

**Case ID: 87**

**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>	20 May 2021

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**First instance ruling – Kellogg’s**

**Description**

Kellogg’s Pringles Instagram post in Italy

**Complaint**

This advert posted on the Pringles Italy [Instagram](#) account on the 26th of February shows an animated ‘Zombie’ with 3d animated effects examining a Pringles tube in wonder. The viewer’s attention is drawn to the promotion on the Pringles package and the reason for the amazed expression of the Zombie) which offers purchasers a free 7-day Xbox Game Pass (with the purchase of each Pringles tube) and the chance to win an Xbox Series X. Eventually, the Zombie becomes so amazed that his jaw drops off, after which it is re-attached by his friend. They then eat Pringles together. The caption reads:

*7 giorni gratis di Xbox Game Pass con ogni tubo e in più puoi vincere una Xbox Series X. Una promozione che ti lascia...a bocca aperta! 🤩🎮👤 #pringles #pringlesgaming #popplayeat*

In English:

7 days free Xbox Game Pass with every tube plus you can win an Xbox Series X. A promotion that leaves you ... in awe! 🤩🎮👤 #pringles #pringlesgaming #popplayeat

The presence of the food product throughout the advert, the presence of an animated character with an amusing appearance (and is very unthreatening and not scary given that it is meant to be a Zombie), the promotion of a premium offer which would be very appealing to children, including young children under 12 (with Xbox and gaming being very popular with this demographic), the simple and amusing humour emphasized in the advert (the jaw falling off because the offer is so good), the allusion to ‘play’ – a concept also clearly associated with children as the slogan ‘Pop, Play, Eat’ is seen in the bottom left corner of the ad, demonstrate that this should be considered an example of marketing towards children, including young children.

### **Advertiser's response**

The EU Pledge is a voluntary initiative by leading food and beverage companies to change food and beverage advertising to children under the age of twelve in the European Union. One of the main commitments is not to advertise for food and beverage products to children under the age of twelve on TV, print and internet, except for products which fulfil common nutritional criteria.

Under the EU Pledge commitment, companies need to ensure that they are not designing company owned websites and company-owned social media profiles that promote products which do not meet the EU Pledge common nutrition criteria in a way that appeals primarily to children under 12, in accordance with the Guidance on Creative Execution.

The Pringles brand has an age target demographic of adults 18+, which is aligned with the audience of the Pringles Italian Instagram social media page. Over 93% of the Instagram followers are over the age of 18. In addition, Instagram may not be used by kids under 13.

This is further reflected in the fact that this campaign included sponsored Instagram ads for which the selected age target was ages 18-44 years.

The creative execution of the Instagram post was clearly aimed at a target audience 18+. The character used, Zombie Frank, is an adult-type horror character which is not designed to appeal to young children. In addition, the male person in the video is 18+ as well and the language accompanying the post is adult-type language.

### 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 (Pringles) 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 old. Company-owned social media profiles 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 Italian Instagram post for Pringles.

Experts took note of the fact that the video appears on Instagram, which bars anyone under the age of 13 from creating an account. 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.

The Panel noted that the composition of the video does not contain any element that would attract the attention of children under 12 years old. The brand-character Zombie Frank is outside the scope of the EU Pledge commitment, but it is nonetheless by definition a scary film-based character that would not appeal to young children. The character does not engage in any activity that would be deemed to be the domain of children. His jaw drops as he is surprised by the prizes that can be won by entering the Pringles competition, but this act would not appeal to children in any way. The prizes are more likely to appeal to teenagers and young adults rather than to children under 12 years old, as the former are generally more interested in console video games than the latter. Moreover, the video does not contain any 3D or 2D animations or any child-oriented graphic element. Consequently, the scary film-based brand-character zombie, the overall execution of the video's graphics, and the prizes to be won, together indicate that the ad is targeted more toward teenagers and young adults, rather than young children. Furthermore, experts noted that the product is generally more popular with older audiences rather than with children.

The Panel also noted that the accompanying text does not engage in any particular way with the audience. It merely describes what the competition is about and what the prizes are.

The contents and style of the video, the action depicted, the inclusion of a zombie, and the accompanying text all consistently indicate that the ad is not meant to target children under 12 years old, nor would its creative composition be appealing primarily to them.

Based on the arguments and rationale outlined above, the Panel judged that the Pringles Instagram 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**

**Case ID: 87**

**Appeal**

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<b>To</b>	EU Pledge Secretariat	<b>Date of mtg</b>	02 July 2021
<b>From</b>	EASA Secretariat	<b>Date sent</b>	30 July 2021

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**Appeal ruling – Kellogg’s Pringles Instagram post in Italy**

**Plaintiff’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 video appears on Instagram, which bars anyone under the age of 13 from creating an account'*. 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 decision.

We would strongly disagree with the assertion by the Panel that the marketing example *'does not contain any element that would attract the attention of children under 12 years old.'* Describing the Zombie Frank as a *'scary film-based character that would not appeal to young children'* does not bear relation to the visuals used in the advert. The execution of the character is clearly not scary but humorous instead and the character partakes in no actions which could be reasonably be described as frightening: looking at the Pringles can, being shocked at the prizes offered so much so that his jaw falls off (again in a clear attempt at humour) and then eating the Pringles with his friend. Indeed, these non-threatening actions which as mentioned are more humorous than anything would be clearly understood and liked by young children.

