

**Case ID: 48**

**Decision**

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<b>To</b>	EU Pledge Secretariat	<b>Date of meeting</b>	7 May 2021
<b>From</b>	EASA Secretariat	<b>Date sent</b>	31 May 2021

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**First instance ruling – Ferrero**

**Description**

Kinder Bueno post on Instagram in Spain

**Complaint**

The @KinderBueno\_es account posted on the 18th of February a [video](#) promoting its celebrations for its 25th anniversary. The post shows a jokey text conversation between the Kinder Bueno products discussing the 25th anniversary of said product, with one imagining how great it would be to celebrate the anniversary by having a tour of the Kinder Bueno factory and the other joking that they have clearly devoted a lot of time to watching movies.

A cartoon landscape then appears with a Kinder Bueno clearly dressed up as Willy Wonka with sweets and chocolate treats scattered around the landscape. The speech box for the Kinder Bueno Willy Wonka character then says ‘Everything in this room is edible, even me.’

The caption for the video is: En 2005 se estrenó una película que nos hizo soñar muchísimo con visitar un lugar donde el chocolate sea infinito. 😊 ¿Os imagináis poder visitar la fábrica de Kinder Bueno y que sea igual que la de aquella famosa peli? ¿Sabéis de cuál estamos hablando? 😊

In English: In 2005 a film was released that made us dream a lot of visiting a place where chocolate is infinite. 😊 Can you imagine being able to visit the Kinder Bueno factory and make it the same as the one in that famous movie? Do you know which one we are talking about? 😊

The appearance of the cartoon landscape with its bright colours and graphics (visuals similar to TV shows and films which are popular with younger children), the presence of the chocolate product, the clear attempt to link the Kinder Bueno product to the movie ‘Charlie and the Chocolate Factory’, a movie which is of obvious appeal to younger children, under 12 years old, the childish humour from the dressing up of the Kinder Bueno chocolate as Willy Wonka means that this marketing example should be considered to be directed towards children under 12 years old.

### 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, this Kinder Bueno Instagram post has been designed and placed to target adults. We have taken all the available measures to ensure compliance with our commitment:

The post is part of a content saga to celebrate Kinder Bueno 25th Anniversary with a 'nostalgia theme' referring to a series of movies from the last 25 years with the aim of challenging our followers to guess the titles and remember memories from that period. The one posted on Feb 18th referred to 'Charlie And The Chocolate Factory', a movie broadcasted in 2005 (16 years ago) with the goal to target users who saw the movie at the time. In fact, the copy reads 'In 2005 it was released a movie that made us dream a lot...'

The post mentioned in the complaints was placed in a 'age-gated' environment as Instagram requires users to be over 13yo to register to the platform. Please note that the demographic data of our Kinder Bueno Instagram profile shows that over 98% of our followers is above 18 years of age.

### 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 Kinder Bueno Instagram post.

Judging the creative execution of the post, the Panel considered that the style of the post with its brand-based colour selection and the presence of some childish elements shown together with the product could be appealing to children as much as to teenagers or adults. Colourful advertising material or 3D animations are not an exclusive advertising method used only for targeting children. The Panel also noted that this post celebrates the 25<sup>th</sup> anniversary of the product, using a film reference from 2005 that is now popular with a young as well as with an older audience. The post would thus try to create a feeling of nostalgia for an audience that remember when the film came out 16 years ago. As such, the post would rather appeal to an adult audience, who are now perhaps parents, but in any case who actually know the film and understand the reference.

In addition, the language used in the post was not found to be targeting children under 12, but rather adults who could recognise the film from the particular dress code of the product and the elements surrounding it. The fact that the post appears on Instagram, 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 but this is not sufficient on its own for compliance.

After taking into consideration the look of the post, the concept surrounding it, the text accompanying it, and the fact that it is found in an age-gated platform, the Panel deemed that the post as a whole is not primarily appealing to children under the age of 12. Therefore, the complaint was not upheld.

### **Panel decision: complaint not upheld**

**Case ID: 48**

**Appeal**

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<b>To</b>	EU Pledge Secretariat	<b>Date of mtg</b>	9 July 2021
<b>From</b>	EASA Secretariat	<b>Date sent</b>	29 July 2021

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## **Appeal ruling – Ferrero Kinder Bueno Willy Wonka 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 post appears on Instagram, 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' and cites it as one of the reasons to reject the complaint in the final paragraph.

