

**Case ID: 79**

**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 – Ferrero**

**Description**

Ferrero Kinder Pingui video on Greek website

**Complaint**

On the Greek Ferrero website there is a [video](#) promoting the Kinder Pingui chocolate product. It shows a family arriving home in the car. The very young children watch their mother walk towards the house in the style of a penguin after which they jump out of the car and follow their mother, also walking like penguins. They continue to walk like penguins until they all reach the fridge freezer when the children are given the Kinder Pingui chocolate products. At the end, when the products are shown by themselves, the products also walk like penguins.

The emphasis on silly humour taking place in the family setting with the mother and the children walking like penguins would be of obvious appeal to very young children under 12 (emphasized by the use of very young child actors and the sound of young children's laughter throughout the short clip, the presence of the chocolate products in the ad and the joy the young children have when receiving said product means that this example should be considered to be advertising to 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 12 years and older, in terms of content, as well as of media purchasing.

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

- This video is placed on our Greek corporate website (link here <https://www.ferrero.gr/>), in the section providing nutritional values of our line of products. This section, as well as the entire corporate website, has been designed not to include any elements – like games, animations or sound effects, colors or easy-to-read language or fonts – that could be of primary appeal to kids.
- The video in question was on air in Greece between January and April 2020 (last broadcasting date 12th April). The media buying for the entire campaign rolled out in Greece was done in accordance to the EU Pledge principles so avoiding placement in programmes where kids under 12 years of age would constitute more than 35% of the audience.

### EU Pledge commitment

- *EU Pledge members commit either to:*
  - *Only advertise products to children under the age of 12 years that meet the common EU Pledge Nutrition Criteria; or*
  - *Not to advertise their products at all to children under the age of 12 years.*
- *The above policy covers marketing communications for food and beverage products that are primarily directed to children under 12 in covered media.*
- *Marketing communications means paid advertising or commercial sales messages for food and beverage products, including marketing communications that use licensed characters, celebrities, influencers, and movie tie-ins primarily appealing to children under 12. Company-owned, brand equity characters are not covered by the policy.*
- *Primarily directed to children under 12 means advertising in measured media where 35% or more of the audience is under 12 years of age. Where adequate data are unavailable, companies will consider other factors as appropriate, which may include the overall impression of the advertising, actions taken to restrict child access and the target demographic based on the company's media plan.*
- *Covered media means the following vehicles: TV, radio, print, cinema, online (including company-owned websites and company-owned social media profiles), DVD/CD-ROM, direct marketing, product placement, interactive games, outdoor marketing, mobile and SMS marketing. Packaging, in-store and point of sale as well as forms of marketing communications which are not under the direct control of the brand owner, such as user-generated content, are not covered by this policy.*

### **Initial decision**

The advertised product (Kinder Pingui) 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 Greek corporate Ferrero website video for Kinder Pingui.

The Panel noted that the corporate Greek website of Ferrero contains no age-gating mechanism but that the contents of the website are not oriented toward a young audience. On the contrary, the website contains solely the video advertisements and technical details about the advertised products and its nutritional value. Such a website or section of a website would not appeal in any way to children under 12 years old. Rather, only adults interested in the nutritional content of the product would perhaps visit the website. Corporate websites are by and large unappealing to young children as it is unlikely they would land on the website and find the contents appealing to their imagination.

Regarding the creative execution of the video, the Panel expressed great concern about the penguin walk that the mother and children engage in as they hop out of the car. The penguin walk is something that would be thought of as funny and comical by young children and is a walk that is exclusively or at least primarily appealing to a very young audience. The interaction between the mother deciding to surprise her children with the product and leading them home by doing a penguin walk is a scene that would be appealing primarily to children under 12 years old. It would be something that many children would wish for to happen to them. However, the video ends with the mother relaxing on a chair and enjoying the product. This alleviates slightly the previous scene involving the penguin walk, as children are not seen consuming the product, but rather an adult. Finally, at the very end, the product itself is seen hopping around in a penguin walk, which would also be particularly appealing to a very young audience.

Consequently, the Panel deemed that the video in itself could be appealing primarily to children under 12. However, due to the placement of the ad on a corporate website that would be unappealing to children and the fact that the ad features an adult consuming the product rather than a child, mitigates its appeal to young children.

