

Date

5 December 2008

Reference

CA/NCB/137/135

Decision made with regard to case 137/OX-2 International (Realtonekado.nl)

Decision

The decision of the Consumer Authority as referred to in Article 2.9 of the Act on enforcement of consumer protection law (Whc [*Wet handhaving consumentenbescherming*]) to impose a penalty on a daily basis (in case of non-compliance) and to impose a fine.

Summary of the decision

OX-2 International is a company that runs a number of websites featuring advertisements for SMS-services provided by other companies. The company advertised the companies Celldorado (for ringtones and wallpapers) and Wixawin (quizzes and competitions using SMS) in this way. In these advertisements, OX-2 International offered a free ringtone or the chance to take part in a quiz or competition to win a prize, such as an iPhone, a scooter or €500 in cash.

As part of this offer, OX-2 International requested visitors to its websites to submit their MSN username and password. These details were used by OX-2 International in order to send e-mails containing adverts to all contacts in a person's MSN address book. This meant that these messages appeared to have come from one of the recipient's contacts and a gift was offered. This was not the case, however. If someone wished to receive a free ringtone or to win a prize, he/she were required to sign up to a paid subscription by SMS.

OX-2 International consequently contravened the Act of enforcement of consumer protection law (Whc [*Wet handhaving consumentenbescherming*]) by sending messages containing advertisements without consent to do so and failed to meet its information obligations, such as stating its identity and address details.

The Consumer Authority has therefore imposed fines of €85,000 in total. Furthermore, three penalties (in case of non-compliance) have also been imposed on a daily basis. The aim of these measures is to ensure that OX-2 International brings its websites and advertising messages into line with the applicable regulations.

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1 Introduction

1. In October 2007, the Consumer Authority received a complaint regarding the website www.realtonekado.nl¹. This complaint was covered by the Consumer Authority service's area of priority in dealing with SMS services. Based upon the complaint that was filed, an investigation began on 14 March 2008 into the www.realtonekado.nl website².
2. This website featured the slogan '*Because free is simply better*'. The website offered free 'realtones' and in order to receive them, the consumer was required to submit an MSN address and password (hereinafter referred to as: MSN details).
3. By submitting his/her MSN details, the consumer was also providing access to the details of all MSN contacts in his/her address book. All of these contacts subsequently received an e-mail offering him/her a free 'realtone' and containing a link to the www.realtonekado.nl website. This e-mail appeared as though it had come from one of the recipient's contacts, but it was in actual fact sent by OX-2 International.
4. Within the scope of the investigation, a visit was paid on 29 April 2008 to the premises of OX-2 International, the holder of the domain name www.realtonekado.nl³ and which was also the home of Mr. <Managing Director>⁴.
5. Mr. <Managing Director> (hereinafter referred to as: the Managing Director) was the proprietor of the sole trader OX-2 International and is now the director and the sole employee of OX-2 International B.V.
6. Following the investigation, a report (hereinafter referred to as: the report) within the meaning of Article 2.8, paragraph 1, of the Act on enforcement of consumer protection law (hereinafter referred to as: Whc [*Wet handhaving consumentenbescherming*]) was drawn up against OX-2 International B.V. and its director. This report forms the grounds for this decision.
7. The interested parties in this case as referred to in Article 7.2 of Whc are deemed to be the Consumer Ombudsman Foundation⁵ [*Stichting de Ombudsman*] and the Consumers Association⁶ [*Consumentenbond*]. Both organisations have declined to provide their view.
8. On 16 October 2008, a hearing took place at the offices of the Consumer Authority. OX-2 International B.V. and its director used this opportunity to state its view.
9. This Decision contains first of all an examination of the parties involved (see Chapter 2), followed by the report (see Chapter 3) and a description of the facts (see Chapter 4). The view of OX-2 International B.V. and its director is provided in Chapter 5, followed by that of the Consumer Authority and the legal

¹ Document 137/1.

² Document 137/1.

³ Document 137/1, Annex 18.

⁴ Document 137/8.

⁵ Document 137/96.

⁶ Document 137/95.

considerations (see Chapter 6). In the final part of this decision (Chapters 7, 8 and 9) the conclusions are reported and the measures to be imposed are determined.

2 Interested parties

10. At the time that the investigation began, OX-2 International was a sole trader that was run by Mr. <Managing Director>⁷ who was also liable for it. The company had been known as OX-2 International B.V.⁸ since 29 May 2008.
11. In addition to the domain name realtonekado.nl, the domain names www.iphonegame.nl, www.winps3.nl and www.jijwint.nl are also registered to the name of OX-2 International⁹.
12. OX-2 International is a company known as an *affiliate*, which is a party that offers advertising space on its website to third parties. In each instance that a contract comes into being via this website, the affiliate receives a fee.
13. In an affiliate network, providers of products or services and affiliates are brought together and payments are made to affiliates through this network. OX-2 International is registered as an affiliate with the affiliate networks Adsmarket and Zanox¹⁰ and it functions as an affiliate for Celldorado (a service provided by Artiq Mobile B.V.) and Wixawin.
14. The website www.realtonekado.nl is an *affiliate site* for Celldorado¹¹. Celldorado offers SMS services, including 'realtones' for mobile phones and it is a service provided by Artiq Mobile. In order to receive a free ringtone, the consumer had to sign up to a paid subscription by SMS and only the first 'realtone' was free.¹²
15. The websites www.winps3.nl and www.iphonegame.nl are affiliate sites for Wixawin, which is also a provider of SMS services, including competitions and quizzes via text messaging. In order to have a chance of winning the prize being offered, the consumer was required to sign up to a paid subscription by SMS. This subscription meant that he/she received various questions via text message and he/she also had to answer them via text message.¹³
16. The website www.jijwint.nl alternates as an affiliate site for Celldorado and Wixawin. The website also displays links to realtonekado.nl, winps3.nl and iphonegame.nl.¹⁴
17. The name 'OX-2 International' shall hereinafter refer to the sole trader OX-2 International, its legal successor OX-2 International B.V. and Mr. <Managing Director>. The corresponding name shall be referred to where one of these three parties is specifically being referred to.

⁷ Document 137/1, Annex 19.

⁸ Document 137/58.

⁹ Document 137/64.

¹⁰ Documents 137/29, 137/38 and 137/48.

¹¹ An affiliate site is the website provided by an affiliate that displays advertisements from third parties.

¹² Document 137/1, Annexes 5,6,8,13,15.

¹³ Document 137/39, Annex 2, and Document 137/41, Annex 1.

¹⁴ Document 137/5 and Document 137/42.

3 The report

18. The report establishes that OX-2 International did not comply with:

- The statutory information requirements of the Information Society that apply to the provision of services (Article 3:15d, paragraph 1, subsections a, b, c and f and the paragraph 2 of the Dutch Civil Code [BW - *Burgerlijk Wetboek*])
- The statutory information obligations that apply to commercial communications (Article 3:15e, paragraph 1, subsections a, b, c and d of the Dutch Civil Code) and
- The obligations that apply to the sending of unsolicited e-mail messages (Article 7:46h, paragraph 2 and paragraph 4, subsection a of the Dutch Civil Code).

4 Actual scope

19. Within the scope of the investigation, the websites www.realtonekado.nl, www.iphonegame.nl, www.winps3.nl and www.jijwint.nl were investigated on the basis of various data in the period from 14 March 2008 up to and including 7 July 2008. A description of these websites is provided below and the content of the websites is explained. For each website, the actions that needed to be carried out by the consumer and the consequences of these are described and details are also included of the various prizes that could be won.

20. A different website run by OX-2 International is also briefly examined, namely www.megaclips.nl. The content of this website reflects the target audience of OX-2 International. Finally, the e-mail messages that were sent to consumers and the opportunity to place advertisements in these e-mail messages for a fee are examined.

4.1 *Realtonekado.nl*

14 March 2008

21. On 14 March 2008, 17 'realtones'¹⁵ and a wallpaper¹⁶ were offered on the website www.realtonekado.nl.¹⁷ These were advertised as follows:

Click on your selected realtone and get it 100% FREE

The text '100% FREE' was highlighted in a white box.¹⁸

The text 'FREE' featured prominently on each image of a 'realtone'.

22. By clicking on the image of a 'realtone', a window opened containing the text¹⁹:

¹⁵ A 'realtone' is a sound indicating a call (ringtone) on a mobile phone.

¹⁶ A wallpaper is an image on the screen of a mobile phone that may also be referred to as an 'image'. The term 'item' is used as the collective name for wallpapers, ringtones and similar.

¹⁷ Document 137/1, Annex 3.

¹⁸ Document 137/70, Film entitled Realtonekado dated 14 March 2008.

¹⁹ Document 137/1, Annex 4.

Activate your 100% FREE realtone!

Log in now using your MSN details in order to get this 100% FREE realtone right away!

Username:

Password:

I agree to the Terms and Conditions and I am over 16 years of age (or I have obtained permission from a parent/guardian).*

Send!

23. The asterisk following the link entitled Terms and Conditions* does not refer the user to anything. The link opened a PDF-file²⁰ entitled "General Terms and Conditions and key stipulation" which contained the text as follows:

Terms of use of this website

By clicking on the send button and ticking the 'I agree' box relating to our general Terms and Conditions applying to the internet site, you acknowledge that you are fully aware that invitations shall be sent to all your MSN contacts. You declare that the MSN contacts listed in your MSN address book are likely to be interested in a realtone gift.

In order to register and to use this service you must be 16 years or over.

Actually ordering the realtone

In the Netherlands

The first realtone is free. This is a subscription service.

Realtones cost €3.00 each (+ SMS download charges) and you receive 3 realtones per week. No longer want this service? Text STOP to 6464. [...]

24. Once the consumer has clicked on the 'Send!' button, the consumer leaves the www.realtonekado.nl website and is directed to a website from Celldorado on which the consumer may enter and submit his/her mobile number²¹. OX-2 International formulates this as follows:

Finally, at the point that a person clicks <...> and has entered all his/her details, an e-mail will only then be sent once. Then he/she is directed to the Celldorado site²².

Put simply, only that MSN thing is ours²³.

This is ours. This is no longer ours. In other words, this belongs to them²⁴.

