

**Case ID: 73**

**Decision**

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<b>To</b>	EU Pledge Secretariat	<b>Date of mtg</b>	14 May 2021
<b>From</b>	EASA Secretariat	<b>Date sent</b>	18 May 2021

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**First instance ruling – McDonald's**

**Description**

McDonald's Denmark Instagram post

**Complaint**

The post by McDonald's Denmark on their Instagram page is promoting a simple 'Egg Hunt' game and competition on their app. The post shows a basket filled with McDonald's products (burger, fries, soda) which is moved by the user to collect eggs emblazoned with McDonald's branding, whilst Easter-themed objects (such as a yellow chick) and hamburgers fall from the sky.

The caption reads:

*Gæk gæk gæk... 🍟  
Nu er tiden kommet til den årlige æggejagt-sæson!  
Saml de røde McDonald's æg i påskeharens kurv og vind lækre præmier. 🐰 😊  
Hop ind i McDonald's app'en og spil med – hver dag indtil 5/4! 😊 Link i bio.*

In English:

*Gæk gæk gæk... 🍟 Now is the time for the annual egg hunting season! Collect the red McDonald's eggs in the Easter bunny basket and win delicious prizes. 🐰 😊 Hop into the McDonald's app and play along - every day until 5/4! 😊 Link and bio.*

The text on the video reads: 'The Egg Hunt: Play in the app and win cool prizes' .

The presence of McDonald's products in the post, the promotion of a simplistic and easy game which would be easily played (and appealing to) young children, including those under 12 years old, the theme of the game being based on an Easter activity which is clearly for younger children, certainly those under 12 (Easter egg hunt), the featuring of childish Easter characters such as the yellow chick and the Easter bunny in graphics which would be familiar and attractive to younger children as well as the incitement to play the game to win 'cool prizes', demonstrate that these marketing examples are clearly targeting young children, including those under 12 years old.

### Advertiser's response

1. The overall impression of the Instagram post does not demonstrate that the post is primarily appealing to children.
  - The post in question is related to Easter, which is a holiday celebrated by all ages and the Egg Hunt game itself is just one of the numerous ways to celebrate it.
  - Although the post uses bright colours and animation, according to the EU Pledge Implementation Guidance, when evaluating animation and sound effects, the focus is on whether or not the ad in question is *'primarily appealing to young children'*, recognizing that not all animation is designed for young children.
  - In this instance, slight animation was used to bring across the spirit of the Easter holiday that resonates with adults on a platform that is targeted towards adults.
  
2. Actions were taken to restrict child access.
  - Instagram is a social media platform that is age-gated for 13 years and older.
  - In addition to the Instagram age requirements, users must be 16 years and older to log into the McDonald's Denmark app (user confirms when registering).
  - Furthermore, users must be 16 years or older to participate in the Egg Hunt game and win prizes (must be logged in and confirm age by entering their birthday when playing the game for the first time.)
    - o This age restriction is also included in the terms and conditions of the game.
  - The post in question includes a statement that was not included in the complainant's original screenshots. The text clearly states: *'Du skal vaere mindst vaere 16 ar for at deltage.'* (In English: *'You must be at least 16 years old to participate.'*)
  
3. The target demographic based on the company's media plan was adults.
  - The post in question was placed on Instagram, instructing viewers to visit the McDonald's Denmark app in order to participate in the game. Viewers of the Instagram post cannot play the game on Instagram directly. As outlined above, Instagram requires users to be 13 or older to use the platform, and the McDonald's Denmark app requires users to be over 16.
  - In this instance, the targeted audience for the paid advertising for this post was 17-29 years old.

### 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 (McDonald's Menu products) 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.

The Panel 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.

Consequently, the Panel is presented with the task to assess the overall creative execution of the advertisement at hand: in this case the McDonald's Instagram post and online adverggame for Denmark.

