

**Case ID: 50**

**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 – Mars**

**Description**

M&Ms Instagram posts in Spain

**Complaint**

M+Ms Superhero Name Game

An Instagram post posted on the 7th of March by @mms\_es presents a simple game to the viewer. The caption asks:

Si fueses el superhéroe de una peli, ¿cuál sería tu nombre? Haz match entre la inicial de tu nombre y tu mes de nacimiento y farda de nombre en comentarios. #MejorConMMs In English: 'If you were the superhero in a movie, what would your name be? Make a match between the initial of your name and your month of birth and name in comments. #BetterWithMMs' The visuals of the post show a M+Ms character wearing a superhero cape, surrounded with 3 variants of the M+Ms chocolate product.

The bright colourful visuals in the post, as well as the 3D graphic appearance of the brand M+Ms characters (similar to graphics of popular children's film and TV shows), the presence of the chocolate product, the simplicity, silliness and amusing nature of the game (creating a two-part superhero name with the first initial of your name assigned a certain descriptive word e.g. Spider, Capitan, Iron and your birth month being assigned another word all related to the M+Ms product e.g. Peanut, Yellow, Caramel,) the engaging interaction encouraged by the post (the encouragement to post your superhero name in the comments) which would be appealing to young children as well as the informal 'Tu' form being used, indicate that this is a marketing example directed towards children, including children under 12 years old.

M+Ms Instagram Movie Awards

An Instagram post posted on the 6th of March by @mms\_es for the occasion of the Spanish national film awards (Goya awards) encourages users to tag their friends who they believe to be deserving of an award.

Como somos tan de pelis, hoy también nos montamos nuestra propia gala de M&M's. Menciona al amigo que se merezca uno de estos premios. Para nosotros el 6 se lo lleva @rocioccamacho. #PremiosGoya

The text on the picture encourages the user to mention a friend who deserves one of the awards such as best film, best costume, best actor/actress in the comments.

The cartoon-appearance of the visuals used in the post, as well as the 3D graphic appearance of the brand M+Ms characters (similar to graphics of popular children's film and TV shows), the presence of the chocolate product (the M+Ms characters are animated version of the product itself), the simple and engaging interaction encouraged by the post (tag a friend who deserves an award) which would be appealing to young children as well as the informal 'Tu' form being used, indicate that this

### **Advertiser's response**

At Mars, we pride ourselves on our commitment to responsible marketing. Our Mars Marketing Code (MMC) is one of the most restrictive in the food industry and we review it regularly. We are one of a few companies to commit not to undertake any marketing activities to children under 12 years (under 13 for digital platforms) across media placement and marketing content – regardless of the product's nutritional profile – and to uphold a 25% child audience threshold. We do not use any licensed characters or celebrities primarily appealing to children under 12 in any of our marketing content. In addition to the EU Pledge audit, we hold ourselves accountable through an external third-party audit of our compliance with our Marketing Code. We report the results to the Mars Board for oversight and publish them in an annual governance report. Our 2020 report can be accessed [here](#).

It is our ambition to be a leader in this space and we are continually evaluating our marketing practices and looking for ways that we can do better. For years, we have worked in partnership with the industry through the EU Pledge and other pledge programmes in an effort to lead the industry in a more responsible direction and encourage our peers to improve their food and beverage marketing practices.

We have reviewed the concerns raised by the complainant in Case 50 and the corresponding posts published on the @mms\_es Instagram account. We appreciate the opportunity to respond and are doing so in line with our Mars Marketing Code (our EU Pledge commitment) as well as the EU Pledge Implementation Guidance Note – particularly section 2 'Addressing Creative Execution'.

As per our commitments and the guidance note, in online media, we consider the placement of the marketing content, the overall impression of the advertising, actions taken to restrict child access and the target demographic based on our media plan. Based on an assessment of both the placement and content, we believe that none of the two Instagram posts in question are in breach of neither the EU Pledge nor our own Mars Marketing Code. Our assessment follows:

1. Placement of marketing content, target demographic based on our media plan and actions taken to restrict child access

The marketing content in posts a. and b. has been published on Instagram, which is a platform that requires users to be aged 13 or higher at a minimum. We rely on Instagram's age-screening and parental consent mechanism, which we know requires a full date of birth as well as a process to verify accounts that are suspected to be too young. We are proactively working with Facebook and Instagram through the Global Alliance for Responsible Media (GARM) to improve the safety and brand suitability of the platform.