25. Once the mobile number has been submitted, a window opened containing the following text:

*Subscribe now and get this RINGTONE FOR FREE^{*25}*

²⁰ Document 137/1, Annex 5.

²¹ Document 137/1, Annex 6.

²² Document 137/112, page 5.

²³ Document 137/112, page 37.

²⁴ Document 137/112, page 38.

²⁵ Document 137/1, Annex 6 and Document 137/70, Film entitled Realtonekado dated 14 March 2008, among others.

26. The asterisk next to the word 'free' initially appears not to refer to anything else. In order to view the text that is referred to, the user must scroll to the foot of the page, where the following text appears – in a smaller font:

This is a subscription service. The first ringtone is free. Items are €3.00 each (= SMS download charges) and three items are sent per week. No longer want this service? Text STOP to 6464.

27. This window that appeared on the homepage of the www.realtonekado.nl contained a link to a Contact page. This link opened a window that contained images and the logo of Celldorado and also a telephone number and a contact form. The link entitled Home in this window opened the Celldorado homepage²⁶.
28. Enforcement officials from the Consumer Authority service requested a free 'realtone' on 14 March 2008 (tweeting chick) via the website www.realtonekado.nl.
29. A contact listed in the address book of the MSN account being used, <name>@live.nl, subsequently received an e-mail²⁷ on 14 March 2008 at 10:20 am, 10:25 am and 11:27 am containing the following text:

*Dear <name>,
You have received a 100% FREE REALTONE from <name>! Click on the link below to receive your FREE realtone right away.
<http://www.realtonekado.nl/?afz==<...>&rt=3&p=<...>@hotmail.com>
Best wishes <...>.
P.S.: If the link does not work, copy and paste it into your address bar.

If you no longer wish to receive these e-mails, please click [here](#).*

9 May 2008 and 4 August 2008

30. On 9 May 2008 and 4 August 2008, the enforcement officers from the Consumer Authority service stated that the website www.realtonekado.nl could not be accessed²⁸.

4.2 Jijwint.nl

14 April 2008/21 April 2008

31. On 14 April 2008, the content of the www.jijwint.nl website was recorded onto a CD-ROM²⁹. On 21 April 2008 this material was investigated.³⁰ On entering the website, a window entitled 'Jijwint.nl – win a Playstation 3 now!!!' appeared, containing the following text:

²⁶ Document 137/1, Annex 10.

²⁷ Document 137/1, Annex 17.

²⁸ Document 137/66 and document 137/68.

²⁹ Document 137/70, Film entitled *jijwint* dated 14 April 2008.

³⁰ Document 137/5.

NEW!!! WIN A PLAYSTATION 3

Enter your details below to activate your chance to win and play right away!

Username:

Password:

I agree to the Terms and Conditions and I am over 16 years of age (or I have obtained permission from a parent/guardian).*

Submit

Answer the question and play to win this PS3.

The following text appeared in a smaller font:

MSN details shall be used solely for the purpose of sending a single invitation to take part in the promotion on this website to all of your MSN contacts. For the complete Terms and Conditions, please see the text above.

The following text appeared below:

See also: realtonekado.nl - winps3.nl - iphonegame.nl.

32. The aforementioned terms and conditions read as follows:

By clicking on the send button and ticking the 'I agree' box relating to our general terms and conditions applying to the internet site, you acknowledge that you are fully aware that invitations shall be sent to all your MSN contacts and that you expressly agree to this .

You declare that the MSN contacts listed in your MSN address book are likely to be interested in the chance to win the prize on offer. <...>

In order to have a chance of winning the prize on offer, you are required to enter your real mobile phone number and then to play and complete the general knowledge quiz. <...>

Jijwint.nl is a publication of

OX-2 International

<address>

Tel: <...> (€0.35 p/m)

E-mail: <...>"

33. The contacts of the MSN user who entered his/her details in the first window received an e-mail containing the following text:

*Hey <name>,
<Name> has offered you the chance to win a new Playstation 3!
Click on the following link for your chance to win:
<http://www.jijwint.nl/afzphp?afz=<...>&name<...>@hotmail.com>
Have fun and win that cool Playstation 3!
Best wishes,
By the way, if the link does not work, simply copy and paste it into your address bar!
If you no longer wish to receive these e-mails, please click [here](#).*

34. The website www.jijwint.nl contained a link to a Wixawin website³¹.

29 April 2008

35. On 29 April 2008, the website www.jijwint.nl was investigated once again³². On entering the website, an image of a lion appeared, accompanied by the following text:

*WIN €500!
Enter your details below to activate your chance to win right away and win that €500!
MSN Username:
MSN Password:
 I agree to the [Terms and Conditions](#)* and I am at least 16 years of age.
Send!
For the Playstation3 click [here](#)*

The following text appeared below in a smaller font:

"Your MSN details shall be used solely for the purpose of sending an invitation to all your MSN contacts. Also see our Terms and Conditions."

36. OX-2 International stated that in this case, the website www.jijwint.nl featured a link to the Celldorado website³³.

13 May 2008

37. On 13 May 2008, the website www.jijwint.nl was investigated was again³⁴. On entering the website, the following text appeared:

³¹ Document 137/5, Annex 4.

³² Document 137/42.

³³ Document 137/112, page 24.

³⁴ Document 137/67.

WIN THIS NEW VESPA!

Enter your details below in order to enter the Celldorado games page now!

MSN Username:

MSN Password:

I agree to the Terms and Conditions and I am at least 16 years of age.*

Send!

The following text appeared in a smaller font:

Your MSN details shall be used solely for the purpose of sending an invitation to your MSN contacts! Terms and Conditions of play | Product costs | Contact

9 May 2008

38 On 9 May 2008, the enforcement officers from the Consumer Authority service stated that the website www.jijwint.nl could not be accessed³⁵.

20 June 2008

39. On 20 June 2008, the website www.jijwint.nl was examined once again.³⁶ On entering the website, the following text appeared:

Play and win!

Enter your details, play the game and win an iPod Touch, Nokia N96 and a Nintendo DS with Brain Training

Enter your details below to activate you chance to win right away and to access our exclusive games page!

MSN Username:

MSN Password:

I agree to the Terms and Conditions and I am at least 16 years of age.*

Send!

WIN THIS GADGET PACKAGE!

The text below it appeared in a smaller font:

Your MSN details shall be used solely for the purpose of sending an invitation to your MSN contacts. Terms and Conditions of play | Product costs | Contact

³⁵ Document 137/66.

³⁶ Document 137/65.

40. The link entitled Contact opened the www.jijwint.nl/contact.html window, which contained the same address details as shown in the General Terms and Conditions (see item number 41) but with the addition of the Chamber of Commerce number³⁷ and the VAT identification number.

41. The link entitled Terms and Conditions of Play opened the www.jijwint.nl/av.pdf which contained the following text:

By clicking on the send button and ticking the 'I agree' box relating to our General Terms and Conditions on the internet site, you acknowledge that you are fully aware that invitations to visit this website shall be sent to all your MSN contacts and that you expressly agree to this .

In order to register and to use this service, you must be 16 years or over.

OX-2 International shall not store your details and shall not use them for any purpose other than to log them on the system and to send invitations to all your MSN contacts.

Immediately after logging in and the e-mail messages being sent, your MSN details shall be completely deleted.

In order to win the prize on offer, you are required to enter your real mobile phone number and to play and complete the general knowledge quiz.

OX-2 International shall observe the Personal Data Protection Act and other legislation and regulations that apply to the services we provide.

Should you no longer wish to receive e-mails regarding this website from your contacts in the future, then click on the link in the e-mail you received or go to <http://www.jijwint.nl/afmelden.php> and enter the e-mail address that you wish to block.

The product following logging in and charges

The first item is free. This is a paid subscription service, costing €3.00 per item, with a maximum of 3 items sent per week. Wish to deregister? Text STOP to 6464. <...> The General and Specific Terms and Conditions of Celldorado apply to this service.

This website is a publication of

OX-2 International

<address details>

Tel: <...> (€0.35 p/m)

E-mail: <...>

Chamber of Commerce no.: 24360169 | VAT: NL150542252B02

42. On the basis of the information behind the link entitled Terms and Conditions of Play, the Consumer Authority deduced that the website www.jijwint.nl was linked to the Celldorado website.

7 July 2008

³⁷ The registration number held in the trade register at the Chamber of Commerce.

43. On 7 July 2008, the content of the website www.jijwint.nl was recorded³⁸. On entering the website, the following text appeared:

Play and win!

Enter your details, play the game and win an iPod Touch, a Nokia N96 and a Nintendo Ds with Brain Training

Enter your details below to activate your chance to win right away and to access our exclusive games page!

Username:
Password:

I agree to the Terms and Conditions and I am at least 16 years of age.*

Send!

WIN THIS GADGET COLLECTION!

The following text appeared below it in a smaller font:

MSN details shall be used solely for the purpose of sending invitations to your MSN contacts!
|Terms and Conditions of Play | Product costs | Contact

44. The link entitled Terms and Conditions* opened the file www.jijwint.nl/av.pdf that contained the same text as that of 20 June 2008. The Chamber of Commerce number and the VAT registration number had been added.
45. The Consumer Authority noted that the website www.jijwint.nl was linked to a Celldorado website.
46. The link entitled Terms and Conditions of Play opened a Celldorado window www.celldorado.com/NL/ADS/196940299/special_terms.php, which stated among other things: "*Participants in this promotion could win an LCD TV, Playstation 3 and a football game*", which does not correspond with the text that appears on the homepage of the website.
47. The link entitled Product charges opened an html-file entitled www.ekpakket/contact.html#kosten, in which it was stated that this was a subscription service, involving a download credit of a maximum of 9 credits, at €9.00 per week that could be used to download selected items from the www.megaclub.com (at a cost of 3 credits per item).
48. The link entitled Contact opened a window www.jijwint.nl/contact.html which showed the same details as given in the General Terms and Conditions, see item number 41.

³⁸ Document 137/70, Film entitled Jijwint, dated 7 July 2008.

4 August 2008

49. On 4 August 2008, the enforcement officers of the Consumer Authority stated that the website www.jijwint.nl could not be accessed.³⁹

4.3 Winps3.nl

29 April 2008

50. On 29 April 2008, the website www.winps3.nl was investigated.⁴⁰ On entering the website www.winps3.nl, the following text appeared:

NEW!!! WIN A PLAYSTATION 3

Enter your details below and activate your chance to win right way and play now!

