

**Case ID: 74**

**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 – Mars**

**Description**

Mars M&Ms Instagram post in Denmark

**Complaint**

An Instagram [post](#) posted on the 8th of February by MMs Denmark which shows two M+Ms characters with facemasks on beating a barrel filled with M+Ms chocolate products. The caption asks ‘*Anyone else going for the cat king or cat queen this year?*’

The post refer to the “Fastelavn” tradition which takes place in February which is a tradition comparable to Halloween or carnival. Children dress up in costumes and alternately strike the barrel that is usually filled up with candy. This is called “*slå katten af tønden*” [“beat the cat of the barrel”]. The one who gets the bottom of the barrel to fall down becomes “*kattedroning*” [“cat queen”] and the one who gets the last plank/board to fall down becomes “*kattekonge*” [“cat king”]. The M+Ms post thus refers to the Fastelavn tradition stating: “*Andre der virkelig går efter kattekonge og -dronning titlerne i år?*” (Anyone else going for the cat king or cat queen this year?)

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) who are dressed up in facemasks, the presence of the chocolate product, the reference to a tradition which is popular with younger children, especially those under 12 years old, indicate that this is a marketing example directed towards children under 12 years old.

### 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 74 and the corresponding post published on the @mmsdenmark 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 the Instagram post is not 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 question 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 @mmsdenmark Instagram account, the age demographic breakdown shows that only 8.8% of our audience is aged 13-17, while the remaining 91.2% 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.

In addition, our Fastelavn campaign (which the post was a part of) had a sponsored/paid for media element. We can only see age breakdowns for the campaign across Facebook-owned platforms (including Instagram which was the primary platform), but can report that only 4% of users reached were under 18 years, with 96% being 18 years or above.

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 Instagram post in question does not feature any licensed characters or movie tie-ins, games, toys or sound effects. The post uses minimal animation of the barrel swinging, but this is not of primary appeal to children under 12.

Looking at the creative execution, the post does not use language, text, navigation or any other aspects of design clearly intended to appeal to young children.

#### 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, 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.

The M&M'S characters can interact with seasons and seasonal rituals (e.g. Easter, Halloween or Christmas), but in a manner of universal age appeal and in line with all guidelines. In this particular post, the M&M'S characters are adults participating in Fastelavn. Fastelavn is a national tradition in Denmark where there are Fastelavn parties for adults as there are for children. This post clearly references the Fastelavn party connected to adult traditions. While the characters wear traditional Fastelavn face masks to indicate the link to the seasonal ritual, they are not in full dress-up costumes as children would be.

### 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 (M&Ms) 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 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 advertisements at hand – in this case the Danish M&Ms Instagram post.

The Panel noted that the post appears on Instagram, which bars anyone under the age of 13 to create a profile. 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.

Regarding the creative execution of the post, experts considered that it contains very few childish elements. Although outside the scope of the EU Pledge commitment, the brand characters of M&Ms are to a certain extent appealing to children, due to the fact that they are 3D cartoons and in this case are dressed up for the Danish folk tradition of Fastelavn. Nonetheless, this post is static with a limited colour palette reflecting the product's colour pattern and in general, animations are not by default appealing exclusively or primarily to young children. Colourful animations and 3D graphics are not an advertising method used exclusively for targeting children. The Panel also noted that the product itself is generally more appealing to an adult audience than it is to a teenage or child one. As such, experts assessed that the Instagram post was targeting just as much, if not more, an adult audience of 18+ such as gate-keepers, than a child one under 12.

The Panel also considered the Danish folk tradition of Fastelavn as being fairly popular with children in Denmark. Similar to Carnival festivities around Europe, it is a yearly tradition that is popular with all ages and involves just as much children from a young age as it does grand-parents. However, children are likely to be particularly excited about such yearly traditions and any advertisement that links itself to it is likely to attract the attention of a very young audience. Experts believed it is crucial for marketers to stay away from annual traditions that are, to one degree or another, popular with children under 12 years old. Nonetheless, the manner in which ads refer to such traditions matters more than simply linking itself to them. For instance, Halloween, Carnival, and Easter, are just as appealing and popular with children as they are with teenagers and adults of all ages, but the way the advertisement is composed and presented in relation to any of these traditions matters more than simply mentioning the celebrations. Consequently, in this case, the graphic presentation of the Instagram post, its static execution, and its limited colour palette, all alleviate its potential appeal to children under 12. Additionally, the post makes only a graphic allusion to the tradition without including a childish video animation or a cute song or voice-over inciting users to participate in this year's festivities. The accompanying short text makes reference to Fastelavn, though it is not targeting any particular audience, merely asking the question openly whether the user will partake in it this year.

Consequently, due to the graphic static execution of the post, combined with the fact that brand characters are out of scope, with a limited allusion to Fastelavn, and a lack of any additional childish or child-oriented material or element, the Panel deemed the Instagram post not to be primarily appealing to an audience under 12.