Regarding the creative execution of the Instagram post, the Panel considered that the animation used in the short video is quite childish and oriented towards a very young demographic. It depicts a short video of what the adverggame looks like, which can be accessed by clicking on the link in the accompanying text. Although colourful animations are not an advertising method used only for targeting children, the Panel deemed that, in this case, the 2D graphics used for the Easter bunny, the bundle of products, the little chick, and the eggs falling are all inherently childish and are drawn in ways that would appeal more towards young children than any other demographic. The choice of colours may in part reflect the brand's colour palette. However, the inclusion of delicate green ferns on the side of the post as well as of the little chick, combined with the fact that the Easter bunny is coloured in pink and light grey, and with the slow pace of the video all indicate for the Panel that the graphic composition of the Instagram post would be appealing primarily to children under 12 years old.

Furthermore, an Easter egg hunt is an activity primarily popular with children under 12 years old. The fact that the post relates to an activity that young children under 12 are every year excited to engage in is another element that the Panel deemed problematic in terms of appealing to a very young audience. In addition, the Easter Bunny pops up at the bottom of the video partly hidden by the frame of the post, giving it a cute and childish touch. The Easter Bunny is a fictional character primarily popular with children, who look forward to meeting him. In fact, the Easter Bunny is generally used in marketing communications to attract children's attention and appeal to their imagination and excitement for an Easter egg hunt. The post featuring both the Easter Bunny and a little chick does not contain any element in its creative composition that would mitigate the ad appealing primarily to children under 12.

The Panel considered the accompanying text as being quite long and not primarily appealing to any young child. In fact, the Panel found that the text may be largely targeting parents as gate-keepers, though it does contain childish words such as 'hop ind' and 'gaek' as well as the emojis. However, notwithstanding the length and the content of the text, the activity it is referring to is something that parents engage in with their children, and not the other way around. In other words, an egg hunt is an outdoor activity that is primarily done by children under 12 years old. The manner in which an ad refers

to such traditions also matters more than simply linking itself to them. For instance, Halloween, Carnival, and Easter can be just as appealing and popular with children as they are with teenagers and adults of all ages, but the way the advertisement is composed, the particular aspects of any yearly celebration to which the ad refers to, and the way it is visually presented matters more than simply mentioning the celebrations. In this case, the ad alludes not merely to Easter as a religious or traditional celebration, but to an Easter egg hunt, which is exclusively a children-oriented activity. Moreover, the graphic composition is predominantly aimed at children through its 2D drawings, the inclusion of the Easter Bunny, a little chick, the slow pace of the video, and its general childish colour palette. Regardless whether the text may be targeting parents, which in some cases can alleviate the creative composition of the post that it accompanies, in this case, the post is overly childish and contains only child-oriented material all whilst incorporating the product.

The Panel also took into account the fact that the company has bought online marketing space aimed particularly at 17 to 29-years-old. This is welcome. However, due to the very nature of social media platforms and online advertising, advertisements can still be primarily appealing to children under 12 due to the inherent creative execution of the ad and that it can still be seen and accessed by young children with or without supervision, regardless of what audience it intends to target.

The Panel also assessed the online adverggame itself. They acknowledged that the website that features the game contains an age-gating system barring anyone under 16 years of age from accessing it. This additional barrier is welcome as well, given the degree of appeal of such a game with children under 12 years old. Nonetheless, as per the EU Pledge commitment, an age-gating system is not sufficient on its own to guarantee the game's compliance. The game contains the same colour palette, folk characters, and link to the traditional Easter egg hunt that the post has, making it primarily appealing to children under 12 years old. The Panel deemed, however, the Instagram post to be more appealing to young children than the adverggame itself, as the latter has an additional age-gating system and the post is a short video of the gameplay making it more enticing, though both are appealing primarily to the demographic.

Based on the arguments and rationale outlined above, the Panel judged that the McDonald's Instagram post and adverggame are appealing primarily to children under 12 years old, and are thus not compliant with the EU Pledge commitment. Therefore, the Panel upheld the complaint.