Username:

Password:

I agree to the Terms and Conditions and I am over 16 years of age (or I have obtained permission from a parent/guardian).*

Send

Answer the question and play to win this PS3

The following text appeared below in smaller font:

MSN details shall be used solely for the purpose of sending one-off invitations to become a user of this website to all your MSN contacts. For the complete Terms and Conditions, see the link stated above.

51. These terms and conditions read as follows:

By clicking on the send button and ticking the 'I agree' box relating to our General Terms and Conditions applying to the internet site, you acknowledge that you are fully aware that invitations shall be sent to all your MSN contacts. You declare that the MSN contacts listed in your MSN address book are likely to be interested in the chance to win the prize being offered.

In order to register and to use this service, you must be 18 or over.

You also declare that you expressly agree to receive e-mail advertisements in the future.

<...>

Winps3.nl is a publication of

OX-2 International

<telephone number> (€0.35 p/m)

³⁹ Document 137/68.

⁴⁰ Document 137/37.

52. Once the MSN details have been entered and submitted, a window opened in which the consumer was required to answer a simple question, enter his/her mobile phone number and could submit these details.
53. Once the customer had entered his/her MSN address and password, all contacts that were listed in his/her MSN address book received an e-mail. The e-mail message was sent by OX-2 International but appeared to have been sent by the consumer due to the appearance of the e-mail address:

*Hey <name>,
<Name> has offered you the chance to win a new Playstation 3!
For your chance to win, click on the following link:
<http://www.winps3.nl/afz.php?afz=<...>&name<...>@hotmail.com>*

*Have fun and win this cool Playstation 3!
Best wishes,
By the way, if the link does not work, you can also copy and paste it into your address bar!
If you no longer wish to receive these e-mails, please click here.*

22 April 2008

54. On 22 April 2008, the website www.winps3.nl was also examined.⁴¹ Once the requested MSN details had been entered, a window appeared with a scrollbar alongside it. By scrolling to the foot of this window, a block of text became visible that contained information with regard to SMS services and that was displayed in small letters and in a colour that proved difficult to read against the background being used. It also contained to link to General Terms and Conditions. This link opened the terms and conditions of the provider of the SMS service, Wixawin.

9 May 2008 and 4 August 2008

55. On 9 May 2008 and 4 August 2008, the enforcement officers of the Consumer Authority Service stated that the website www.winps3.nl could not be accessed.⁴²

⁴¹ Document 137/39

⁴² Document 137/66 and Document 137/68

4.4 Iphonegame.nl

29 April 2008

56. On 29 April 2008, the website www.iphonegame.nl was examined.⁴³ On entering the website, the following text appeared:

*Win this iPhone
Would you like to win this iPhone?
Enter your details below to activate your chance to win and play right away for this cool, brand-new iPhone!
Username:
Password:
 I agree to the Terms and Conditions* and I am at least 16 years of age.
Activate chance to win!*

57 The terms and conditions read as follows:

By clicking on the 'Activate chance to win!' button and ticking the 'I agree' box relating to our General Terms and Conditions applying to the internet site, you acknowledge that you are fully aware that invitations shall be sent to all your MSN contacts. You declare that the MSN contacts listed in your MSN address book are likely to be interested in the chance to win the prize being offered.

In order to register and to use this service you must be 16 or over.

You also declare that you expressly agree to receive e-mail advertisements in the future.

This website is a publication of

OX-2 International

Tel. <number> (€0.35 p/m)

58. Once the MSN details have been entered and submitted, a window opened in which the consumer is required to answer a simple question, enter his/her mobile phone number and could submit these details.

59. The contacts in the address book of the MSN user who entered his/her details in the first window received an e-mail message containing the following text:

⁴³ Document 137/36.

Dear <name>,
 Would you like to win an iPhone just like I do?
 Click on the link below for the chance to win your iPhone right away!
<http://www.iphonegame.nl/afz.php?afz=<...>&name=<...>@hotmail.com>

Best wishes <...>
 P.S: If the link does not work... Simply copy and paste it into your address bar.
 If you no longer wish to receive these e-mails, please click here.

22 April 2008

60. On 22 April 2008, the website www.iphonegame.nl was also examined⁴⁴. Once the requested MSN details have been submitted, a window appeared with a *scrollbar* alongside it.

61. By scrolling to the foot of this window, a block of text became visible that contained information with regard to the SMS service and that was displayed in small letters and in a colour that proved difficult to read against the background being used. The window also contained a link to the Terms and Conditions, which opened the terms and conditions of the SMS service-provider, Wixawin.

9 May 2008 and 4 August 2008

62. On 9 May 2008 and 4 August 2008, the enforcement officers of the Consumer Authority service noted that the website www.iphonegame.nl could not be accessed⁴⁵.

4.5 Megaclips.nl

63. Megaclips.nl is a website that provides video clips to consumers. OX-2 International also offers companies the opportunity to advertise on this website.

29 April 2008

64. On 29 April 2008, the website www.megaclips.nl was examined⁴⁶.

65. On the left-hand side of the homepage of the website, an eye-catching link appears in red capital letters, stating FREE REALTONES! This link opened the website www.realtonekado.nl.

66. A link to Advertise appears underneath, which opens the window www.megaclips.nl/adverteren.php. This contained the following text:

⁴⁴ Document 137/41.

⁴⁵ Document 137/66 and document 137/68.

⁴⁶ Document 137/4.

*Advertise on megaclips.nl
Megaclips.nl is website of **OX-2 International** that is able to reach a huge number of young consumers in the 12-23 age group.
Advertising on Megaclips.nl is therefore a smart choice that will enable you to reach your target group quickly. Please contact us if you would like further information about the options available.*

67. Underneath the link entitled Advertise, there appeared a link entitled Contact us that opened a window to www.megaclips.nl/contact.php and which contained the following text:

*Megaclips is a publication of OX-2 International
For further information about Megaclips.nl or about OX-2 International, just contact us using the details given below.*

4.6 Provision of advertising space

68. Advertisements from third parties may be included in the e-mails that are sent to consumers (see item numbers 29, 33, 53 and 59).

On 8 October 2007, the following offer appeared on the TBForum⁴⁷ website:

*Hello,
We provide advertising space in e-mails that are sent via our network. Advertising spots are sold by the day.
Most e-mails are sent via MSN-invite.
The advertisement takes the form of a TEXT advertisement containing a maximum of 150 characters, which appears at the end of an e-mail.
<example>
Advertising is charged at €100 per day.
This works out at only 0.001 per e-mail
A maximum of 1 advertisement may be placed per e-mail.*

69. On 9 October 2007, the Director posted the following message:

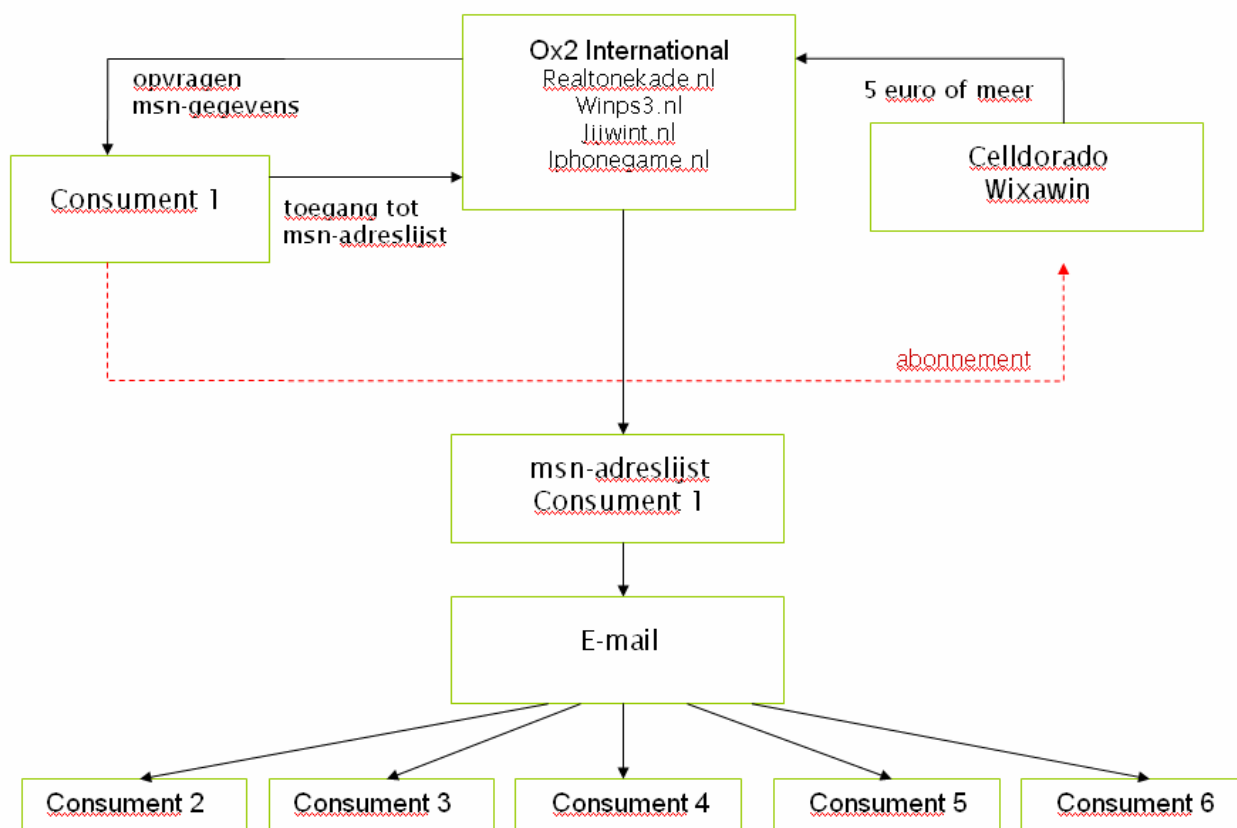
⁴⁷ Document 137/1, Annex 21. TBForum is a website for Webmasters that offers products including domain names and advertisements and on which internet-related news items are posted.

