

Case ID: 77

Decision

To	EU Pledge Secretariat	Date of meeting	7 May 2021
From	EASA Secretariat	Date sent	31 May 2021

First instance ruling – Mondelez

Description

Chips Ahoy! Instagram stories in Spain

Complaint

Chips Ahoy! Crash Bandicoot

This five part Instagram story shows a Chips Ahoy! Cookie with a cartoon face and limbs on top of a Chips Ahoy! Wooden crate. As you move through the Instagram story the cookie appears to jump up and down. The final story post shows that the cookie has disappeared, replaced with text which says 'Me encantaria quedar contigo...pero es que hoy sacan un juegazo y ademas no me apetece' (In English: I would love to stay with you...but today they've brought out a new game, and also I don't feel like it'. There is a hashtag #crashbandicoot in the final story too.

The presence of the cookie product throughout the stories, the simple jumping action of the cookie produced by clicking through the stories (similar to a stop-motion) which would be appealing to younger children, the jokey tone of the text in the final story and the link with a popular and very well-known video game (which had launched that day a version for phones) where smashing crates is one of the main actions in the game, and which is popular with young children under 12 (the App Store age rate it for children from the age of 9 and above), as well as the cartoonish appearance of the cookie wearing sunglasses (like the Crash Bandicoot video game character) demonstrates that this example should be considered to be marketing to children under 12 years old.

Chips Ahoy! Father's Day Instagram Post

An Instagram story was posted on Chips Ahoy!'s Spanish account, two days ahead of Father's day in Spain. The first story post shows a cartoonish version of the Chips Ahoy! Cookie with the text asking 'Tan malote eres que tienes a tu padre bloqueado?' (Are you so bad that you have your father blocked?).

The next story announces a competition draw with the following rules:

Sigue a tu padre en instagram y haz una captura en la que se vea (Follow your father on instagram and take a screenshot that proves it). Sublea a tus stories mencionando @chipsahoy_es, a ty padre y siguenos (Submit to your stories mentioning @chipsahoy_es, your father and follow us).

The final slide shows the Mini Chips Ahoy! Prize with the text: Podras ganar un lote de productos para compartir con ese senor que te compraba chips ahoy de pequena. (O no compartir). (You could win a batch of products to share with that man who bought you chips today as a child. (Or not share)

The presence of the cookie products throughout the stories, the cartoonish appearance of the cookie in the first story, the premium offers of a competition to win cookie prizes, the simple means of entering the competition, the emphasis on fathers (two days before Father's day) as well as the question to viewers about having their fathers blocked (very unlikely to be relevant for an adult audience) and the jokey tone of the text strongly suggesting that this post is targeted towards young children, including those under 12 years old.

Advertiser's response

At Mondelez 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 and direct and create our advertising; online games and social media stories for gatekeepers – adults, parents, or guardians – and people 12 years and older.

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 two Mondelez Instagram stories.

Judging the creative execution of the first Instagram stories in question, the Panel deemed that the simple jumping action of the cookie and the overall cartoonish appearance of the cookie wearing the sunglasses as a reference to a popular game can be appealing to a young audience. However, as a whole, the series of Instagram stories is not appealing primarily to children under 12 years old. The reference to the video game Crash Bandicoot is only relevant to individuals who know the game's name and can read the hashtag, or by deducing it from the cookie's attire and behaviour. However, not only is the video game popular with a diverse demographic, but the reference to it would not be picked up easily by children. The Panel also noted that such stories transition quite quickly and the presence of a lot of text on one of them also gives the impression that the story is not directed towards children below 12 years old. Rather, a company would rather choose a very short and easy to read message to target children under 12.

Judging the creative execution of the second series of Instagram stories, the Panel found that the presence of the cookie and the overall cartoonish appearance of the cookie wearing the sunglasses can be appealing to a young audience. However, as a whole, the series of Instagram stories is not primarily appealing to children under the age of 12. The Panel noted that the text is emphasised on the fathers, that the question posed is aimed at rewarding fathers by giving them a cookie. However, the Panel did not conclude that these elements taken together were sufficient to indicate that the story is primarily appealing to children under 12 years old. The mention regarding the fathers who can be blocked from their children's Instagram accounts is not primarily targeting children under 12 but rather older age groups, as the post urges users to tag their parents, something that a child under 12 would be unlikely to do.

The fact that the stories 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 primarily appealing to children under the age of 12, and therefore the complaint is not upheld.

Panel decision: complaint not upheld

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Appeal

To	EU Pledge Secretariat	Date of mtg	9 July 2021
From	EASA Secretariat	Date sent	29 July 2021

Appeal ruling – Mondelez Chips Ahoy! Instagram Spain

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 fact that the stories 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'.

Appeal

We would like to appeal this Panel Decision.

Crash Bandicoot Instagram Post

Although the Panel does recognise that the post has various child-appealing elements ‘the Panel deemed that the simple jumping action of the cookie and the overall cartoonish appearance of the cookie wearing the sunglasses as a reference to a popular game can be appealing to a young audience’ it has decided not to uphold the complaint.