## Appeal

We would like to appeal this Panel Decision.

### Child-Appealing Elements

We do not believe that the Panel have adequately taken into consideration in its decision the power and effect the inclusion of such children-centred movie in its ad would have.

While the Panel does acknowledge that the 'presence of some childish elements' could be appealing to children, it ultimately finds that the reference to a children's movie which came out in 2005 would have more of a nostalgic influence on adults and parents than children. However, this ignores that not only does the Charlie and the Chocolate Factory a children's movie itself (rated PG), but it is in fact a re-working of a previous film version in the 70s and that in turn is an adaptation of the popular book written by well-known children's author Roald Dahl which was first published in 1964. This book is still read by young children (or parents to their young children today) and, in spite of it being almost 60 years following its publication it is clear that the appeal is still for children under the age of 12 years old, and not for adults who read it as children. The same holds for the movie – this is a children's movie and is still appealing to children as the primary audience. The Panel acknowledge that the post is, 'using a film reference from 2005 that is now popular with a young as well as with an older audience'. We would stress that it would be very unlikely that this movie would still be popular with an older audience who, if they were to watch it, would almost certainly be doing so with a child under the age of 12. Given the other childish elements in the post, together with the fact that it is plainly a children's movie which is being referenced, the overall appeal is not negated by the film release date. Indeed, films which are of clear appeal to children such as the Lion King or the Little Mermaid are respectively 27 years and 32 years old but it is clear that their audience and appeal is still for children.

Moreover, the tone of the textual caption and the inclusion of certain emojis is not one which would be addressed to adults:

*In 2005 a film was released that made us dream a lot of visiting a place where chocolate is infinite. Can you imagine being able to visit the Kinder Bueno factory and make it the same as the one in that famous movie? Do you know which one we are talking about?*

The emphasis on imagination and visiting a chocolate factory would be clearly of more appeal to children than adults.

### Colour

Simply because an advert uses a 'brand-based colour selection' does not mean that the colour scheme in question is not attractive or appealing to young children. Indeed, it is obvious that brands – especially those whose products are targeted towards children – will have chosen colour schemes precisely because they are bright and attractive.

It is interesting to note that this Instagram post has since been deleted from the account of Kinder Bueno ES account.

## 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 48 for Ferrero Kinder Bueno Instagram post in Spain.

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 post, the Appeal Panel considered that the video did contain certain childish visual elements and references, such as the inclusion of sweets and lollipops. The brand character's attire referencing the film *Charlie and the Chocolate Factory* is also, to a certain extent, appealing to children under 12 years old. However, whilst the film is indeed popular with children, it is not *primarily* so and would in fact appeal to a wide audience, ranging from children to adults who will have seen either production of the film or who have read the original novel. Moreover, the rating of the film does not necessarily correlate with the appealed audience – the rating merely indicates that it would be suitable, in theory, to a wide age group.

The overall creative execution emanates a certain surreal feel, in line with the narrative's known use of futuristic and extravagant technology, but the Appeal Panel did not find the post to be overall primarily appealing to under-12-year-olds. Whilst some visual elements may be appealing to some children, such as the animation of the post, the Appeal Panel concurred with the First Instance decision that the post does not appeal primarily to them. Creative and colourful animations are not an advertising method used exclusively to appeal to children.

When assessing the post, the Appeal Panel also took note of the fact that there is significant amount of text structured to resemble a phone text or social media conversation. Children between the ages of 9 and 11 would most likely be able to easily read the text, however the content of the text largely targets a much older audience. It talks about a "popular film" from 16 years ago – anyone born after or close to 2005 would not relate to the question or the reference made to *Charlie and the Chocolate Factory*, even if they may know of the film. Moreover, whilst the film itself includes many child-actors,

this does not automatically make it a children's film nor one that would appeal to children in the same way as the Lion King or The Little Mermaid.

Finally, the Appeal Panel noted that the video has since been taken down from the Instagram profile of Kinder Bueno Spain, or it was at least inaccessible by the Panel.

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.**