Here is another brief explanation of how it works:

1. The user visits the website
2. The user would like to tell their MSN contacts about the website
3. The user activates MSN-invite by entering his/her username and password
4. The user's contacts receive an e-mail
5. The MSN address of the user appears as the sender of the e-mail

4.7 Schematic Overview

70. The mode of operation of OX-2 International is summarised schematically in the diagram below.



Key to diagram

NL

Opvragen MSN-gegevens
Consument 1
Toegang tot msn-adreslijst
MSN-adreslijst Consument 1
Abonnement
5 euro of meer
E-mail

EN

Request for MSN details
Consumer 1
Access to MSN address book
MSN address book of Consumer 1
Subscription
5 euros or more
E-mail

4.8 Offers on the websites

71. The offers on the website varied regularly. On the website www.jijwint.nl, for example, a Playstation 3 was on offer in 14 April 2008, on 29 April 2008, €500 cash was offered, while on 13 May 2008, a new Vespa could be won and on 20 June a prize known as a 'gadget package' was on offer.⁴⁸
72. Of the complaints filed with the Independent Post and Telecommunications Authority⁴⁹ (OPTA [*Onafhankelijke Post en Telecommunicatie Autoriteit*]), it emerged that in each case between 24 February 2008 and 2 April 2008, a free DELL laptop was on offer, while in each case between 28 May 2008 and 5 June 2008 a 'special European Football Championship package' consisting of a Sony LCD TV, a Playstation 3 and a football game was offered.

4.9 Unsolicited sending of e-mails

73. E-mails as referred to in item number 68 were sent to consumers without them having given their consent.
74. OPTA received more than 20 complaints about OX-2 International with regard to the sent e-mails in the period from 20 February up to and including 4 April 2008.⁵⁰

4.10 The appearance of the sender of the e-mails

75. The e-mails as referred to in item number 68 displayed the sender address in such a way that it appeared as though the e-mail had been sent by one of the recipient's contacts. This impression was enhanced by the informal tone of the content of the e-mails, which suggested some personal involvement with the sender.
76. Consumers have stated the following with regard to this matter:

*Tipje100 is one of my contacts, but she told me later on that she had not sent that e-mail and that she is also receiving this kind of e-mail.*⁵¹

*I did not suspect a thing and I clicked on the link in good faith, as it had come from <name altered>*⁵²

*I have been receiving many e-mails lately about the chance to win a laptop on www.jijwint.nl that appeared to have come from my pals on MSN*⁵³

⁴⁸ Documents 137/5, 137.42, 137/67 and 137/65 respectively

⁴⁹ Document 137/81

⁵⁰ Document 137/81, see complaint numbers 44367 (realtonekado, of 20 February 2008), 44394 (ditto, of 21 February 2008), 46093 (jijwint.nl, playstation, of 10 April 2008) and 46531 (jijwint.nl, 500 euros, of 27 April 2008) in particular.

⁵¹ Document 137/49, page 6, Forum Computergenie.nl, 21 February 2008.

⁵² Document 137/49, page 10, Blog: Waarschuwing voor Wixawin [*Beware of Wixawin*] of 13 April 2008

⁵³ Document 137/49, page 19, msn-messenger.startpagina.nl/prikbord, of 26 March 2008

5. The view of OX-2 International

77. Following the report, OX-2 International briefly stated the following at the hearing that took place on 16 October 2008.⁵⁴
78. OX-2 International has been active since end of September/beginning of October 2007 with the websites www.realtonekado.nl, www.jijwint.nl, www.winps3.nl and www.iphonegame.nl. The websites have always taken the same form and stated the same details and terms and conditions.
79. OX-2 International had read the report and noted that it did not contain any matters that it was unaware of. During the visit to its premises, it emerged that the VAT registration number was not stated on the websites and this was immediately rectified. OX-2 International also repeatedly requested to know what precisely was supposed to be wrong with the websites, but the Consumer Authority has given no response to this. If the Consumer Authority were to explain the requirements that the websites must meet, OX-2 International would then adapt the websites accordingly.
80. The sending of e-mails to MSN contacts does not depend on whether or not the consumer enters into a subscription. As soon as the consumer's MSN details have been entered and submitted, an e-mail is sent to all the contacts of that person.
81. OX-2 International uses a single set of (General) Terms and Conditions, namely the terms and conditions attached to the link in the window in which the consumer may enter his/her MSN details. OX-2 International does not use any other terms and conditions.
82. There is no specific reason as to why the websites could not be accessed on 9 May 2008 and 4 August 2008. It may have been the case that there was a technical fault. After 4 August 2008, the websites could still be accessed.
83. The sole trader OX-2 International no longer exists. OX-2 International is now a B.V. [*besloten vennootschap* - limited company] with the Mr. <Managing Director> as the sole director and the sole employee. The sole shareholder is OX-2 International Beheer B.V., of which Mr. <Managing Director> is the sole shareholder.
84. OX-2 International appeared before the Advertising Code Committee [*Reclame Code Commissie*] some time ago following a complaint regarding the use of MSN details. The Advertising Code Committee handed down its ruling on 5 August 2008 and approved this type of use. A copy of this ruling has been passed to the Appeals Board of the Consumer Authority.⁵⁵

6 Legal Considerations

6.1 Powers

⁵⁴ Document 137/122.

⁵⁵ Document 137/121.

85. The Consumer Authority is charged with the enforcement of statutory stipulations on the grounds of Article 2.2 of the Act on enforcement of consumer protection law (Whc [*Wet handhaving consumentenbescherming*]), referred to in sections a and b of the Annex to that Act. The breaches that were identified in the report are stated in Section b of the Annex to the Whc, which the Consumer Authority may enforce under administrative law.
86. The Consumer Authority may take action if there is evidence of actions or failure to act that is harmful to or may cause harm to the collective interests of consumers. The mode of operation of OX-2 International, the use of the internet and e-mail traffic for advertising purposes is characterised by the fact that many consumers have been affected or may be affected in the same way, and in doing so there is evidence of a potential contravention of the collective interests of consumers.
87. Needless to say, the Consumer Authority notes that, according to a statement from Microsoft, there are approximately 6 million MSN users in the Netherlands and one MSN user has, on average, 80 people listed in their address book⁵⁶.
88. The information relating to the affiliate networks ADSMarket and ZanoX (see item number 158 and the following) also provides an insight in the number of consumers that have been affected by the mode of operation of OX-2 International.
89. In Article 4.1, paragraph 1 of the Act on enforcement of consumer protection law (Whc [*Wet handhaving consumentenbescherming*]), the Tax and Customs Administration [*Belastingdienst*]/FIOD-ECD [*Fiscal Information and Investigation Service and Economic Investigation Service - Fiscale inlichtingen- en opsporingsdienst en Economische controledienst*] and the Independent Post and Telecommunications Authority (OPTA) have been designated as constituting a government body in the sense of Article 4, paragraph 2 of the Regulation 2006/2004. The FIOD-ECD may take enforcing action with regard to Article 3:15 of the Dutch Civil Code [*Burgerlijk Wetboek – BW*] and OPTA may do so with regard to Article 11.7 of the Telecommunications Act [*Telecommunicatiewet*]. The Consumer Authority likewise has enforcing powers. With due regard to the provisions set out in Article 4.2, paragraph 2 of the Act on enforcement of consumer protection law (Whc [*Wet handhaving consumentenbescherming*]), the Consumer Authority launched an investigation into any breaches.⁵⁷

6.2 Statutory information requirements in the case of a service that forms part of the information society

90. Article 3:15d, paragraph 1 of the Dutch Civil Code [BW - *Burgerlijk Wetboek*] stipulates that an entity that provides a service that forms part of the information society shall make the following details accessible in a simple, permanent and direct manner:
- a. *the identity and the address of its registered office*
 - b. *details that enable swift contact and a direct and effective means of communication with the company*

⁵⁶ Document 137/75.

⁵⁷ Document 137/33 and document 137/80.

- c. *the register in which the company is registered and its registration number, in so far as the company is registered in a trade register or a similar public register, or a similar means of identification in that register (the Chamber of Commerce number) and [...]*
- f. *the VAT registration number as referred to in Article 2a, paragraph 1, subsection g, of the Turnover Tax Act 1968, in so far as the company undertakes an activity that is subject to VAT.*

91. Article 3:15d, paragraph 2 of the Dutch Civil Code stipulates that prices shall be indicated in a clear and unambiguous manner, stating explicitly whether tax and delivery charges are included in the price, and if possible, which ones.

92. The *online* provision of SMS services and the online provision of information or commercial communication are deemed to be services that form part of the information society.⁵⁸

93. The Explanatory Memorandum to Article 3:15d, paragraph 1 of the Dutch Civil Code, states that the requirements with regard to permanent access are met if the details are available continuously in a place that may be easily accessed by consumers and are updated as necessary, for example on a website that may be accessed by the general public. The one-off provision of information is not sufficient in this regard⁵⁹.

94. Furthermore, the Explanatory Memorandum deems details to be accessible in a simple and direct manner if these details and their location are presented in a clear and recognisable form.⁶⁰

6.2.1 Stating the identity, registered office address, contact details, public registration and VAT registration number (see Article 3:15d, paragraph 1, subsections a, b, c and f of the Dutch Civil Code [BW - Burgerlijk Wetboek])

Realtonekado.nl

95. The website www.realtonekado.nl did not state any of the details as referred to in Article 3:15d, paragraph 1 subsections a, b, c and f of the Dutch Civil Code on 14 March 2008.⁶¹

96. During the visit to the premises of OX-2 International on the 29 April 2008, the Director declared the following:

I just have my address details, but they're not on realtone.nl. That really needs to be sorted out as soon as possible⁶².

97. On 11 June 2008, the Consumer Authority received the 'Promo tool files'⁶³ from OX-2 International by e-mail. These files are the source files for the four websites, complete with the *tool* or the script that is used for personalising e-mails automatically. The folder 'bestanden promotool/Realtonekado.nl'

⁵⁸ Parliamentary Papers II, 28197 2001-2002, no.3, page 40.

⁵⁹ Parliamentary Papers II, 28197 2001-2002, no. 3, page 37.

⁶⁰ Parliamentary Papers II, 28197 2001-2002, no.3. pages 37-38.

⁶¹ Document 137/1.

⁶² Document 137/112, page 10.

⁶³ Document 137/43.