The Panel further asserts in its decision that the *'inclusion of a zombie'* indicates that it is not meant to target children under the age of 12 years old. We believe that this takes a naive view of the interests of children under the age of 12. Indeed, Zombies are not exclusively used in teenager/adult media with some very popular young children's shows specifically centered on this type of character. For example, on the Netflix Kids Channel, the Last Kids on Earth which is about zombies and monsters invading an orphan's hometown is age rated as 7+ while the kids' show 'Zombie Dumb' (also completely Zombie-themed) is age rated as 8+.

A recent campaign in the UK 'Veg Power', further demonstrating these 'scary' themes being so central and effective to children, chose these themes for the hugely successful UK Veg Power Campaign, persuading children to eat more vegetables. The theme was 'Eat Them to Defeat Them, and showed vegetables rising up from the ground monster and zombie-like. The campaign is designed for primary school-aged children. Report here and campaign website here.

We furthermore strongly disagree with the assertion by the Panel that *'the prizes are more likely to appeal to teenagers and young adults rather than to children under 12 years old, as the former are generally more interested in console video games than the latter'* which fails to take into account the reality of the demographics who use these games consoles.

Young children are in fact a key demographic for video games. Indeed, as OFCOM found in 2020, *'Ofcom's media literacy research indicates that four in ten (39%) UK adults and three-quarters of children (75%) played video games of some kind in 2019'*. Indeed, within this demographic of children who play video games, 83% of children play on TV-connected games consoles (the same kind as shown in the advert). Moreover, amongst all age groups children were by far the most common age group to play games consoles (see below). These figures are likely to be replicated across Europe. So, in fact, games consoles are not only appealing to children but they are the demographic for which these prizes would be the most relevant. Moreover, the offer of free access for 7 days to the Xbox would reinforce

the games console prize and be particularly interesting to children who clearly have fewer own resources to pay for access to these platforms.

**Figure 3.6: Percentage of the UK adult and 8-15 game-playing population who play games, by device, age and gender: 2020**

	Male					Female				
	Mobile	Tablet	PC	Console	Handheld	Mobile	Tablet	PC	Console	Handheld
65+	16%	23%	28%	7%	4%	19%	21%	25%	5%	3%
55-64	27%	29%	31%	21%	6%	34%	31%	19%	15%	10%
45-54	60%	47%	46%	48%	20%	54%	47%	34%	28%	18%
35-44	77%	56%	63%	69%	30%	71%	48%	39%	50%	32%
25-34	79%	51%	68%	71%	42%	82%	54%	47%	55%	35%
18-24	87%	49%	65%	79%	39%	81%	44%	59%	57%	40%
Children	86%	79%	72%	90%	52%	90%	81%	70%	75%	45%

While the Panel asserts that, ‘the video does not contain any 3D or 2D animations or any child-oriented graphic element’ it is clear that the Zombie character (and his jaw falling off) is indeed the result of 3D animations which are extremely common in children’s TV shows and movies. In fact, the top 20 highest grossing animated films globally are all children’s films demonstrating the clear child-appealing nature of using such animation in this advert.

Finally, the Panel’s statement that they ‘noted that the product is generally more popular with older audiences rather than with children’ fails to recognise that while children under the age of 12 years old will naturally not be the members of the household to purchase the product, the ‘pester power’ from children is a well-recognised and powerful influence on parents which would be all the more so enhanced by the prizes advertised on the packaging.

**Advertiser’s response**

We do not have new information or evidence of substantial flaw with procedure or adjudication. So, unless the complainant has additional evidence they were unable to provide earlier, which we don’t believe they do from the information you shared, we will reiterate that the ad in question was targeted at adults.

The Pringles brand has an age target demographic of adults 18+, which is aligned with the audience targets of the Pringles Italian Instagram social media page. Over 93% of the Instagram followers are over the age of 18. In addition, Instagram may not be used by kids under 13.

The use of humour does not immediately make an ad directed to children. The character used, Zombie Frank, is an adult-type horror character which is not designed to appeal to young children and was

used in a real-life context unlike the animated children's TV shows which the complainant refers to. As the panel stated, the video does not contain any child-oriented graphic or thematic elements.

The complainant state that the prizes were particularly interesting to children who have fewer own resources to pay for access to these platforms. However, the minimum age for participation in the competition was 18+. The panel also confirmed in its decision that the prizes are more likely to appeal to teenagers and young adults rather than to children under 12 years old, as the former are generally more interested in console video games than the latter.

The complainant also refers to 'pester power', however, as the panel stated in its decision, the accompanying text does not engage in any particular way with the audience. It merely describes what the competition is about and what the prizes are. The actors in the video also do not engage with the audience.

We believe that the overall execution, the use of an adult actor, the adult directed language and 18+ minimum age to participate in the competition demonstrate that the target group and the primary appeal of this ad is towards adults.

### **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. The Appeal Panel did not consider that the complainant provided any new evidence or arguments which would require the Panel to reassess the case. Children under the age of 12 might at some extent indeed find zombies appealing, but the specific Pringles post is clearly not primarily targeting children under 12 years old. In the absence of further substantial evidence, the Appeal Panel judged that the arguments were insufficient to point towards a possible substantial flaw of adjudication. The Appeal Panel therefore finds the appeal not admissible.

**Decision regarding the appeal: not admissible.**