We recognise that some children under the age of 13 may not be truthful about their age to access the platform (the exact number particularly in Europe is unknown, but, as an example, data published by the Pew Research Center in July 2020 reported that 5% of U.S. parents say

their child of age 11 or younger used Instagram<sup>1</sup>). Therefore, we take additional actions to minimise children under 13 being exposed to our marketing content. These include a continuous review of the age demographics of the followers and viewers of our accounts, and targeting any sponsored/paid-for content at higher ages.

In the case of the @mms\_es Instagram account, the age demographic breakdown shows that only 6.5% of our audience is aged 13-17, while the remaining 93.5% are aged 18 or higher. This means that even if the 13-17 age range included children under age 13, their share of the total audience would be below the EU Pledge's 35% audience threshold as well as our stricter 25% audience threshold.

We are happy to share proof of age breakdown with the EU Pledge Secretariat under NDA, but unfortunately cannot do so publicly as it contains confidential information.

### 2. Overall impression of the advertising

In addition to the placement, and in recognition of a small number of Instagram users being under age 13, we use both Mars proprietary frameworks (grounded in academic evidence and consumption data) and the EU Pledge Implementation Guidance Note to ensure our marketing content doesn't primarily appeal to those under age 12.

In line with the EU Pledge and our MMC, the two Instagram posts in question do not feature any licensed characters or movie tie-ins, games, toys, animation or sound effects that primarily appeal to young children. Post a.'s mechanic is not a game, but a theme in line with movie awards season. The reference to superheroes is universal in its age appeal as most superhero movies are targeted at audiences aged 13 and higher, including the Iron Man, Spider Man and Indiana Jones franchises, all rated PG-13 by the Motion Picture Association, and who are nodded at in the post. Both the EU Pledge and our own Marketing Code allow linking to movies rated 'PG-13', but require avoidance of movies rated 'U' or 'PG'. Post b. refers to the Goya Awards, the Spanish national film awards which are of universal appeal as they feature all kinds of films. The post does not link to any particular movie which could be primarily directed at children under 12.

Looking at the creative execution, the posts do not use language, text, navigation or any other aspects of design clearly intended to appeal to young children. Engaging with users is a key feature of social media and the grammatical form 'tu' to address people is very common and used not only throughout daily life in Spain regardless of age group, but is the way all of our brands communicate with our consumers. All Mars Wrigley brands stay clear of any language that directly addresses children, such as 'hey kids'. The colour schemes in both posts are of universal appeal and do not feature any cartoon-style execution.

### 3. Use of brand characters

Both our EU Pledge and MMC commitments allow the use of brand characters, in line with academic literature differentiating between brand characters and licensed characters. Our M&M'S characters are intended to appeal to people aged 13 and above. They have been up-aged and need to adhere to strict character guidelines, ensuring that the context, theme and tone of their execution is adult. For example, they do not act in cartoon settings but stay in the real world or their neutral yellow world, interact with photorealistic props only, represent adults with adult voices, humour and mannerisms, and avoid any childish or slapstick behavior. The 3D-rendering of

the characters is a technique that decreases child appeal, as opposed to 2D-renderings which are more closely linked with cartoon-style execution and popular children's shows.

In post a., the M&M'S character is interacting with the cape which is photorealistic and intended as an accessory. Going forward, we are working to make it even clearer that accessories and props are better identifiable as such, so that we avoid confusion with clothing items. The M&M'S character is not in full dress-up or a superhero costume as children's cartoons and programming would feature them.

### 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 Mars Instagram posts.

Judging the creative execution of the first post, the Panel found that the game presented is very simple and some children might enjoy playing. However, such types of games are targeted to a broader audience than just to children younger than 12. The presence of the product itself is not against the EU Pledge commitment. Although brand-characters are outside the scope of the EU Pledge commitment, the inclusion in the post with a superhero cape combined with the bright background could make it appealing to a young demographic. The Panel did not find that the language appearing in the actual picture was addressing children under 12. For instance, the use of the word “*farda*” refers to a vocabulary once used by children that are now grown-up, and was thus considered to be a way to communicate with adults and an older audience. Young children of today are unlikely to use words such as “*farda*”.

