not been addressed by the Panel even though it would be of clear appeal to children.

However, while the Panel deemed that the age of the influencer would mean that it was not primarily aimed to young children, on the other hand, the Panel finds that the 'personality mainly targets teenagers'. It is not clear why the Panel reasons that teenagers would find an older personality appealing while children under 12 years wouldn't. It is clear that children are not only fans or followers of other children of the same age with many older pop stars or celebrity influencers being incredibly

popular with this demographic. Indeed, the Panel itself '*noted the reach that this gaming influencer has among young ages*'.

As we have previously stated, we do not believe that the Panel has adequately taken into account the fact that the interests of children under the age of 12 years old are not homogenous and 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 activities or content (such as this gaming influencer) therein as appealing as their teenage peers.

It is interesting to note that the Instagram post has since been deleted from the gaming influencer's account.

### **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 71 for the Chips Ahoy post on Instagram in Portugal.

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 first judged the creative execution of the posts. The Appeal Panel agreed with the First Instance Panel that there is nothing in the interaction between the influencer and the product, including the one where the personality is hugging the product, that would be primarily appealing to children below 12 years old. The Appeal Panel took note that children do engage in online gaming and that children, as well as teenagers, can find influencers older than themselves appealing, but none of these arguments make these particular stories appealing primarily to children under 12. In addition, the appellant should have provided these statistics before the First Instance Panel, or otherwise outline why this was not possible, as per the EU Pledge commitment.

The Appeal Panel also agreed with the First Instance Panel that marketers should be careful when using such informal language, as the adverts' appeal may be broader than they intended to. In this case, the post's content was not deemed to contain any childish element, animation, graphic design, or character, that would indicate that children would feel drawn to the advert.

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.**