Based on the arguments and rationale outlined above, the Panel judged that the Danish M&M Instagram post 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: 74**

**Appeal**

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<b>To</b>	EU Pledge Secretariat	<b>Date of mtg</b>	24 June 2021
<b>From</b>	EASA Secretariat	<b>Date sent</b>	30 July 2021

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**Appeal ruling – Mars M&Ms Instagram post in Denmark**

**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.

### **Appeal**

We would like to appeal this decision.

### **Age Screening**

While it is acknowledged in the ruling that an ‘age-screening mechanism’ is not sufficient by itself for compliance’, at the same time it was also considered and cited by the panel when rejecting the complaint. Indeed, the Panel states that ‘Instagram ... bars anyone under the age of 13 to create a profile. However, the mere presence of an age-gating mechanism does not in itself actually ‘bar’ children under the age of 13 from creating profiles.

In any case, age-screening mechanisms are well-recognised as unreliable tools to prevent children under 13 years old from using a social media platform 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. Moreover, Instagram itself has acknowledged that it is an issue as ‘young people can lie about their date of birth’.

### **Appeal to Children**

We do not believe that the Panel have adequately taken into account or comprehended the child-appealing nature of the Instagram post, namely the Fastelavn tradition of beating the barrel, as shown in the post. While of course seasonal celebrations are not exclusively enjoyed by children (for example, Christmas or Easter are celebrated by both adults and children), there are clearly certain traditions, practices or characters associated with such celebrations which are of obvious primary appeal to children. From visiting Santa’s grotto at Christmastime to participating in an Easter egg hunt or trick and treating at Halloween, there are pastimes and activities for which children are the primary participants and for whom it would be the most appealing and exciting. This was highlighted in a recent Panel decision to uphold a complaint about an Easter egg hunt themed advert, as the ad had alluded not merely to Easter as a religious or traditional celebration but to an Easter egg hunt which is exclusively a children-oriented activity with the Panel highlighting that, ‘the activity it is referring to is something that parents engage in with their children, and not the other way around.’

The situation is the same here. The Fastelavn tradition “slå katten af tønden” is clearly one such practice and is well-known in Denmark as an activity which is exclusively of appeal and participated in by young children, and not teens nor adults. Denmark’s largest Christian website [www.kristendom.dk](http://www.kristendom.dk), describes the Fastelavn tradition (which begins the Lent period for Christians) as an activity which was once an adult activity, but centuries ago. Now, it is well-recognised within the country as one for which children are the clear participants. Moreover, if one searches on google image for “slå katten af tønden” you can clearly find only photos where it is children who beat the barrel (except for a few black/white illustrations from history books).

We would strongly disagree with the Panel’s assertion that there is only a ‘limited allusion’ to Fastelavn. It is clear that the post is entirely focused on Fastelavn in fact. From the masks the characters use, the activity the characters are undertaking (hitting the barrel which is synonymous with the Fastelavn tradition) to the caption accompanying the post. The caption relates to the “Kattedroning” og “kattekonge” titles directly associated to “slå katten af tønden”. These words are not used in any other context in Denmark and actually becoming “kattekonge/kattedroning”



means that you win a paper crown to wear the rest of the day, which is definitely also child appealing.

It is not a requisite of the Pledge that a ‘cute song or voice-over’ be part of a marketing post for such a post to be considered child-appealing. While these techniques are certainly used by advertisers to enhance appeal for certain marketing, it does not follow that a marketing post which does not include a cute song will automatically not be child-appealing when there are clearly other elements which are very appealing to children.

The Panel’s decision cites the ‘static’ nature of the post as one of the key elements which, it claims, ‘alleviates its potential appeal to children under 12’. However, the post is not in fact ‘static’ as the Panel asserts – the post is not an unmoving image but rather a gif which shows the barrel continuously swaying to and fro. In any case, we furthermore disagree with the Panel’s assertion that in general merely because a marketing post is ‘static’ means that it would not be appealing to children. The post which shows the presence of the two MMs characters in fancy-dress, participating in a children’s activity (with obvious appeal for young children) would have been child-appealing whether it was animated/moving or not (in this case the post is in fact a moving image).

Another element cited by the Panel in its decision to not uphold the complaint was the graphic presentation of the Instagram post, highlighting that, ‘3D graphics are not an advertising method used exclusively for targeting children’ and that ‘the graphic presentation... alleviate [s] its potential appeal to children’ appearing to concur with the food companies’ assertion that ‘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.’

We would strongly disagree with the assumption that because 3D graphics are used it means that the post is not targeting children (rather the opposite). While it could be argued 2 or 3 decades ago that children’s animation was characterised by 2D cartoons, that is clearly not the case today where the vast majority of children’s animations use 3D graphics. The top 20 highest grossing animated films (all children’s films) lists only one 2D animated movie (The Lion King, 1994) with the rest being 3D animated. Indeed, the world’s largest creator of children’s animated movies, Disney, announced already in 2013 that there were no 2D features left in development (nor have there been any since) demonstrating the clear preference for 3D for children’s content. Moreover, it is obvious that animated movies or TV shows in general remain much more prevalent for the children’s demographic than teen/adult-directed entertainment.