The Panel then discussed the second post, concerning the Goya film awards. This prize is not popular with children, especially not with children under the age of 12. The use of the brand characters and the product is not as such against the EU Pledge commitment. Moreover, the way the characters are presented, even with a bright background behind them, was not deemed to be primarily appealing to children. Colourful advertising material or 3D animations are not an exclusive advertising method used only for targeting children. In fact, the colour palette for the post reflects the brand colours. Even so, the colours are not vivid or based on childish pastel-like drawings or 3D animations that would refer to popular characters.

The fact that both posts 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, this is not sufficient on its own to guarantee compliance.

Based on the above rationale, the Panel judged that both posts are not appealing primarily to children under the age of 12, and therefore the complaint was not upheld.

### Panel decision: complaint not upheld

**Case ID: 50**

**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 – Mars M&Ms 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 both posts 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.' 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 Panel Decision.

### Instagram Superhero Name Game

Although the Panel does acknowledge that the game presented is very simple and ‘some children might enjoy playing’ they then counter that such games are targeted to a ‘broader audience than just to children younger than 12’. However, the Panel does not explain how older children or adults would find this game appealing.

Indeed, we do not believe that the Panel have adequately taken into account the childish and silly nature of the humour of this simple game and the effect of the potential names arrived at from playing it e.g. Spider Peanut, Doctor Yummy, Capitan Lentil – not something adults would find that amusing.

The childish nature of the game is underlined by the fact that the theme of the game is to find your ‘superhero’ name. This theme is naturally of appeal to younger children primarily and is further emphasised by the brand character sporting a superhero’s cape. While the Panel states that brand characters are out of scope, the embellishment of the cape is not and should be considered in assessing the overall impact of the advert.

Finally, the Panel has highlighted the use of one word –‘farda’ to suggest that the post is communicating with adults or an older audience. Once again, one word in a textual caption which is clearly not the most appealing or eye-catching element of the post (the game and image are) is being used to justify not upholding the complaint. We believe that this disregards the overall impression of the advert which is clearly child-appealing.

### Movie Instagram Post

We would disagree with the Panel’s assertion that ‘the way the characters are presented, even with a bright background behind them, was not deemed to be primarily appealing to children.’

The Panel states that, ‘the colours are not vivid or based on childish pastel-like drawings or 3D animations that would refer to popular characters.’ We would disagree and can not see how the colours could be described as anything but vivid – bright yellows, bright reds, further emphasised by the graphics highlighting the movie element of the post.

The Panel states that the palette chosen ‘reflects the brand colours’ which doesn’t take into account that a brand’s choice of colour scheme may be chosen to be inherently attractive to children in the first place. Moreover, M+Ms and come in a very wide range of different colours which they do not have exclusive rights over. To exclude colours from consideration in a Panel decision simply because a brand’s ‘colour palette also uses them would render the scope unduly narrow.

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 (such as movie awards) or animations therein as appealing as their teenage peers. ‘Childish pastel-like drawings’ may be appealing to very young children under 12 but it should not be considered as a pre-requisite to be considered to be appealing to children under 12 (as older children in this age bracket will not be attracted to such infantile content).

## 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 50 for the Mars M&Ms 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 adverts' compliance, and must be considered in combination with all other factors.

Firstly, the Appeal Panel assessed the Instagram post featuring a static advergaming. The Appeal Panel found that the colour palette used and the idea game's idea of finding one's superhero name would probably be appealing to children under 12 years old. Though, the Appeal Panel noted that the game would most likely be also thought of as something funny and comical to engage in, regardless of age. The brand character wearing a superhero cape could be appealing to under-12-year-olds. However, whilst the concept of the game in itself is probably appealing to them, and the choice of flashy and catchy colours in the post may attract their attention, the general appeal of the post would likely be shared among a diverse age group, ranging from children to adults. This is further emphasised by its static nature and the lack of any specific element that would be *primarily* appealing to children under 12. Moreover, the use of a language style that is generally more understood by adults than children, such as, among other things, the use of the word "*farda*", would also appeal less to a young audience under 12.

Secondly, the Appeal Panel assessed the Instagram post featuring questions relating to the Goya awards. The Goya awards are not popular with children and the types of questions asked would not be appealing in any way to them. The colour scheme may be appealing to a certain extent, but that is not enough to assess an ad as being primarily appealing to children under 12. In fact, as the First Instance decision noted, the language is largely aimed at adults. Only adults would know the answers to these questions. Moreover, its static nature further emphasises this assessment.

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.**