(promotool files) also contained the file 'AV.pdf' (the General Terms and Conditions) dated 10 April 2008. The relevant details were missing in this file too.

Jijwint.nl

98. The website www.jijwint.nl stated the identity and the address of the registered office (Article 3:15d, paragraph 1, subsection a of the Dutch Civil Code) and contact details (Article 3:15d, paragraph 1, subsection b of the Dutch Civil Code) in the General Terms and Conditions⁶⁴. The Chamber of Commerce number and the VAT registration number were missing.

99. On 20 June 2008, it was established that the Chamber of Commerce number (paragraph 1, subsection c) and the VAT registration number (paragraph 1, subsection f) had been added.⁶⁵

Winps3.nl

100. On 29 April 2008, the website www.winps3.nl only stated the identity (Article 3:15d, paragraph 1, subsection a of the Dutch Civil Code) and telephone number (Article 3:15d, paragraph 1, subsection b of the Dutch Civil Code). The address of the registered office was not stated (Article 3:15d, paragraph 1, subsection a of the Dutch Civil Code) and there was no e-mail address available (Article 3:15d, paragraph 1, subsection b of the Dutch Civil Code). The Chamber of Commerce number (Article 3:15d paragraph 1, subsection c of the Dutch Civil Code) and the VAT registration number (Article 3:15d, paragraph 1, subsection f of the Dutch Civil Code) were also missing.⁶⁶

Iphonegame.nl

101. The website iphonegame.nl only stated the identity (Article 3:15d, paragraph 1, subsection a of the Dutch Civil Code) and a telephone number (Article 3:15d, paragraph 1, subsection b of the Dutch Civil Code). No address of a registered office was provided (Article 3:15d, paragraph 1, subsection a of the Dutch Civil Code) nor an e-mail address (Article 3:15d, paragraph 1, subsection b of the Dutch Civil Code). The Chamber of Commerce number (Article 3:15d, paragraph 1, subsection c of the Dutch Civil Code) and the VAT registration number (Article 3:15d, paragraph 1, subsection f of the Dutch Civil Code) were not stated.⁶⁷

Conclusion of the Consumer Authority with regard to Article 3:15d, paragraph 1 of the Dutch Civil Code

102. The Consumer Authority has determined that OX-2 International has not met the stipulations of Article 3:15d, paragraph 1, subsections a, b, c and f of the Dutch Civil Code with regard to the website www.realtonekado.nl

103. The Consumer Authority has determined that OX-2 International provided the details as referred to in Article 3:15d, paragraph 1, subsections a and b of the Dutch Civil Code, attached to the link entitled Terms and Conditions* on www.jijwint.nl, but it did not comply with the stipulations of Article 3:15d, paragraph 1, subsections c and f of the Dutch Civil Code on 29 April 2008.

⁶⁴ Document 137/55.

⁶⁵ Document 137/65.

⁶⁶ Document 137/37.

⁶⁷ Document 137/36.

104. The Consumer Authority has determined that OX-2 International has not fulfilled the stipulations of Article 3:15d, paragraph 1, subsection a of the Dutch Civil Code with regard to the websites www.winps3.nl and www.iphonegame.nl by failing to state the address of its registered office, nor the stipulations of Article 3:15d, paragraph 1, subsection b of the Dutch Civil Code by failing to state an e-mail address, nor the stipulations of Article 3:15d, paragraph 1, subsections c and f of the Dutch Civil Code.

6.2.2 Indication of the price and the associated charges (Article 3:15d, second paragraph, Dutch Civil Code [BW - *Burgerlijk Wetboek*])

105. OX-2 International appears as an affiliate for Celldorado on the website www.realtonekado.nl, for Wixawin on the websites ww.winps3.nl and www.iphonegame.nl and appears as an affiliate for both Celldorado and Wixawin on the website www.jijwint.nl.

106. Once the consumer has entered his/her MSN details, ticked the box next to the Terms and Conditions and clicked the 'Send' or 'Activate' buttons, he/she is directed to a website run by Celldorado or Wixawin. At this point, the consumer enters into a subscription by SMS if he/she chooses to take up the offer of a free ringtone or to take part in the quiz or competition.

Conclusions of the Consumer Authority

107. The Consumer Authority determined that free ringtones were offered on the website www.realtonekado.nl. However, if the link entitled Terms and Conditions* is opened, it is stated that the free 'realtone' is only provided if the user enters into a subscription in which a charge of €3.00 applies per 'realtone' and 3 'realtones' are sent per week until the subscription is cancelled. The 'realtone' was in fact only free on the condition that the user signed up to a subscription.

108. With regard to the website www.jijwint.nl, the Consumer Authority determined that OX-2 International offered the chance to participate in a game without directly and visibly stating that charges were involved. The offer read as follows: "*Enter your details, play the game and win*". On 20 June 2008⁶⁸, it was established that OX-2 International did in fact state in the General Terms and Conditions that this was a paid subscription service. On 7 July 2008, the fact that a paid subscription by SMS of €9.00 per week in addition to a one-off subscription fee of €3.00 was involved was included under the link entitled Contact⁶⁹. OX-2 International also stated under the link to Terms and Conditions that a paid subscription by SMS consisting of a maximum of 3 items per week at a cost of €3.00 per item was involved. The sign-up fees were not mentioned but the download charges were.

109. With regard to the websites www.realtonekado.nl and www.jijwint.nl, the Consumer Authority determined that OX-2 International did not comply with Article 3:15d, paragraph 2 of the Dutch Civil Code by failing to provide clear and unambiguous indication of prices.

⁶⁸ Document 137/36

⁶⁹ Document 137/70, Film 'jijwint' of 7 July 2008, window entitled www.ekpakket.nl/contact.html#kosten

110. With regard to the websites www.winps3.nl and www.iphonegame.nl, the consumer is only able to retrieve information relating to the charges once he/she has entered and submitted his/her MSN details and has been directed to the Wixawin website.

6.3 The extent to which the company's identity and the Terms and Conditions of the offer are recognisable and identifiable in commercial communications (under Article 3:15e, paragraph 1, subsections a, b, c and d of the Dutch Civil Code [BW - Burgerlijk Wetboek])

111. Article 3:15e, paragraph 1 of the Dutch Civil Code aims to lay down regulations in the interests of the consumer and focusing on the fairness of transactions⁷⁰. Paragraph 1 of this Article pertains to the extent to which commercial communication through electronic channels is recognisable and clear and serves to provide general protection for the public from misleading advertisements and any unfair consequences of this.

112. Consumers are offered a free 'realtone' on the website www.realtonekado.nl by means of images⁷¹. Once consumers clicked on the image, a window opened in which the consumer was required to fill in his/her MSN details⁷². Once the consumer submitted his/her MSN details, he/she was directed to a website run by Celldorado.

113. On the websites www.jijwint.nl, www.winps3.nl and www.iphone.nl, the consumer was offered the chance to participate in a competition or a quiz⁷³. Once the consumer had submitted his/her MSN details, he/she was directed to a website run by Celldorado or Wixawin.

114. In both cases, the consumer had to enter into a paid subscription by SMS in order to be able to take up the offer. The charges relating to this subscription amounted to €3.00 per item with 3 items per week in addition to download charges for a realtone-subscription. In the case of quiz subscriptions, the consumer was charged €1.50 per message received and €0.25 per sent message with 8 questions being sent per month.

115. OX-2 International used the MSN details that were submitted and sent an e-mail to all the contacts included in the consumer's address book, irrespective of whether or not the consumer had completed the ordering process.

116. The e-mail displayed the e-mail address of the sender as that of one of the recipient's contacts and the subject box contained the text: '*FREE realtone*'⁷⁴, '*<name> has given you the chance to win a Playstation 3!*'⁷⁵, '*<name> has given you the chance to win a Playstation 3!*'⁷⁶ and '*Win an iPhone!*'⁷⁷

⁷⁰ Parliamentary Papers II, 28 197, no.3, p.41.

⁷¹ Document 137/1, Annex 3.

⁷² Document 137, Annex 4.

⁷³ Documents 137/5, Annex 1, 137/42, 137/65, 137/36, Annex 1, 137/70, Films entitled 'jijwint of 14 April 2008', 'winps3 of 29 April 2008', 'iphone game of 29 April 2008' and 'jijwint of 7 July 2008'.

⁷⁴ Document 137/1, Annex 1 (message of 12 October 2007) and Annex 17 (messages 14 March 2008).

⁷⁵ Document 137/5, Annex 5 (message of 14 April 2008).

⁷⁶ Document 137/37, Annex 4, (message of 29 April 2008).

⁷⁷ Document 137/36, Annex 5.

117. The e-mails were intended to lure as many consumers as possible to the Celldorado and Wixawin websites in question so that they could sign up to a subscription by SMS. OX-2 International received a fee each time a consumer signed up to a subscription. During the visit to the premises on 29 April 2008, the Director stated the following with regard to the use of MSN details:

It is purely and simply advertising⁷⁸

All that we do is to guide people to a website run by Celldorado⁷⁹

What we are doing is entirely promotional⁸⁰

This does however constitute commercial communication in the sense of Article 3:15e, paragraph 3 of the Dutch Civil Code.

118. The aim of the emails was to promote the sale of a product, namely the sale of subscriptions by SMS.

119. E-mails with a link to the Celldorado website contained an offer, namely for a free 'realtone'. What was not stated, however, was the fact that the free 'realtone' could only be obtained by means of signing up to a subscription by SMS that involved a maximum of 3 items per week at a cost of €3.00 per item in addition to download charges.⁸¹

120. E-mails with a link to a website run by Wixawin contained an invitation to participate in a competition or a game. What was not stated was the fact that the consumer was only able to compete for the prize on offer if he/she signed up to a subscription by SMS involving participation in a competition or quiz in which 8 questions per month had to be answered, at a cost of €1.50 per received message and €0.25 per sent message.⁸²

121. The e-mail displayed the address in such a way that it appeared as though it had come from one of the recipient's contacts. See paragraph 4.10 in relation to this.

122. E-mails were sent entirely at the initiative of OX-2 International and the permission of the recipients had not been sought. Therefore, this involved unsolicited communication in the sense of Article 3:15e, paragraph 1, subsection b of the Dutch Civil Code.