If the advert were to appear on a different medium or were it to only show the mother doing the penguin walk in front of her children as a short social media post, the Panel would judge that that advertisement is appealing primarily to children under 12 years old. As it stands, the advert in its current form and its current location, it is not appealing primarily to children under 12.

Based on the arguments and rationale outlined above, the Panel judged that the Greek corporate website for Kinder Pingui 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: 79**

**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 – Ferrero Kinder Pingui video on Greek website**

**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.

While the general colour scheme of the corporate website may not be brightly coloured, it is clear that certain content such as the video in question will be of clear and increased appeal to children, and to which they will naturally navigate should they find themselves on this website.

Moreover, a strong focus of the website is the pictures and videos promoting the adverts, content which would naturally be more interesting to children. On the homepage, the most vivid and attractive elements are the Kinder/Ferrero products themselves. As you can see in the screenshot below, the

promotion of the Kinder/Ferrero products in the red box and yellow box (which you can scroll through to see all available products) are the most prominent/visible and attractive elements of the homepage. When you click on each product it brings you to a page where an image and video advert promoting the product is prominently displayed, demonstrating the key focus on imagery and video content of the website in spite of it being a corporate website.

Moreover, while the Panel asserts that *'only adults interested in the nutritional content of the product would perhaps visit the website'* the website contains much more than just nutritional content with videos being the most prominent element in the pages for nutrition information. As you can see below, it is the image and video and not the nutritional element which are clearly the most attractive primary elements of the page: the picture is the largest image on the webpage, the video is also prominently displayed at the top of the page and to reach the text-based nutritional information you have to scroll down the page.

As highlighted in the recent Joint Research Centre report on Young Children (0-8) and Digital Technology, found that their most common activity in their leisure time is watching online videos, demonstrating how this kind of content on the Ferrero website, which is strongly emphasised, would be the most appealing to them should they end up on this website. We would therefore disagree that it is unlikely that any children who land on the website would *'find the contents appealing to their imagination'* as stated by the Panel, even if the website is ostensibly a corporate one.

This is especially unlikely given the Panel's acknowledgement and stated great concern that there are several key elements to the video contents which would be very appealing to children under the age of 12 years old which led the Panel to conclude that the *'video in itself could be appealing primarily to children under 12'* including: the funny penguin walk which would be *'exclusively or primarily appealing to a very young audience'*, the appealing interaction between the mother and her young children and the product itself hopping around in a penguin walk.

Indeed, there is no indication on the website that it is meant for adults only and should not be viewed by children (should a child land on the site).

Finally, it is also important to note that the company itself has stated that the video in question was on air in Greece for four months (between January and April 2020) and it is therefore very likely that many children will have been exposed to this advert (even if the children's audience is below the high 35% threshold required by the EU Pledge rules).

## 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.*

### **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 79 for the Kinder Pingui video on its Greek website.

The Appeal Panel first assessed the creative execution. The experts reiterated the concerns that the First Instance Panel had expressed regarding the penguin walk that the mother and children engage in as they hop out of the car. This is something that would be seen as funny and enjoyable to a very young audience. However, the Appeal Panel found that there are elements in the ad which limit the appeal, such as the fact that the mother is the one handing out the product to the children and she is the one enjoying it in the end instead of the children. The penguin walk is an interaction between the mother and the children, and initiated by the mother. It is actually the mother who is the main character of the advertisement and the whole storyline is seen from her perspective. This, together with the colours of the commercial and its general impression slightly alleviates the childish penguin walk.

The Appeal Panel also noted that the website is clearly not oriented toward a young audience. Even though the website does promote pictures and videos of the adverts, it is mostly adults who would be interested in the nutritional content of the product and on further information about the company. Corporate websites are by and large unappealing to young children as it is unlikely they would land on the website and find the contents appealing to their imagination. Furthermore, the presence of the video on TV is out of the remit of this particular case.

Based on the arguments and rationale outlined above, the Appeal Panel does not overturn the original decision. The complaint remains not upheld and the Ferrero Kinder Pingui video is compliant with the EU Pledge commitment.

**Decision regarding the appeal: admissible.**

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