

Case ID: 83

Decision

To	EU Pledge Secretariat	Date of mtg	28 May 2021
From	EASA Secretariat	Date sent	08 June 2021

First instance ruling – Ferrero

Description

Ferrero Kinder Fresh ad Slovenia

Complaint

In this commercial which was shown at 10:50am on the 19th of March and appeared on Youtube on an ad before watching a video, we see a woman playing the piano with her (animated) cat by her side. When she gets up, her cat remains by the piano pressing a few of the keys on the keyboard in a haphazard manner. The cat's head appears around a corner to check where the woman is, the cat then proceeds to play the piano very well, with evident pleasure. The cat continues to play the piano as the woman eats the Kinder product. The narrator says: Have you tried it yet? A pleasure you won't be able to resist.

The consumption of the product in the advert, the simple humour and use of an animated cat (using graphics which would appeal to young children under 12 years old, appearing often in children's TV shows or films) demonstrating human emotions/actions such as playing a piano to a high level and deriving pleasure from the action would be appealing to a young child audience, including for those under 12.

This video is also available on the Slovenian Kinder website ([here](#)) and also has a number of child-friendly elements such as: website photos (pictures of parents with young children under the age of 10 watching a tablet computer) and phrases such as 'explore Magic Kinder, the world of entertainment and learning' and 'Be the first to find out all the news from the world of Kinder. Play with us and win prizes.', it can therefore be assumed that their website is also targeting young children.

Advertiser's response

All Ferrero's brands globally do not communicate directly to children. Ferrero has always believed in the crucial role played by parents in educating their children to a balanced and varied diet and an active lifestyle. Therefore, advertising and marketing communications concerning our food products are directed primarily to adults who make the household purchasing decisions and to young people, in compliance with local requirements, in terms of content, as well as of media purchasing.

As for all the marketing communications concerning our food products, the entire Kinder Choco Fresh campaign has been designed and placed to target adults. We have taken all the available measures to ensure compliance with our commitment:

- **Website** - This video is placed on our Slovenian Kinder website, in the section providing nutritional values of our product. See screenshots 1 and 2 below. This section, as well as the entire website, has been designed to target adults both in terms of language and creative execution. See screenshots 3, 4 and 5 below.
- **TVC** - the media buying for this campaign was done in accordance to the EU Pledge principles so avoiding placement in programmes where kids under 12 years of age would constitute more than 35% of the audience. While we would like to highlight that, having checked with our local media agency, this TVC was not aired in Slovenia at the time flagged in the complaint, below you can find the information substantiating the compliance of the closest placements of that specific day.
- **YouTube pre-roll** – our Choco Fresh paid campaign on YouTube targeted only adults aged between 25 and 44 and excluded 'unknown users' in order to ensure that only profiles registered with a confirmed adult demographic would be reached. Below you can find the substantiating screenshot from our media agency.

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 (Kinder Fresh) 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 websites fall under the non-measured media category, meaning that adequate audience metrics are unavailable. Consequently, the Panel is presented with the task to assess the overall creative execution of the advertisement at hand: in this case the Kinder Fresh video as appearing on the Ferrero website in Slovenia.

The Panel considered that the animated cat appearing in the video alongside a woman playing at the piano does not seem to be inherently appealing to young children. Whilst the animation of the cat might be perceived as funny by children and thus possibly appealing to a young audience, the Panel did not find the video in itself to be appealing predominantly to this demographic. In fact, cat videos are generally more popular with adults and teenagers. Additionally, animations are not an advertising method used only for targeting children. In this case, the Panel found that the 3D rendition of the pet as the only animated element of the video that otherwise features solely an adult playing at the piano in a homely environment, is insufficient to consider the video as inherently appealing to children under 12 years old. The graphic execution of the animated cat does not contain any childish themes or elements. Moreover, the whole scene takes place in a living room that does not feature any toy or child-oriented material.

The Panel also took into account the comic scene of the animated pet suddenly playing increasingly better at the piano as the human reaches for the product. Similarly to the animation of the cat itself, whilst the depicted scene may be perceived as funny by some children, it is more likely to speak to adults who have a pet at home. The situation seems to mirror one that they may encounter routinely as they walk into the kitchen for a snack for themselves and their pet suddenly becomes interested in what the human could offer them as well. It is largely a portrayal of a comic situation that many adults with pets can easily relate to. The advertisement revolves solely around the product itself, with no connection to any other external theme, object, or character.

Finally, the Panel noted that the video appears on the corporate website of Ferrero. The particular webpage that features the video contains only technical information about the product and a picture of the product. The other screenshots mentioned in the complaint appear on other parts of the website, and do not relate to this product. Even so, the Panel finds the website to be primarily aimed at adults and parents interested to learn more about the Ferrero Kinder products. Children would generally not be interested in such websites displaying nutrition facts.

Based on the arguments and rationale outlined above, the Panel judged that the Ferrero Kinder Fresh video is not appealing primarily to children under 12 years old, and is thus compliant with the EU Pledge commitment. Therefore, the Panel did not uphold the complaint.

Panel decision: complaint not upheld

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Appeal

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

Appeal ruling – Ferrero

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.

Appeal

We would like to appeal this Panel Decision.

The Panel asserts that cat videos are 'generally more popular with adults and teenagers'. This is a vague generalisation which does not take into account the difference between a video of an animated cat (clearly of more interest to young children) and videos of actual cats.

The Panel does acknowledge that the animated cat 'might be perceived as funny by children' but also stated that because the 3D rendition of the cat is the only animated element of the video, it is 'insufficient to consider the video as inherently appealing to children'. However, the combination of live action and animated content is an extremely common and popular theme with children's TV shows and movies which has not been taken into account by the Panel. The below images show just a few examples of such popular live-action/computer-generated animated children's films.

The Panel argue that, although the comic scene may indeed be perceived as funny by some children, it is more likely to speak to adults who have a pet at home as, they say, 'The situation seems to mirror one that they may encounter routinely as they walk into the kitchen for a snack for themselves and their pet suddenly becomes interested in what the human could offer them as well. It is largely a portrayal of a comic situation that many adults with pets can easily relate to.' However, this is not what happens in this scene as the cat does not become more interested in the food the human gets from the fridge – the cat is clearly more interested in playing the piano. In any case, the simple humour of a pet playing a piano proficiently is an uncomplicated joke which would be especially appreciated by young children for whom the inclusion of animals in the advert would be additionally appealing.

The advert was found on the brightly-coloured Kinder website (which contains more than just technical information), not the Ferrero corporate website as stated by the Panel. In any case, the advert also appeared on Youtube as an advert and on TV (on the website it even says 'Poglej si TV oglas': Watch the TV ad).

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 83 for the Ferrero Kinder Fresh ad on company-own website.

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, the Appeal Panel did not find the inclusion of an animated cat as an element that would appeal primarily to children under 12 years old. Its inclusion in the ad is fairly short and does not engage in any activity that would be the domain of young children under 12. Moreover, video animations are not an advertising method used exclusively to target children or appeal to their imagination. Whilst some animated films or semi-animated films may be designed primarily for children, it is not a rule that the use of animations is primarily meant to target children, even if the animated element is a cat playing the piano. Whilst some children may find that one particular scene amusing, there is nothing else in the video, according to the Appeal Panel, to assess that the ad would be appealing primarily to children under 12. The ad is directed to a fairly wide audience, including young adults. The Appeal Panel did not find any element that would conclude that the ad was appealing primarily to children 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.