Conclusions of the Consumer Authority

123. The Consumer Authority determined that, with regard to the e-mails that were sent via the websites www.realtonekado.nl, www.jijwint.nl, www.winps3.nl and www.iphonegame.nl, OX-2 International had not fulfilled the stipulations of Articles

- 1) 3:15e, paragraph 1, subsection a of the Dutch Civil Code, that any commercial communication
- 2) 3:15e, paragraph 1, subsection b of the Dutch Civil Code, that the identity must be stated in any commercial communication

⁷⁸ Document 137/112, page 5.

⁷⁹ Document 137/112, page 14.

⁸⁰ Document 137/112, page 24.

⁸¹ Document 137/1, Annexes 6,8, 13

⁸² Document 137/36, Annex 4, Document 137/39, Annex 1, and Document 137/41, Annex 1.

- 3) 3:15e, paragraph 1, subsection c of the Dutch Civil Code, that any commercial communication containing promotional offers, competitions or games must state clearly and unambiguously what the terms and conditions of use are
- 4) 3:15e, paragraph 1, subsection d of the Dutch Civil Code, that any unsolicited commercial communication by means of e-mail must be clearly and unambiguously recognisable as such on receipt.

6.4 Unsolicited commercial communication (Article 7:46h in conjunction with 7:46i, paragraph 1 of the Dutch Civil Code [BW - Burgerlijk Wetboek])

124. Article 7:46a, subsection a of the Dutch Civil Code, defines a distance contract as a contract that is concluded involving the exclusive use of one or more means of communication at a distance up to and including the point of its conclusion. Article 7:46a, subsection b of the Dutch Civil Code defines a distance purchase as a contract that involves a consumer purchase.
125. Article 7:46h of the Dutch Civil Code relates to the regulations regarding unsolicited commercial communication with the focus on the manner in which a distance purchase comes into being. Article 7:46h, paragraph 2 of the Dutch Civil Code relates to approaching natural persons who do not conduct business using commercial communication in the course of their profession or business (i.e. consumers).
126. Article 7:46i, paragraph 1 of the Dutch Civil Code states that this provision shall apply *mutatis mutandis* to a contract to carry out services.
127. Consumers who entered into a contract with Celldorado via the websites www.realtonekado.nl or www.jijwint.nl signed up to a subscription by SMS that involved a maximum of three items per week, at a cost of €3.00 per item in addition to download charges.
128. Consumers who entered into a contract with Wixawin via the websites www.jijwint.nl, www.winps3.nl or www.iphonegame.nl signed up to a subscription by SMS that involved participating in quizzes in which questions had to be answered by text message at a cost of €1.50 per received message and €0.25 per sent message.
129. These contracts are deemed to constitute distance contracts to carry out services.
130. OX-2 International advertises these services on its websites⁸³ and by means of sending e-mails to contacts listed in the MSN address books of consumers who enter their MSN details on one of these websites. These contacts received an e-mail inviting them to visit the websites because they “*have received a free realtone*”⁸⁴, “*(have) a chance to win a free Playstation 3*”⁸⁵ or they “*have a chance to win a Playstation 3*”⁸⁶.

⁸³ Document 137/112, page 24: “*What we are doing is entirely promotional*”.

⁸⁴ 137/1, Annex 1 (12 October 2007) and Annex 17 (14 March 2007).

⁸⁵ Document 137/5, Annex 5 (14 April 2008).

⁸⁶ Document 137/37, Annex 4 (29 April 2008) and document 137/39, Annex 3 (22 April 2008).

131. These e-mails were sent entirely at the initiative of OX-2 International and the permission of the recipients had not been sought. The e-mails were sent automatically and without human intervention.
132. The Consumer Authority is of the opinion that the e-mails and the websites alike, were directed at natural persons. This appeared to be the case, not only because of the medium that was used (MSN) but also because of the offers on the websites, such as free 'realtones' and gadgets. This was also apparent from the description that OX-2 International provided itself on its www.megaclips.nl website: "*young consumers [...] in the 12-23 age group*"⁸⁷.
133. The e-mails constitute unsolicited commercial communication as referred to in Article 7:46h, paragraph 2 of the Dutch Civil Code, aimed at promoting distance purchasing, namely signing up to subscriptions by SMS.
134. The e-mails displayed the address in such a way that it appeared as though they had come from one of the recipient's contacts. See paragraph 4.10 in relation to this.
135. The actual sender of the message, OX-2 International, is not named as the sender nor is it named in the text contained within the e-mail.

Conclusions of the Consumer Authority

136. The Consumer Authority determined that, with regard to the e-mails that were sent via the websites www.realtonekado.nl, www.jijwint.nl, www.winps3.nl and iphonegame.nl, OX-2 International did not fulfil the stipulations of Article 7:46h, paragraph 2 of the Dutch Civil Code as consent had not been obtained from the recipients of the e-mails.
137. Contrary to the opinion held by OX-2 International⁸⁸ the consent of recipients may not be replaced by consent given by a third party. Article 7:46h, paragraph 2 of the Dutch Civil Code stipulates that the transmission of unsolicited communication to a natural person shall only be permitted in the event that the person in question has given his/her consent to receive this. This article therefore pertains to the recipient of the unsolicited e-mails. As established in the previous item number, the consent of the recipient had not been obtained in this case.
138. Nor does the argument put forward by OX-2 International that the consumer actually sent the e-mails as opposed to OX-2 International have any grounding in reality⁸⁹. OX-2 stated in small to very small font, at the foot of the windows in which the MSN details needed to be entered or under the link entitled Terms and Conditions* that the details would be used in order to send e-mails to MSN contacts⁹⁰. According to the Consumer Authority, this does not mean that the consumer then became the sender of these messages.

⁸⁷ Document 137/4.

⁸⁸ Document 137/122, page 5.

⁸⁹ Document 137/122, page 21.

⁹⁰ Document 137/1, Annex 5, Document 137/5, Document 137/36, Annex 2, Document 137/37, Annex 1, Document 137/65, Document 137/67, Document 137/70, Film 'jijwint' of 7 July 2008.

139. The Consumer Authority determined that OX-2 International, with regard to the websites www.realtonekado.nl, www.jijwint.nl, www.winps3.nl and www.iphonegame.nl, did not fulfil the stipulations of Article 7:46h, paragraph 4, subsection a of the Dutch Civil Code, as the real identity of the entity on whose part the communication was sent, namely OX-2 International, was not named.

7 Conclusions

140. The Consumer Authority concluded that OX-2 International has acted in contravention of the following Articles:

Article 8.2, paragraph 1 of the Act on enforcement of consumer protection law [Whc – *Wet handhaving consumentenbescherming*], in conjunction with Article

1. 3:15d, paragraph 1, subsection a of the Dutch Civil Code [*BW - Burgerlijk Wetboek*] (identity and address of registered office)
2. 3:15d, paragraph 1, subsection b of the Dutch Civil Code (contact details)
3. 3:15d, paragraph 1, subsection c of the Dutch Civil Code (Chamber of Commerce number)
4. 3:15d, paragraph 1, subsection f of the Dutch Civil Code (VAT registration number)
5. 3:15d, paragraph 2 of the Dutch Civil Code (price, taxes and delivery charges)

Article 8.2, paragraph 2 of the Act on enforcement of consumer protection law [Whc – *Wet handhaving consumentenbescherming*], in conjunction with Article

6. 3:15e, paragraph 1, subsection a of the Dutch Civil Code (clear and recognisable)
7. 3:15e, paragraph 1, subsection b of the Dutch Civil Code (identity)
8. 3:15e, paragraph 1, subsection c of the Dutch Civil Code (nature and Terms and Conditions relating to the offer)
9. 3:15e, paragraph, subsection d of the Dutch Civil Code (clear and recognisable on receipt)

Article 8.5, paragraph 2 of the Act on enforcement of consumer protection law [Whc – *Wet handhaving consumentenbescherming*], in conjunction with Article

10. 7:46h, paragraph 2, in conjunction with 7:46i of the Dutch Civil Code (consent of the recipient) and
11. 7:46h, paragraph 4, subsection a, in conjunction with 7:46i of the Dutch Civil Code (identity of the sender)

8 Measures

141. Pursuant to Article 2.9, paragraph 1 of the Act on enforcement of consumer protection law [Whc – *Wet handhaving consumentenbescherming*] the Consumer Authority is able to impose a penalty on a daily basis (in case of non-compliance) and/or an administrative fine on the transgressor, if it is of the opinion that a contravention has taken place.
142. In this case, there is no evidence of there being a situation in which a penalty on a daily basis or administrative fine may not be imposed, as referred to in Article 2.16, paragraphs 1 and 2 of the Act on enforcement of consumer protection law [Whc – *Wet handhaving consumentenbescherming*] and Article 2.19, paragraphs 1, 2, 4 and 5 of the Act on enforcement of consumer protection law.

8.1 Administrative fine

143. The Consumer Authority is authorised to impose fines pursuant to Article 2.15 of the Act on enforcement of consumer protection law [Whc – *Wet handhaving consumentenbescherming*] not exceeding the sum of the fifth category of fines (Article 23 of the Penal Code [*Wetboek van Strafrecht*]). This sum amounts to €74,000 with effect from 1 January 2008 for each instance of a contravention. When determining the level of the fine to be imposed, the Consumer Authority has taken in account the fact that the contraventions began in 2007, when the sum of the fifth category of fines amounted to €67.000 for each instance of a contravention.
144. Pursuant to the provisions of Article 2.21 of the Act on enforcement of consumer protection law [Whc – *Wet handhaving consumentenbescherming*], the Consumer Authority takes the severity and the duration of the contravention and the extent to which the blame may be placed with the transgressor into account in every case when ascertaining the level of the fine to be imposed.
145. Pursuant to Article 3:4, paragraph 2 of the General Administrative Law Act [*Awb- Algemene Wet Bestuursrecht*], the Consumer Authority observes the principle of proportionality in determining the level of the fine. On the basis of this provision, the adverse consequences for one or more of the interested parties as a result of a decision may not be disproportionate to the aims to be served by the decision. The general benchmark that applies in this case is that the level of the fine must be such that this restrains the transgressor from carrying out further contraventions (known as special prevention) and should also serve as a deterrent in general terms to other (potential) transgressors (known as general prevention).
146. In the case at hand, the Consumer Authority is of the opinion that, in view of both the number and the nature of the contraventions that were committed, it is appropriate to impose a fine as a result of the contraventions of:
- The statutory information requirements relating to the company as a service provider that forms part of the information society (Articles 3:15d, paragraph 1, subsections a and b and 3:15d, paragraph 2 of the Dutch Civil Code) and
 - The statutory information requirements relating to commercial communication (3:15e, paragraph 1, subsections a, b, c and d and Article 7:46h, paragraphs 2 and 4, subsection a of the Dutch Civil Code).

