

Case ID: 76		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 YouTube ad Hasbro game

Complaint

McDonald's Twister game on Instagram

The [advert](#) posted by McDonald's Espagne on their Youtube account page on the 23rd of March concerns the promotion they are currently offering: With the purchase of a Large McMenu, Signature Menu or Salad Menu you can purchase one of the three McDonald's branded family boardgames (Twister, Trivial Pursuit Family Edition or Scattategories) for just one extra euro.

The Youtube ad opens with family members, including a very young child, react with excitement at the game, and then playing the game. McDonald's products (Cola, Burgers and Fries) are shown throughout the short advert. In one of the final shots, you can see all of the available games which are available with this promotion, surrounded by said McDonald's products.

The presence of McDonald's products in the ad, the promotion of a premium offer of family boardgames available for one extra euro with the purchase of specific Menu items (a nominal sum), the fact that most of the boardgames are clearly of appeal to younger children under 12 years old (Twister is for ages 6+, the Trivial Pursuit game is not the adult version but is the family edition which is easier and intended for children from the age of 8), the inclusion of a young child in the advert who demonstrates happy and excited emotions upon seeing the game 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 YouTube ad does not demonstrate that the ad is **primarily** appealing to children.*
 - The overall impression of the ad is directed to and designed for adults.
 - The ad features adults over 15 years (the target audience) enjoying a family game. The presence of a child does not indicate that the ad is **primarily** directed to children given the focus on adults playing the game.
 - The presence of a child and the age availability of a board game “ages 6 and up” is not indicative that the advertisement is **primarily** appealing to children. The ad features adults enjoying the games in question which is consistent with enjoyment of these games outside of the promotion as well and showing adults they can enjoy the game as a family.
 - Notably, during the child’s presence, he is not shown with any food near or around him. Food is only shown when adults are featured in the spot.
 - Neither the ad, nor the McDonald’s Spain YouTube channel features any characteristics of what would be considered as appealing primarily to children- no excessive animation, bright colors or sounds- simply it hosts McDonald’s Spain’s television ads.

2. *Actions were taken to restrict child access.*
 - Youtube is age-gated for 13 years and older, and the ad in question was placed on [McDonald’s Spain YouTube](#) channel which is directed to the general audience of adults. McDonald’s Spain includes all of it’s TV commercials on this page.
 - Because the site is a McDonald’s Spain owned website, in accordance with the EU Pledge Implementation Guidance, the full profile should be taken into account to see if the page itself is appeals primarily to children under 15, in order to comply with the restrictions of advertisement to children in internet ruled by the PAOS CODE.
 - As noted, McDonald’s Spain YouTube page is targeted to adults generally and nothing on the site makes it primarily appealing to kids as discussed above.
 - The BBLL – rules that govern the promotion – were posted, indicating that in order to participate in the 1€ 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).

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 video appears on YouTube, 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. 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 YouTube video in Spain.

The Panel first considered the inclusion of the three board games (Twister, Trivial Pursuit Family Edition and Scattergories) in the advert. They noted that both Twister and Scattergories are a boardgame 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 an inherently 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.

Trivial Pursuit Family Edition is not a game that is intended to be played solely by children. Though this version may be better suited to include children in a game played with adults, the amount of trivia and general knowledge required to play a Trivial Pursuit game naturally directs it to older audiences. It is also not a game that children are naturally drawn to, as it is a rather static and knowledge-based game, as opposed to other boardgames that are founded on the actions and decisions of the players.

The Panel assessed as well the language used in the advertisement. 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 video uses the informal pronoun does not increase the likelihood that the ad would appeal more to children than it would to teenagers or adults. Moreover, the audio plays on a nostalgic feeling with the inclusion of "*revive los juegos de siempre*" meaning "to relive" or "to replay games of old" that were once popular with an audience that is now much older. The voice-over also seems to be an older adult and seems to be targeting parents in his speech. There are no childish intonations or child-related jargon that would attract children's attention.

The video also shows a family introducing the game to their child. Although the inclusion of such a young child in the ad is not recommended, it is not an issue within the context of this ad. Simply displaying a child does not automatically imply that children will find the content appealing to them. In this case, the ad is showing that these board games can be played with the whole family, and does not include any animation, bright colours, or visual element that would indicate the ad to be targeting primarily children under 12 years old, or that it would appeal primarily to this demographic. The excited behaviour of the child and their parents also does not pose an issue within the context of this ad, as it is only natural to feel excited when engaging into a family activity with a new boardgame. It is, however, recommended that marketers avoid including children in their ads where not necessary.

The advertised promotion is in fact targeting primarily adults and parents, due to the fact that 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, barring any teenager or child to participate.

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: 76

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 video appears on YouTube, which bars anyone under the age of 13 from setting up an account on their platform’. It is

important to clarify that Youtube 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 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 games shown in this advert and have incorrectly dismissed the inclusion of family editions in the promotion.

