
Case ID: 75 **Decision**

To	EU Pledge Secretariat	Date of mtg	28 May 2021
From	EASA Secretariat	Date sent	31 May 2021

First instance ruling – McDonald’s

Description

McDonald’s Twister game on Instagram

Complaint

McDonald’s Twister game on Instagram

On the 26th of March McDonald’s Espagne on their Instagram account a 6-part Instagram story promoting their new promotion (Twister games available for one euro with the purchase of a McMenu Grande).

The captions of the stories read:

‘Llega twister a mcdonalds. Prepera tus pulgares! Tienes que ser muy rapido pulgar derecho a Big Mac. Pulgar izquierdo a McFlurry. Pulgar derecho a McFlurry. Pulgar izquierdo McNuggets. Bien hecho! Ahora consigne tu Twister par solo 1 euro mas con tu McMenu Grande y vence a tus amigos.’

In English: Twister arrives at McDonalds. Prepare your thumbs! You have to be very quick. Right thumb to Big Mac. Left thumb to McFlurry. Right thumb to McFlurry. Left thumb McNuggets. Well done! Now consign your Twister for just 1 euro more with your McMenu Grande and beat your friends.

Throughout the Instagram stories McDonald’s products (Happy Meals, Double Cheeseburgers, McFlurries, Chicken McNuggets) feature as the captions instruct the viewer to ‘prepare their thumbs’ and to then find a particular food icon with their thumbs ‘Right thumb to McFlurry’ (replicating the real Twister game which instead instructs players to move their hands or feet to particular colours).

The presence of McDonald’s products in the stories, the promotion of the premium offer of the very well-known boardgame popular with children, ‘Twister’ (intended for children from ages 6 and up) available for one extra euro with the purchase of a McMenu grande (a nominal sum), the bright colours and cartoonish graphics used in the Instagram stories, the encouragement to ‘play’ the game with thumbs on the Instagram story, as well as the informal use of ‘tu’ demonstrate that this marketing example should be considered to be marketing to children 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**.*
 - Although the story uses bright colours and animation, according to 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. Additionally, Instagram stories are a popular way of interacting with users and are used by brands to create excitement and interest with audiences over the age of 13.
 - Informal use of “*tu*” is commonly used in advertisements and social media communications to address adult audiences and is the intended demographic of the story. It is meant to create an informal feeling and personal experience with the audience and this is a common technique used in Spanish marketing directed towards audiences over the age of 13.

2. *Actions were taken to restrict child access.*
 - Instagram is a social media platform that is age-gated for 13 years and older.
 - The BBLL – rules that govern the promotion – were posted, indicating that in order to participate in the 1 euro promotion, consumers must be 15 years of age or older. This was published on McDonald’s Spain’s website, publicly notarized according to Spanish law, and published in the *Archivo electrónico de bases de Concursos del Consejo General del Notariado* (Electronic File of Contest Bases of the General Council of Notaries).
 - The offer of a Hasbro game for 1 euro is not intended for children, and is only available upon purchase of adult-directed McMenú® Grande menu items. When determining whether a “nominal cost” indicates appeal to children, the price of the original product (in this case, the McMenú Grande, Menú Signature or Menú Ensalada) must also be considered. In fact, McDonald’s Spain does not advertise promotional products to children that imply the payment of any amount.

3. *The target demographic based on the company’s media plan was adults.*
 - The target audience for the ad was 15 years and older.
 - The 1 euro promotion was tied specifically to large menu sizes in order to ensure adult appeal.

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 products (McDonald's Menu products) are 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 the McDonald's story appears on Instagram, which bars anyone under the age of 13 from setting up an account on their platform. Nonetheless, as per the EU Pledge commitment, an age-gating system is not sufficient on its own to guarantee 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 story in Spain.

The Panel first considered the inclusion of the Twister game as a hook in the advert to attract the attention of users. They noted that Twister is a board game popular with a large demographic and known by individuals of all ages. Though it is recommended to be at least 6 years old to play, it is not inherently a childish game or one that is primarily popular with children. Though some children will certainly find it a fun activity to play with friends or family, it is more likely to target and appeal to an adult or teenage audience. Moreover, the age rating of a game is only indicative.

In addition, the Panel also considered that the colour scheme used in the Instagram stories reflect rather the colour palette of the Twister game and of the McDonald's brand. In fact, they noted that the colours displayed were also not particularly childish or oriented to target or appeal to a young audience. They are not bright and vivid nor is the font used for the text in anyway particularly targeted at young children. In short, the colours used for the stories are not appealing any more to children than they will be to teenagers or adults.