Culpability, duration and severity of the contraventions

147. OX-2 International has stated in its view⁹¹ that it is not aware which items need to be adapted on the websites, but that it is prepared to rectify any problems if it is simply given an explanation of what must be done. The Consumer Authority points out that an explanation was provided by the enforcement officials as part of the visit to the premises on 29 April 2008.⁹² In cases where the visit to the premises forms part of an investigation, an explanation is given with regard to the aim of the investigation and the relevant rules and regulations may also be mentioned, which took place in this case too. In the opinion of the Consumer Authority, the provision of advice to companies with regard

⁹¹ Document 137/122.

⁹² Document 137/112, particularly pages 1, 9, 10, 12, 13, 14, 24 (regarding the Articles 3:15d and 3:15e of the Dutch Civil Code) and 21 (regarding Article 7:46h of the Dutch Civil Code).

to the applicable statutory rules and regulations and the manner in which these must be complied with does not form the primary responsibility of the supervisory body.

148. In the opinion of the Consumer Authority, third parties may not be held responsible for day-to-day management. The business owner is responsible for keeping up to date with the legislation and regulations that apply to him/her and for complying with these.
149. The Consumer Authority notes that, contrary to what was stated by OX-2 International at the hearing on 16 October 2008⁹³, the Advertising Code Committee [*Reclame Code Commissie*] objected to the use of consumers' MSN details. The Advertising Code Committee stated the following with regard to the use of these details: "It was neither stated nor did it become apparent that the complainant could know that the invitations could be sent in his/her name." The Advertising Code Committee is of the opinion that the complainant ought to have been informed of this fact and that his/her consent ought to have been sought, and it upheld the complaint against OX-2 International. The complaint that the recipients of the e-mails had not given their consent for these to be sent was also upheld by the Advertising Code Committee.
150. The Consumer Authority furthermore notes that, with the exception of the addition of the Chamber of Commerce number and VAT number on the website www.jijwint.nl, it has not been proven that there was any effort on the part of OX-2 International to bring its websites and its commercial communication (the e-mails) into line with the statutory stipulations.
151. The Consumer Authority is of the opinion that a more proactive approach may be expected of a professional company. The appeal of OX-2 International on the grounds of ignorance or lack of information may not be accepted either.

Duration of contraventions

152. In determining the duration of contraventions, the Consumer Authority has taken into consideration that OX-2 International stated that the websites www.realtonekado.nl, www.jijwint.nl, www.winps3.nl and www.iphonegame.nl were active from the end of September 2007/beginning of October 2007 and that the websites have taken the same form and displayed the same terms and conditions and details since that time.⁹⁴

Duration of contravention of Article 3:15d, paragraph 1, subsection a, b, c and f and paragraph 2 of the Dutch Civil Code [BW - *Burgerlijk Wetboek*]

153. The Consumer Authority has determined that, supplementary to the previous item,
- 1) the website www.realtonekado.nl did not fulfil the stipulations of Article 3:15d, paragraph 1, subsections a, b, c and f of the Dutch Civil Code on 14 March 2008
 - 2) the website www.jijwint.nl did not fulfil the stipulations of Article 3:15d, paragraph 1, subsections c and f of the Dutch Civil Code on 14 April 2008, yet it did so on 20 June 2008

⁹³ Document 137/121

⁹⁴ Document 137/122, page 2

3) the websites www.winps3.nl and www.iphonegame.nl stated the identity and the telephone number, but not the address, e-mail address, Chamber of Commerce number or VAT registration number on 29 April. Therefore the websites only partly fulfilled the stipulations of Article 3:15d, paragraph 1, subsections a and b of the Dutch Civil Code and did not fulfil the stipulations of Article 3:15d, paragraph 1, subsections c and f of the Dutch Civil Code.

154. In view of the adaptations that were made to the website www.jijwint.nl, the Consumer Authority deems that the website is no longer in contravention of Article 3:15d, paragraph 1, subsection c and f of the Dutch Civil Code.

155. The Consumer Authority is of the opinion that OX-2 International has neither stated nor proven that measures have been taken with regard to the websites www.realtonekado.nl, www.winps3.nl and www.iphonegame.nl in order to put an end to the contraventions that were observed.

156. With regard to these websites, the Consumer Authority has therefore determined that there was no evidence that the contravention of Article 3:15d, paragraph 1, subsection a, b, c and f of the Dutch Civil Code has ceased.

157. With regard to the websites www.realtonekado.nl and www.jijwint.nl, the Consumer Authority has likewise ascertained that there was no evidence that the contravention of Article 3:15d, paragraph 2 of the Dutch Civil Code has ceased.

Duration of contravention of Articles 3:15e, paragraph 1 and 7:46h, paragraphs 2 and 4 of the Dutch Civil Code [BW - Burgerlijk Wetboek]

158. It emerged from information provided by Celldorado (Artiq Mobile) that, in the period between September 2007 up to and including April 2008, 13,829 subscriptions to SMS services provided by Celldorado were purchased through various websites run by OX-2 International⁹⁵.

The Zanox affiliate network

159. The website www.realtonekado.nl, which was registered with the Foundation for Internet Domain Registration in the Netherlands [*SIDN – Stichting Internet Domein Registratie Nederland*] on 9 September 2007⁹⁶, attracted well over 2 million visitors during the period between October 2007 up to and including July 2008⁹⁷. Well over 62,000 visitors have clicked on links to the Celldorado website and therefore entered and submitted their MSN details⁹⁸. This resulted in 7043 people signing up to subscriptions for which OX-2 International received a fee from Celldorado via Zanox.⁹⁹

160. As stated under item number 87, MSN users in the Netherlands have on average 80 contacts in their address book. Based on this average figure, almost 5 million unsolicited e-mails were sent via the website www.realtonekado.nl.

⁹⁵ Document 137/24.

⁹⁶ Document 137/1, Annex 18.

⁹⁷ Document 137/50, Annex 'realtonekado NL', Views column

⁹⁸ Ditto, Clicks column

⁹⁹ Ditto, Sales column

Affiliate network ADSMarket

161. OX-2 International acted as an affiliate for Wixawin during the period between 21 February up to and including 29 June 2008¹⁰⁰. According to an overview provided by the affiliate network ADSMarket, well over 45,000 visitors clicked on links to a Wixawin¹⁰¹ website and therefore entered and submitted their MSN details.
162. According to an overview provided by the affiliate network ADSMarket, a further 148,000 visitors clicked on links to a Celldorado website via a website run by OX-2 International¹⁰². These consumers also entered and submitted their MSN details.
163. During the hearing on 16 October 2008, OX-2 International stated that websites can still be accessed or at least, that they could still be accessed after 4 August 2008¹⁰³.
164. The Consumer Authority is of the opinion that OX-2 International has neither stated nor proven that measures have been taken in order to put an end to the contraventions that have been observed.
165. The Consumer Authority has noted that the website www.jijwint.nl could be accessed at all times on 18 November 2008.
166. In view of this fact, the Consumer Authority determined that there was no evidence that contraventions of Articles 3:15e, paragraph 1 and 7:46h, paragraphs 2 and 4 of the Dutch Civil Code have ceased.

The severity of the contraventions

167. With regard to the severity of the contravention, the damage caused to consumer confidence and any benefit enjoyed by the company is taken into account in determining the fines to be imposed, in so far as this can be ascertained by the Consumer Authority. With regard to the contraventions named in Section 7, the Consumer Authority is of the opinion that distinctions may be made as to the severity of the different contraventions.

Statutory information requirements, Article 3.15d, paragraphs 1 and 2 of the Dutch Civil Code [BW - *Burgerlijk Wetboek*]

168. If statutory information requirements relating to the company as a service provider as part of the information society are not fulfilled, the Consumer Authority deems this to be a serious contravention. By failing to provide simple, direct and permanent access to details concerning the identity, the address and contact details, it is not clear or is not sufficiently clear for consumers as to whom they are dealing with and to whom they can address complaints – for example, with regard to the use of their name and MSN address for the purpose of sending advertisements. The key characteristic of

¹⁰⁰ Document 137/51.

¹⁰¹ Document 137/38.

¹⁰² Document 137/38.

¹⁰³ Document 137/122, page 2.

service provision as referred to in Article 3:15d of the Dutch Civil Code is that the provider and the consumer conduct their business at a distance. It is therefore particularly important that the information stated in Article 3:15d, paragraphs 1 and 2 is supplied and that this takes place in such a way that this information is easily accessible.

Commercial communication, Article 3:15e, paragraph 1 and 7:46h, paragraphs 2 and 4 of the Dutch Civil Code

169. If statutory information requirements relating to commercial communication are not fulfilled, the Consumer Authority deems this to be a very serious contravention.
170. The Consumer Authority determined that OX-2 International used e-mails to invite consumers to request a free 'realtone' or to participate in a game or a quiz, without stating the associated obligations and charges involved in doing so. Once the MSN details were submitted, these were used by OX-2 International to approach all MSN contacts listed in consumers' address books.
171. These MSN contacts received e-mails from OX-2 International that appeared as though they had come from a sender who was known to the recipient. OX-2 International used this to create the impression that the e-mails were genuine and that the links provided could be used safely.
172. As this involved unsolicited e-mails being sent and these were not immediately recognisable as 'advertising' on receipt, the recipients were not prepared for the fact that these messages were of a commercial nature.
173. The Consumer Authority also deems the sending of e-mails without the recipient's consent to be a very serious contravention. Even if consumers who entered and submitted their MSN details had no objection to the fact that contacts listed in their address book were to be approached by e-mail, this could not, in any case be said of the recipients of the e-mails. Recipients stated that they were confronted with unsolicited messages containing advertisements, furthermore in which essential information, namely the true identity of the sender, was withheld. Recital 17 of the European Directive 97/7/EC¹⁰⁴ on the protection of consumers in respect of distance contracts – which is enacted by Article 7:46h of the Dutch Civil Code – states the following with regard to this matter: "Whereas [...] the consumer's right to privacy, particularly as regards freedom from certain particularly intrusive means of communication, should be recognized; whereas specific limits on the use of such means should therefore be stipulated; whereas Member States should take appropriate measures to protect effectively those consumers, who do not wish to be contacted through certain means of communication, against such contacts[...]".