The Family Edition of Trivial Pursuit is an adaptation of the adult Trivial Pursuit which has been adapted expressly so that children can play it. Nevertheless, the Panel argue that 'Trivial Pursuit Family Edition is not a game that is intended to be played solely by children'. The Panel have in fact previously upheld complaints where an activity highlighted in an advert/post is 'referring to something that parents engage in with their children, and not the other way around.' This is precisely the case here.

While adults and parents can of course play the family edition of Trivial pursuit with their children, they would never play it by themselves without children (rather they would use the original Trivial Pursuit version). We would therefore strongly disagree that the Family Edition of Trivial Pursuit is naturally directed to 'older audiences' because of the trivia and general knowledge required. The Family Edition has designed the trivia and general knowledge requirements (and quicker child-friendly pace) for this game precisely in order to be accessible to children and consequently appealing to children. If the advertisers had wished to target adults only they would have made sure to include only the adult version of the game. Moreover, it is clear that the colours and design of the mentioned game itself (see below) is obviously designed to be appealing to children, not adults or teenagers, using bright, colourful and cartoonish animations (also branded with the McDonald's logo).

While the Panel claims on the one hand that Trivial Pursuit Family Edition would not be appealing to children because they would naturally be drawn to 'other boardgames that are founded on the actions and decisions of the players', it then argues that Twister, a game which clearly falls into this description, is not appealing to children. 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. The packaging on the Twister game itself also only features children and no adults:

Nostalgia

We would also disagree with the Panel's assertion that because the ad alludes to nostalgia and encourages viewers to 'replay games of old' which 'were once popular with an audience that is now much older' it does not target children. While older audiences will naturally recognise these games as ones they may have played when they were younger, the games are not associated with a particular decade or time point in the past as they have been available for decades and are very much still sold for children to play them today and are still evidently very popular with new generations – Twister for example is still a 'best-seller' in the Toys category on Amazon.

Inclusion of a young child

Even though the Panel state that is 'recommended that marketers avoid including children in their ads where not necessary' they do not find issue with the presence of a young child in the context of this ad. We would disagree with the Panel and believe that this enhances the child-appealing nature of the promotion.

We would disagree with the Panel that the child has been 'simply displayed' as the child is certainly not passive in the ad but rather has a very excited face when discovering the game. The Panel states that, 'The excited behaviour of the child and their parents also does not pose an issue within the context of this ad, as it is only natural to feel excited when engaging into a family activity with a new boardgame.' While we agree that it is indeed a natural emotion for a child to have to play a new boardgame with their family, we do not understand how this is evidence that it doesn't appeal to children, rather the opposite. Clearly the food company and marketers have chosen to include the young child for a reason.

The Panel deem 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.

We would strongly disagree with the Panel that an advert needs to have animation or bright colours to qualify as targeting children primarily under 12 years old. The promotion of the games (which have clearly been chosen to be able to include and appeal to children under the age of 12) for just one extra euro, the fun and excitement shown by the child and the adults in a family setting would clearly be appealing to children.

Age restriction

The Panel asserts that 'the promotion states that participants are required to be at least 15 years old, barring any teenager or child to participate'. Whether the promotion states that or not, does not mean the promotion targets adults (and in fact, it does allow teenagers to participate). As with most marketing to children under 12 years old, it can not reasonably be expected that children have to 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 child buys said product in the supermarket themselves.

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 Twister is a board game popular with a large demographic of all ages, the color scheme used reflects McDonald's color palette which does not appeal primarily to children, create an overall impression that McDonald's YouTube and Hasbro game 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 76 for McDonald's Hasbro board games video on YouTube.

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.

Whilst it is advised that care should be taken when including children in advertisements, in this case, the Appeal Panel did not find any other element or aspect of the video that would attract the attention of children. Featuring young children in ads does not necessarily mean that the ad will be primarily appealing to children under 12.

The Appeal Panel found the ad to be targeting a wide audience, ranging from teenagers and children to older adults. Board games are played by people of all ages and are not an activity that is primarily the domain of children. 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, even if a board game is designed primarily for children, an ad that alludes to the game does not necessarily appeal primarily to children – it all depends on the creative execution of the advert.

Furthermore, the Appeal Panel agrees with the First Instance Panel in that the voice-over is referring to "*games of old*" and as such instils a feeling of nostalgia to adults that may have played to games when they were young. In essence, while some children may find the ad appealing, it is likely to appeal more to parents or young adults who are familiar with these board games. It is an advert that targets families who would present the games to their children, groups of friends, or couples, who would be keen to relive the classic board games. The Appeal Panel did not find sufficient elements in the ad to suggest that it would appeal primarily to a young audience under 12.



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.