**Panel decision: complaint upheld**

**Case ID: 73**

**Appeal**

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<b>To</b>	EU Pledge Secretariat	<b>Date of mtg</b>	14 May 2021
<b>From</b>	EASA Secretariat	<b>Date sent</b>	30 July 2021

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### **Appeal ruling – McDonald’s Denmark Instagram post**

#### **Advertiser’s appeal**

As noted in our original submission to the Panel and supporting evidence, McDonald’s ensured the three criteria that should be considered when determining whether an ad is primarily directed to young children under 12 were met:

1. The overall impression of the advertisement did not primarily appeal to young children under 12.
2. Actions were taken by McDonald’s to restrict young children under 12 access.
3. The target demographic based on the company’s media plan was adults.

In our opinion, the Panel has not evaluated all three factors in addressing whether the advertisement is primarily directed to young children under 12. It is not a question of the ad could appeal to some children, the key is on the word primarily, which, here, is not the case considering all actions McDonald’s took to ensure the ad was directed to adults.

#### **Overall Impression**

In considering the overall creative execution of the advertisement the Panel has not sufficiently demonstrated or provided evidence that the advertisement appeals “primarily to young children under 12.” “Primarily” is a higher standard than “more appealing towards young children than any other demographic.”

Easter is a holiday celebrated by all demographics, with an inherent joyful touch due to its religious origins regardless of the audience, and just because the traditional colors of Easter are bright and cheerful and the characteristics of the holiday may by simple, should not automatically be determinative that it is not a holiday enjoyed by adults. It is unclear how elements of the post, including “delicate green ferns” and animated animals, proves that this is more appealing to young children under 12 versus young adults.

Due to its implicit joyful meaning, Easter is celebrated and represented with cheerful elements such as Easter bunny and Easter eggs which are meant to please and be enjoyed by all demographics. While potentially any advertising celebrating an event / holiday with an inherent joyful touch might bring with it certain more child-orientated aspects, this does not mean per se that the overall advertisement is addressed primarily to children, particularly in those cases where the advertisement (like in this case)

contains all the necessary safeguards not to address it primarily to children, as the Panel itself has acknowledged in its decision.

### Restricting Access

The EU Pledge Implementation Guidance acknowledges that mechanisms aimed at age-screening and/or parental consent mechanisms are helpful in verifying the age before allowing access to the content. While we acknowledge that this is not seen to be entirely sufficient in a situation where advertisements are primarily directed to young children under 12, the Panel has not sufficiently considered and provided adequate weight to the steps McDonald's took to restrict access. Here, there were three levels of age-gating- (1) Instagram, (2) age-gating of 16 years or older to log into the McDonald's Denmark app and (3) users must be 16 years or older to participate in the Egg-Hunt game and win prizes. The 3 levels of age-screening are on top of clear language on the advertisement itself that says "You must be at least 16 years old to participate." There can be no mistake that the target of this advertisement was to adults and this should mitigate any potential concern with the creative expression when taking into account the "overall impression" of the advertisement as required by the EU Pledge.

### Target Demographic

The Panel dismissed the fact that the target of the advertisement was 17 to 29 years old. The EU Pledge Implementation Guidance states that for non-measured media all three factors (overall impression, actions to restrict child access and target demographic) should be viewed equally and holistically.

Here, in the Decision, the Panel states, "regardless of what audience it intends to target," which erroneously discounts the company's target audience as a factor that must be considered when evaluating the overall impression equally alongside the other factors.

### Conclusion:

1. In assessing carefully all three factors to determine whether an advertisement can be considered primarily addressed to young children under 12, the data available clearly supports the advertisement is primarily directed to adults. The Panel agrees that two out of three factors (namely, actions to restrict access and target demographic) have been clearly and fully respected by the McDonald's advertising with the only debate left over the overall impression.
2. The "overall impression" factor, as explained above, has been assessed and interpreted by the Panel in a purely subjective way of certain parts of the ad only without considering the overall context of the event to enjoy (Easter), the inherent joyful aspects that Easter brings (Easter egg, Easter bunny), the undeniable adult-oriented accompanying text in the ad, and is therefore lacking substantial arguments to consider the overall impression as primarily addressed to children under 12.
3. All this considered, when the challenged advertisement is evaluated properly with all three factors together, the advertisement is not primarily directed to young children under 12.
4. Given the above, it must be stated that on this occasion, McDonald's has complied with all the commitments assumed under the EU Pledge, which it has voluntarily adhered to.