The inclusion of small images of the product on different parts of the Twister game is only meant to include the product within the advert, which is not against the EU Pledge commitment. Whilst it might appeal to certain children, simply showing the product as a cartoon-like graphic is not an element that can decide the case on its own.

The Panel assessed as well the language used in the advertised stories. The use of the informal Spanish pronoun 'tu' does not pose an issue within the local linguistic context. Its usage is much more prevalent in daily life and in commercial communications than it is for instance in French, where the distinction between pronouns is much more pronounced and has more weight in the tone and context of social interactions. As such, the fact that this series of stories uses the informal pronoun does not increase the likelihood that the ad would appeal more to children than it would to teenagers or adults. The emphasis of the caption on playing the game is not something that would be particularly enticing to young children, who are more likely to be attracted by the visuals than the text.

The advertised promotion is targeting primarily adults and parents, due to the fact the 1 euro addition, though a nominal sum, is nonetheless linked to a large adult menu and not a children's Happy Meal. In addition, the promotion states that participants are required to be at least 15 years old.



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

Panel decision: complaint not upheld

Case ID: 75

Appeal

To	EU Pledge Secretariat	Date of mtg	12 July 2021
From	EASA Secretariat	Date sent	02 August 2021

Appeal ruling – McDonald’s

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 ‘The Panel took note of the fact that the McDonald’s story appears on Instagram, which bars anyone under the age of 13 from setting up an account on their platform.’ 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.

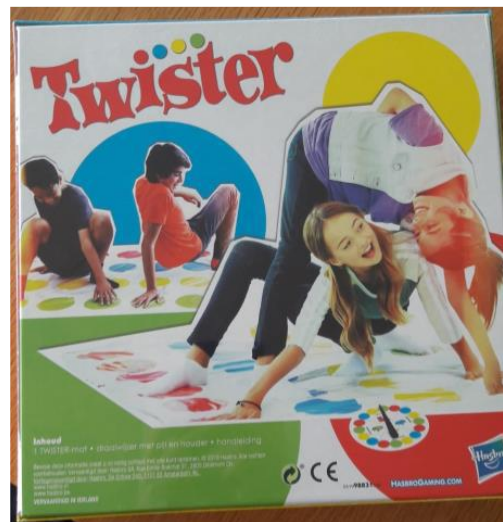
Appeal

We would like to appeal this Panel Decision.

Inclusion of Children's Games

We do not believe that the Panel have adequately taken into account the appeal of the game (Twister) shown in this advert and have incorrectly dismissed the inclusion of such in their decision.

We would strongly disagree that such a simple party game which is age-rated for 6 years old and above is more likely to target or appeal to an adult or teenage audience. Moreover, McDonald's itself clearly recognised the appeal of Twister to younger audiences and in Spain this year it has also promoted the game with its Happy Meal offer demonstrating the obvious appeal this game has with younger children. Indeed, Twister is still marketed and sold for children to play—it is a 'best-seller' in the Toys category on Amazon. The packaging on the Twister game itself also only features children and no adults.



Moreover, the playful manner in which the promotion has been advertised – the Instagram post encouraging users to 'play' Twister with their thumb has not been addressed by the Panel. The directions in the posts are short and express excitement (which would be appealing to younger children): 'Prepare your thumbs! You have to be very quick. Right thumb to Big Mac. Left thumb to McFlurry. Right thumb to McFlurry. Left thumb McNuggets. Well done!'. Moreover, the incitement to 'beat your friends' would also be appealing to a younger demographic, especially in relation to such a childish game.

Colour

The Panel dismiss the bright and vivid colours used in the Instagram post and say that the 'colour scheme used in the Instagram stories reflect rather the colour palette of the Twister game and of the McDonald's brand' which ignores the fact that the indisputably bright and attractive colours used in a Twister game were chosen to be attractive to children in the first place. It should also be noted that simply because a brand or game employs a colour theme which uses certain colours, it does not follow that this colour scheme will not be attractive to children. Indeed, it is often likely that a brand has chosen such colours for exactly this reason.