Websites specifically aimed at children and young people

174. The websites www.realtonekado.nl, www.jijwint.nl, www.winps3.nl and www.iphonegame.nl are specifically aimed at children and young people. This has not only been proven in the statement made by OX-2 International itself on www.megaclips.nl (see item number 66), but also by the use of MSN, a medium that is often used by children and young people and by offering items such as 'realtones' that

¹⁰⁴ Official Journal No. L 144 of 04 June 1997 p.19 – 27.

appeal to this age group and the prospect of prizes (gadgets, a Playstation and similar). The Consumer Authority places the blame fully with OX-2 International for the fact that the actions undertaken as described above involved a risk that children and young people are duped.

Determining the fine to be imposed

The Consumer Authority imposes fines accordingly of:

- €20,000 for contraventions of the statutory information requirements relating to the company as a service provider (Articles 3:15d, paragraph 1, subsections a and b and 3:15e, paragraph 2 of the Dutch Civil Code) and
- €65,000 for contraventions of the statutory information requirements involved in commercial communication (3:15e, paragraph 1, subsections a, b, c and d and Article 7:46h, paragraphs 2 and 4, subsection a of the Dutch Civil Code).

175. In relation to the contravention of Article 3:15d, paragraph 1, subsections c and f of the Dutch Civil Code (failing to state the Chamber of Commerce number and VAT registration number), the Consumer Authority will not impose a fine, in view of the specific circumstance that the harm that this contravention may cause consumers is very limited, together with the fact that the contraventions have ceased.

8.2 Penalties imposed on a daily basis (in case of non-compliance)

Introduction

176. The Consumer Authority is authorised to impose penalties on a daily basis (in case of non-compliance) in order to rectify a contravention or to prevent the contravention being repeated (Article 2.10, paragraph 1 of the Act on enforcement of consumer protection law [Whc – *Wet handhaving consumentenbescherming*] in conjunction with Articles 5:32, paragraphs 2 to 5 inclusive, and 5:33 to 5:35 inclusive of the General Administrative Law Act [Awb – *Algemene Wet Bestuursrecht*]). The amount of the penalty to be determined is reasonably proportionate to the severity with which the interests were harmed and the intended effect of the penalty imposed.

177. From what was put forward in the verbal exchange of opinion, the Consumer Authority did not find any evidence that the contravention of the Articles 3:15d, paragraph 1, subsections a, b, c, and f and paragraph 2 of the Dutch Civil Code, Article 3:15e, paragraph 1, subsections a, b, c, d of the Dutch Civil Code and Article 7:46h, paragraphs 2 and 4, subsection a of the Dutch Civil Code has ceased. Measures are necessary in order to make certain that the statutory information requirements are complied with in fulfilment of the contract.

Details of the charge

178. The Consumer Authority orders OX-2 International to amend its websites in accordance with Article 3:15d, paragraph 1, subsections a, b, c and f and paragraph 2 of the Dutch Civil Code. This means that OX-2 International, subject to a penalty, must make the following details accessible immediately and on a permanent basis:

- the identity of the company and the address for visitors of its registered office
- the details enabling swift contact and a direct and effective means of communication, including an e-mail address and

- the Chamber of Commerce number and the VAT registration number.

179. The Consumer Authority orders OX-2 International to amend its websites www.realtonekado.nl, www.jijwint.nl, www.winps3.nl and www.iphonegame.nl in accordance with Article 3:15d, paragraph 2 of the Dutch Civil Code. This means that OX-2 International must state clearly and unambiguously the costs that are involved for the services being offered. It is not sufficient for OX-2 International to state the costs under a link entitled Terms and Conditions while the product itself is promoted as being free on the homepage of the website (www.realtonekado.nl) or the user is given the impression that participation is free (www.jijwint.nl, www.winps3.nl and www.iphonegame.nl).
180. The Consumer Authority has furthermore ordered OX-2 International to amend its commercial communication in accordance with Article 3:15e, paragraph 1, subsections a, b, c, and d of the Dutch Civil Code. This means that OX-2 International, subject to a penalty, must adapt its commercial communication, i.e. the e-mails that are sent via its websites, in such a way that:
- this is clearly recognisable as advertising
 - the identity of the company is stated
 - the Terms and Conditions of use of its offers are stated in a clear and unambiguous manner
 - e-mails are clearly and unambiguously recognisable as advertising material by the recipient on receipt of the e-mail
181. The Consumer Authority has ordered OX-2 International to amend the way in which unsolicited communication is sent out in accordance with Article 7:46h, paragraphs 2 and 4, subsections a of the Dutch Civil Code. This means that OX-2 International, subject to a penalty, must adapt its practices in such a way that:
- e-mails are only sent if the recipients of the e-mails have given their permission to receive them and
 - the identity of the company is stated in the e-mails.

Amount of incremental penalty

182. The incremental penalties as specified in the previous items are set at €500 per penalty per day up to a maximum of €50,000.

Period of grace

183. OX-2 International is given a period of two weeks with effect from the date that the decision is published in order to enable it to carry out the required action without the incremental penalty payment being imposed. This period is regarded as being sufficient to adapt the information on the websites and in the e-mails, and to amend the manner in which these are sent.

Consideration in the event of the penalty being superfluous

184. In order to prevent misunderstandings arising with regard to the issue as to whether the action has been carried out, OX-2 International is strongly advised to inform the Consumer Authority of this prior to the end of the period of grace.

8.3 Attribution of the contraventions

185. The sole trader OX-2 International has been run by Mr. <Director> since 20 April 2004.¹⁰⁵
186. The sole trader OX-2 International has been a private limited company, OX-2 International B.V. with effect from 29 May 2008. The sole shareholder is OX-2 International Beheer B.V., of which Mr. <Managing Director> is the sole shareholder. Both companies have registered offices at the same address in Vlissingen. Mr. <Managing Director> is the sole director and the sole employee of OX-2 International B.V.¹⁰⁶
187. In view of the above, it may only be concluded that OX-2 International, currently OX-2 International B.V., is completely controlled by Mr. <Managing Director> and that he is the only person who may decide what takes place in the company and the manner in which this takes place and is also effectively responsible for the day-to-day management.
188. The Consumer Authority is of the opinion that it is therefore appropriate to impose fines on OX-2 International, currently OX-2 International B.V. and Mr. <Managing Director> together for the payment of which they are each jointly and severally liable.

9 Decision

The Consumer Authority:

- a) Ascertains that OX-2 International has committed a contravention of the following Articles:

Article 8.2, paragraph 1 of the Act on enforcement of Consumer Protection Law [*Whc – Wet handhaving consumentenbescherming*] in conjunction with Article

3:15d, paragraph 1, subsection a of the Dutch Civil Code [*BW - Burgerlijk Wetboek*]

1. (identity and address of registered office)
2. 3:15d, paragraph 1, subsection b of the Dutch Civil Code (contact details)
3. 3:15d, paragraph 1, subsection c of the Dutch Civil Code (Chamber of Commerce number)
4. 3:15d, paragraph 1, subsection f of the Dutch Civil Code (VAT registration number)
5. 3:15d, paragraph 2 of the Dutch Civil Code (the price, taxes and delivery charges)

Article 8.2, paragraph 2 of the Act on enforcement of Consumer Protection Law [*Whc – Wet handhaving consumentenbescherming*] in conjunction with Article

6. 3:15e, paragraph 1, subsection a of the Dutch Civil Code (clear and recognisable)
7. 3:15e, paragraph 1, subsection b of the Dutch Civil Code (identity)
8. 3:15e, paragraph 1, subsection c of the Dutch Civil Code (nature and Terms and Conditions of the offer)
9. 3:15e, paragraph 1, subsection d of the Dutch Civil Code (clear and recognisable on receipt)

Article 8.5, paragraph 2 of the Act on enforcement of Consumer Protection Law [*Whc – Wet handhaving consumentenbescherming*] in conjunction with Article

10. 7:46h, paragraph 2, in conjunction with 7:46i of the Dutch Civil Code (consent of the recipient)
- and

¹⁰⁵ Document 137/1, Annex 19, extract of the Chamber of Commerce of 31 March 2008.

¹⁰⁶ Document 137/58, extract of the Chamber of Commerce dated 23 July 2008 and document 137/122, page 3.

11. 7:46h, paragraph 4, subsection a, in conjunction with 7:46i of the Dutch Civil Code (identity of the sender)
- b) Attributes the stated contraventions to OX-2 International B.V. with its registered office in Rotterdam and Mr. <Managing Director> of <place>
 - c) Imposes fines totalling €85,000 on the company and Mr. <Director> as a result of these contraventions, for the payment of which they are jointly and severally liable.
 - d) Imposes a penalty on a daily basis (in case of non-compliance) of €500 per day up to a maximum of €50,000 on OX-2 International B.V. and Mr. <Managing Director> to amend the content of the websites www.realtonekado.nl, www.jijwint.nl, www.winps3.nl and www.iphonegame.nl of the e-mails sent via these websites due to the aforementioned contraventions.

The Hague, 5 December 2008

(Signed) Ms. M.E. Hulshof

Consumer Authority

Any persons whose interests are directly affected by this decision may submit a notice of objection to this decision, giving proper reasons for doing so, within six weeks following the date on which this decision was published, to the Consumer Authority, Legal Department [Juridische Dienst], Postbus 16759, 2500 BT, The Hague.

The fines must be paid within 6 weeks following the date on which the decision was published in the manner prescribed under Article 3:41 of the General Administrative Law Act [Algemene Wet Bestuursrecht], by deposit into bank account number 30.00.32.706 in the name of the Consumer Authority, Postbus 16759, 2500 BT The Hague, quoting the reference number of this decision. Once this period has elapsed, the fine will be increased at the statutory interest rate.