The Panel states that ‘the reference to the video game Crash Bandicoot is only relevant to individuals who know the game’s name and can read the hashtag, or by deducing it from the cookie’s attire and behaviour’. Firstly, given that Crash Bandicoot is one of the most famous video game franchises in the world (the game in question had 27 million downloads in the first week after its release making it the second most popular mobile game in the world), coupled with the popularity of online games (especially on mobile devices) in general for young children under 12 years old, it is very relevant to children who are in fact likely to know the game’s name. Moreover, the ability to read the hashtag #crashbandicoot as referenced by the Panel, sets a very low bar as most children under the age of 12 would be able to read this hashtag.

We would further disagree with the Panel that ‘not only is the video game popular with a diverse demographic, but the reference to it would not be picked up easily by child’. The crate on which the Cookie jumps, in addition to the signature sunglasses of Crash Bandicoot, would be very well-recognised, especially the crates which are well known as the primary game element of Crash Bandicoot. Moreover, the hashtag #crashbandicoot in the final post confirms that the post and graphic elements are meant to link to this game. It should be noted that the game itself is recommended for children as young as 9 to play and the video game’s main character is a cartoonish animal (appealing to children).

The Panel draws attention to the fact that the stories transition quite quickly and state that the ‘presence of a lot of text on one of them’ gives the impression that the story is not directed towards children below 12 years old. However, the quick transition of the story is one of the appealing elements for children – by clicking through the stories in rapid succession it makes it appear as though the cookie is jumping similar to a simple stop-motion animation. Moreover, we would disagree that one 16 word sentence for a 5-part Instagram story could be construed as ‘a lot of text’ especially when the text is very jokey (I can’t stay, I have to play a game etc.). It is a very short and easy message to read and comprehend for children under the age of 12 years old.

Chips Ahoy! Instagram Father’s Day

Although the Panel accepts that ‘the presence of the cookie and the overall cartoonish appearance of the cookie wearing the sunglasses can be appealing to a young audience’ they have not upheld the complaint.

We would disagree with the assessment by the Panel which finds that the ad doesn’t target children as the ‘the text is emphasised on the fathers, that the question posed is aimed at rewarding fathers by giving them a cookie.’ In fact, the text is targeting sons rather than fathers and the question posed aiming at rewarding fathers. The text is targeting sons:

- Are you so bad that you have your father blocked?
- Follow your father on instagram and take a screenshot that proves it
- Submit to your stories mentioning @chipsahoy_es, your father and follow us
- You could win a batch of products to share with that man who bought you chips ahoy as a child. (Or not share)

The protagonist is clearly not the father but the son who indeed is described in the post as the one in control of the chocolate product, rather acting as the 'gate-keeper' towards his father ('or not share'). Given the other child-appealing elements of the post, as recognised by the Panel, the sons in question would be young children.

The Panel does not explain why children under the age of 12 would be unlikely to tag their parents, especially when encouraged to do so by this chocolate cookie brand to win prizes and offers. Again, 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, content or animations therein as appealing as their teenage peers.

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.

Appeal 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 77 for the Mondelez Instagram post in Spain.

The Appeal Panel considered that the original decision's arguments 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 adverts' compliance, and must be considered in combination with all other factors.

Firstly, the Appeal Panel assessed the Instagram stories portraying the product jumping on a crate. Regarding the creative execution of the story, the Appeal Panel considered that the colour palette chosen was not targeting children in any particular way. The stories make reference to the console and mobile game app Crash Bandicoot. Whilst the game is rated at 9+, that does not automatically entail the game to be purposed for children of that age. Rather, it merely indicates that it is suitable for anyone older than 9 to play, but it is not aimed or meant to be played by children 9 to 11 years old specifically. Moreover, given the level of difficulty of the game, the Appeal Panel deemed that it was largely being played more by teenagers than children. Though some children may know the game and play gladly, the Appeal Panel did not have sufficient reasons and arguments to justify that this video game would be primarily appealing to children below 12 years old. In addition, the reference to the game is not particularly pronounced. The cookie dressed as the Crash Bandicoot character may be an element some children may recognise, as would any other older user. Whilst some children could read the hashtag at the very end of the story, on its own it would not attract them to eat or buy the product more because of its nominal association to the console video game. In fact, the story does not allow to play the game – it merely links itself to it. The product's act of jumping up and down on the crate is not an inherently childish or funny situation that would *primarily* attract the attention of children under 12 years old. The Appeal Panel finally judged that the first Instagram story does not contain any specific elements that would be appealing primarily to children under 12 years old. As such, the story would be appealing to a wider audience.

Secondly, the Appeal Panel assessed the Instagram stories involving a reference to fathers' day. The Appeal Panel did not find any particular aspect to the stories that would attract the attention of children in any particular way. Similarly to the first Instagram story described above, this post is largely

targeting a teenager or young adult audience that have blocked their parents on social media. The product is not inherently childish nor is it overwhelmingly popular with children. On the contrary, the product and the advert are largely aimed at teenagers who play video games and who perhaps have blocked their parents on social media to avoid embarrassment. Whilst it is possible that some children may find the ad appealing or funny, the Appeal Panel did not deem the ad to be primarily aimed at them.

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.