Moreover, we disagree with the Panel that the use of high-contrast block use of bright blue, yellow and red in the posts would not be considered to be bright and vivid or 'particularly childish'. The use of strong block colours would clearly be of more appeal to children. Indeed, as mentioned here, ***Children tend to be attracted to the bright block colors of the color wheel rather than pastels or muted blends. Primary colors red, yellow and blue, and secondary colors green, orange and purple, are more appealing than light shades of pink and beige or neutral shades of gray and brown. For this reason, the food and beverage industries, as well as the toy industry, use bright***

colors to market children's products.' This marketing website further underlines the attraction of bright colours for young children, *'For babies, toddlers and pre-adolescents, using high contrast and primary colours is likely to be more successful. Patterns are less appealing for child audiences and products or services aimed at this market. Solid blocks of colour are far more likely to attract attention for the right reasons.'*

Cartoon Images of McDonald's Food

The series of Instagram story posts includes some cartoonish graphics of McDonald's products which have been incorporated into the advergaming 'Right thumb to McFlurry'. The Panel argues that while these cartoonish graphics might appeal to certain children, 'simply showing the product as a cartoon-like graphic is not an element that can decide the case on its own.' It is clear however, that the use of cartoon graphics is not the only childish element in this case, as we had mentioned many other child-appealing elements in our original complaint. Moreover, the Panel have failed to address that the cartoon graphics of the food products in this advert are not 'simply' being shown but are fully incorporated into the advergaming post, with the instructions being for the user to move his finger or thumb to said products (emulating the instructions of the Twister game).

Age Restriction/Primary Target

The Panel asserts that 'the promotion states that participants are required to be at least 15 years old'. Whether the promotion states that or not, it does not mean the promotion targets adults. As with most marketing to children under 12 years old, it cannot reasonably be expected that children must actually purchase the food/beverage themselves for it to be considered as such. For example, while an ad for a chocolate bar with obvious child themes and child-appealing elements which could target very young children should be considered as marketing to children, it shouldn't require that a 5 year old child for example buys said product in the supermarket themselves.

Moreover the Panel claim that because the advertised promotion is linked to 'a large adult menu and not a children's Happy Meal' that it is in fact targeting primarily adults and parents. Notwithstanding the powerful and well-recognised influence of 'pester power' from children to their parents which would undoubtedly be encouraged with this promotion (the appeal to children of the games and the fact that it only costs an extra euro), we would strongly disagree with the Panel that a non-compliant product high in nutrients of concern needs to be from the Happy Meal menu to be considered as attractive to children, especially given the creative content of the advert and the promotion with child-appealing games.

Advertiser's response to the appeal

As the Panel stated in its Decision, marketing on social media platforms must consider the overall creative execution of the advertisement to determine whether the promotion of food products are primarily appealing to children under 12. As such, McDonald's supports the Panel's findings that the board games included are popular with a large demographic of individuals of all ages, the use of "tu" is prevalent in daily adult lives in Spain and there is a 1 euro addition linked to a large adult menu create an overall impression that the McDonald's Twister stories are not appealing primarily to children under 12 and are compliant with the EU Pledge. References to additional policy frameworks and international commitments are outside the scope of the EU Pledge and should not be considered in reviewing the complaint, the Panel's decision, or the appeal.

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 75 for McDonald's Twister game story on 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.

Regarding the creative execution of the Instagram story, the Appeal Panel found that the colours used were not in any particular way appealing to children. In this case, the stories were indeed colourful, but that does not by default entail that the post is primarily appealing to children under 12 years old. The Appeal Panel also noted that the allusion to the Twister game in the story was not particularly aimed at children nor in any special way enticing to them. Twister is a boardgame popular with a wide audience and not children in particular. The age rating of 6 years or more of the game is indeed indicative. However, that does not mean that it is primarily children playing the game. In addition, the idea of using thumbs to play a kind of Twister game in the story would not be appealing any more to children than to teenagers or young adults. In essence, the manner in which the Twister game is framed and displayed in the Instagram story would appeal as much to children as it would to other audiences, such as teenagers and younger adults.

Moreover, the Appeal Panel noted as well that the story features only small icons of the products and do not link in any way the non-compliant products with children under the age of 12. Finally, the Appeal Panel agrees with the First Instance decision in that the use of the Spanish informal pronoun 'tu' does not pose an issue in this context. Whilst in some cultural context, such as in France, the use of informal pronouns are primarily used to target a younger audience, the same cannot be said for the Spanish context, which allows the use of the informal pronoun to target any age-group, and rarely makes use of the formal version.



Based on the arguments and rationale outlined above, the Appeal Panel does not overturn the original decision of the First Instance Panel. The complaint remains not upheld and the advert is compliant with the EU Pledge commitment.

Decision regarding the appeal: admissible.

Decision regarding the complaint: not upheld.