For these reasons, McDonald's appeals the Panel decision of 18 May 2021.

### **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 company. 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.

Based on the arguments provided by the plaintiff in the Appeal 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 73 for Mc Donald's Instagram post in Denmark.

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. As a social media platform, Instagram contains an age-gating mechanism that prohibits anyone under the age of 13 from creating an account. The Appeal Panel also took note that there are two more levels of age-gating, 16 years or older to log into the company-owned app and that users must be 16 years or older to participate in the Egg-Hunt game and win prizes. These factors are not a *sine qua non* element in terms of compliance, as under the rules of the EU Pledge commitment, an age-gating mechanism cannot guarantee conformity on its own. When considering placement of the advert, the Appeal Panel considered that the age-gating mechanism has nonetheless a deterring effect on children from creating an account on the platform. The Appeal Panel took note of the fact that the target of the advertisement was 17 to 29 years old as stated by the company.

Regarding the creative execution of the Instagram video, the Appeal Panel noted that the animation used in the short video is quite childish and oriented towards a very young demographic. It depicts a short video of what the advergaming looks like. The Appeal Panel agreed with the First Instance Panel that the 2D graphics used for the Easter bunny, the bundle of products, the little chick, and the eggs falling are all inherently childish and are drawn in ways that would appeal more towards young children than any other demographic. The choice of colours may in part reflect the brand's colour palette. However, the inclusion of the little chick, combined with the fact that the Easter bunny is coloured in pink and light grey, and the slow pace of the video, all indicate for the Panel that the graphic composition of the Instagram post would be appealing primarily to children under 12 years old.

The Appeal Panel also agreed with the First Instance Panel on how the activity of the Easter hunt is primarily popular with children under 12 years old. The fact that the post relates to an activity that young children under 12 are every year excited to engage in is another element that the Panel deemed problematic in terms of appealing to a very young audience. In addition, the Easter Bunny, a fictional character primarily popular among children, pops up at the bottom of the video partly hidden by the frame of the post, giving it a cute and childish touch. It is also important to note that it is not merely the Easter egg hunt activity that is appealing to children, but particularly the creative execution of the video. Whilst depicting an Easter egg hunt does generally appeal to children, it is especially the design and composition of the ad that will make it appealing primarily to them. In this case, the ad refers to

an Easter egg hunt in a particularly colourful, joyful, animated, and childish way that would render it appealing predominantly children under 12.

The Appeal Panel considered that the accompanying text used is quite long and even though it contains childish words such as 'hop ind' and 'gaek', as well as emojis, in general it is not primarily appealing to young children. The accompanying text in the caption may in fact be targeting slightly more parents than their children due to it being quite long and in small script. The sentence in the video would probably not be attractive to children or in any case would be appealing in any way to them and would likely to targeting parents interested in the promotional aspect of the advertisement. However, the Appeal Panel deems that the creative execution of the ad is heavily childish and oriented toward attracting the attention of children rather than any other demographic. The accompanying text is, in this case, a factor that does not mitigate sufficiently the inherently childish nature of the video.

The Appeal Panel found that there are sufficient elements to consider the Instagram post to be predominantly targeting children, regardless of certain mitigating factors, such as the age-gating mechanism, the company's plan and the language used. Indeed, whilst these factors are important when assessing the ad, the Appeal Panel needed to weigh them against the creative execution which is primarily appealing to children under 12 years old. The Appeal Panel found that the graphic design of the Instagram post is overwhelmingly appealing to children and thus it agrees with the First Instance Panel that the post is in breach of the EU Pledge commitment. Thus, the complaint remains upheld.

**Decision regarding the appeal: admissible**

**Decision regarding the complaint: upheld**