There is also somewhat of a contradiction in the decision on colour. On the one hand, the Panel states that ‘colourful animations...are not an advertising method used exclusively for targeting children’ thereby indicating that they consider the post to be colourful. On the other hand, the Panel asserts that the post uses a ‘limited colour palette’. We disagree with the latter statement – the post clearly uses bright vivid colours (green, red and yellow) which is not negated by the fact that these colours are also used by M+Ms products.

## Advertiser's response

We appreciate the opportunity to respond to the appeal raised by the complainant in Case 74 and would like to add the following to our initial response.

### Children's Rights

In line with the Convention on the Rights of the Child and UNICEF's Children's Rights and Business Principles, Mars respects and supports children's rights by limiting the impact of our marketing on children and guarding their privacy. We work to advance children's rights by respecting the role of parents and guardians and ensuring that our marketing does not undermine healthy lifestyles.

We acknowledge that children have the right to special care and protection, including when they are engaging with our brands. At the same time, we recognize that the abilities, needs, and judgement of children develops in distinct stages as they progress toward adulthood. As such, our commitments recognize these differing needs by balancing protective measures with decision-making empowerment and access to information. Existing scientific evidence demonstrates that children's cognitive ability to understand and critically question the intent of marketing typically develops by age 12. Based on this evidence, Mars does not market to children under 12 years (under 13 years for digital platforms). Aligned with recommendations by the World Health Organization to limit the effects of marketing to children, we address both the reach of our marketing communications (to limit exposure) and their power (to limit appeal).

### Age Screening

Reiterating our initial response, we rely on Instagram's age-screening and parental consent mechanism, but 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, as outlined previously, we take additional actions to minimise children under 13 being exposed to our marketing content, such as 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 @mmsdenmark Instagram account, children's exposure is minimal with the age demographic breakdown showing that only 8.8% of our audience is aged 13-17, while the remaining 91.2% 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 well below the EU Pledge's 35% audience threshold as well as our stricter 25% audience threshold. In addition, the post in question had a sponsored/paid for media element. We can only see age breakdowns for the campaign across Facebook-owned platforms

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<sup>1</sup> <https://www.pewresearch.org/internet/2020/07/28/childrens-engagement-with-digital-devices-screen-time/> (accessed 14 April 2021)

(including Instagram which was the primary platform), but can report that only 4% of users reached were under 18 years, with 96% being 18 years or above.

### **Appeal to Children**

As stated in our initial response, both the EU Pledge and our own Mars Marketing Code allow our brands to link with seasons and seasonal rituals, provided this is done in a manner of universal age appeal and without targeting children directly. This is in line with existing precedent set by advertising standards organisations, such as the United Kingdom's Advertising Standards Authority in Ruling A18-4462732, which determined that a link to Easter egg hunts does not breach the strict ASA Code not to market to children, it was only a seasonal storybook and activity pack made specifically for children that were found to be in breach.

Finally, regarding animations and their child appeal, we would like to add to our initial response that when accounting for all child-targeted audio-visual properties, not just box office movies, a vast amount employs 2D animation, whereas teenage and adult-targeted properties rarely use this technique. In addition, animated child-targeted properties are animated in their entirety – while the M&M'S characters themselves are animated, but all props, accessories and the environment they interact in is photorealistic and/or set in real life.

### **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.*

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<sup>2</sup> <https://www.asa.org.uk/rulings/mondelez-uk-ltd-a18-446273.html> (accessed 17 June 2021)

### **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 74 for M&Ms Instagram post in Denmark.

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.

The Appeal Panel agreed with the First instance Panel that, regarding its creative execution, the post contains only a few childish elements. It has a very limited colour palette and it is rather static, with a very slight movement. The Appeal Panel took note of the 3D graphics of the post. However, the presence of 3D graphics alone does not automatically make a post primarily appealing to children. It is one of the elements that the Appeal Panel took into consideration.

The Appeal Panel took account of the link to the Fastelavn tradition in the post. Similarly to the First Instance Panel, the Appeal Panel noted that the Danish folk tradition of Fastelavn is fairly popular with children in Denmark, as it is a tradition similar to Carnival in other parts of Europe. The Appeal Panel took into account that children are likely to be particularly excited about such yearly traditions, but also considered that these celebrations have an appeal to a broad range of age groups, from teenagers who may still be fascinated by them to adults who look back at them with a nostalgic view. Appeal Panel experts nonetheless reiterated that it is crucial for marketers to stay away from annual traditions that are, to one degree or another, popular with children under 12 years old, or by ensuring to portray the tradition in a more adult setting.

The Appeal Panel agreed, however, with the First Instance Panel that, in this case, the graphic presentation of the Instagram post, its execution, and its limited colour palette, all alleviate its appeal to children under 12 stemming from the link to the Fastelavn tradition.



Based on the arguments and rationale outlined above, the Appeal Panel does not overturn the original decision. The complaint remains not upheld and the M&Ms Instagram post in Denmark is compliant with the EU Pledge commitment.

**Decision regarding the appeal: admissible.**

**Decision regarding the complaint: not upheld.**