

DECISION

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Subject

Decision with regard to case 64 / Holdvest
Investments B.V. en Wizz Mobile Interactive
B.V.

Decision

Decision of the Consumer Authority in the sense of Article 2.9 of the Act on enforcement of consumer protection law [*Wet handhaving consumentenbescherming*] to impose administrative fines and a penalty on a daily basis (in case of non-compliance).

Summary of the decision

Consumers have filed complaints with ConsuWijzer regarding Wizz Mobile Interactive B.V., also known as Mobqo. This company advertises ringtones by means of banners on websites. Wizz Mobile concludes contracts over the internet by means of offers on its own websites www.mobqo.nl and www.2game.nu, but also via websites such as www.spele.nl and www.clipjes.nl in particular. Following a large scale, international campaign to find websites that are aimed at young people, the banners placed by Wizz Mobile provided grounds for closer investigation.

It emerged from the complaints that were filed that consumers were unintentionally entering into a subscription, while under the impression that they are doing nothing more than ordering a free ringtone. Consumers were misled by the item being offered as 'free'. Wizz Mobile used text messaging to send out three ringtones per week to its customers and charged €3 per ringtone. Another complaint was that it subsequently proved difficult to terminate the subscription because it was not clear who should be contacted and how that could be done.

Specific statutory information requirements apply to the provision of services such as ringtone subscriptions through the internet. An example of these is that the identity of the company and its e-mail address must be clearly stated. Furthermore, under these requirements, it is not permitted to suggest that a service is provided free of charge, while in reality the consumer is tied in to a subscription.

At the request of the Consumer Authority, the Advertising Code Committee [*Reclame Code Commissie*] issued its ruling in January 2008 regarding publicity provided by Wizz Mobile. The

investigation carried out by the Consumer Authority and the negative ruling handed down by the Advertising Code Committee have only succeeded in persuading Wizz Mobile to make partial and gradual amendments to its websites.

The Consumer Authority has determined that Wizz Mobile Interactive B.V. and Holdvest Investments are co-perpetrators that have jointly committed various contraventions of consumer law. These contraventions related to regulations governing the provision of services that form part of the information society, distance purchasing and unsolicited sending of items. The Consumer Authority has fined both these companies a total of €76,000 as punishment for these contraventions. Furthermore, a penalty has been imposed on a daily basis of €250 per day up to a maximum of €25,000. This sanction is intended to force Wizz Mobile Interactive B.V to bring the manner in which it provides information to consumers fully into line with the applicable regulations.

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1 Introduction

1. On 11 June 2007, the information 'hotline' was launched on the website of Consuwijzer, the information desk provided by the Consumer Authority for consumers, the Netherlands Competition Authority [*Nederlands Mededingingsautoriteit*] and the Independent Post and Telecommunications Authority [*Onafhankelijke Post en Telecommunicatie Autoriteit*] to which the public is able to submit issues relating to text messaging services¹. The Consumer Authority received many reports through this information hotline regarding situations in which consumers found that they had unintentionally signed up to a subscription for text messaging services. Some of these reports could be traced back to the company Wizz Mobile Interactive B.V.².
2. On 24, 25 and 26 September 2007, an internet sweep was carried out by enforcement officials from the Consumer Authority service³, during which these officials studied websites that are (partly) aimed at young people. In particular, this involved examining websites in order to ascertain whether banners or other forms of publicity were being used to offer text messaging services and whether the provider of those services provided the important information to (young) consumers. During this internet sweep, it was established that Wizz Mobile Interactive B.V. was offering ringtones by means of banners on the website www.spele.nl under the name "*Mobqo*".
3. On the basis of the reports filed with ConsuWijzer and the findings of the internet sweep, the enforcement officials from the Consumer Authority⁴ began an investigation into the extent to which Wizz Mobile Interactive B.V. complied with the obligations arising from the provision of services that form part of the information society, distance purchasing and unsolicited sending of items.
4. Within the scope of this investigation, a visit was made to the premises of Wizz Mobile Interactive B.V. on 12 November 2007.
5. The Consumer Authority filed two complaints regarding Wizz Mobile Interactive B.V. with the Advertising Code Committee [*Reclame Code Commissie*] in December 2007. The Advertising Code Committee issued its ruling on 23 January 2008 regarding case numbers 07.0632 and 07.0633 that the publicity of Wizz Mobile Interactive B.V. were in contravention of Articles 1 and 5 of the Advertising Code concerning Children and Young People [*Kinderen Jeugdreclamecode*] and Article 7 of the Dutch Advertising Code.
6. The enforcement officials furthermore investigated the role of Holdvest Investments B.V., the parent company of Wizz Mobile Interactive B.V.

7. Following the investigation, a report was drawn up against Wizz Mobile Interactive B.V. and Holdvest Investments B.V. on 19 May 2008 in accordance with Article 2.8, paragraph 1 of the Act on enforcement of consumer protection law [*Wet handhaving consumentenbescherming*] (hereinafter referred to as Whc). This report forms the basis for the decision at hand.
8. The Consumer Ombudsman Foundation [*Stichting de Ombudsman*] and the Consumers Association [*Consumentenbond*] are deemed to be interested parties in the sense of Article 7.2 of the Act on enforcement of consumer protection law [*Whc -Wet handhaving consumentenbescherming*]. Both organisations have however declined to provide a viewpoint in this matter.
9. On 24 June 2008, a hearing took place at the offices of the Consumer Authority. Wizz Mobile Interactive B.V. and Holdvest Investments B.V. used this opportunity to put forward their view on the basis of the report.
10. In this Decision, the interested parties will be examined first of all (Section 2), followed by the report (Section 3) and a description of the facts (Section 4). The view of Wizz Mobile B.V. and Holdvest Investments B.V. will follow in Section 5, followed by the powers of the Consumer Authority and legal considerations (Section 6). In the final part of this decision (Sections 7, 8 and 9), the conclusions will be presented and the measures to be imposed will be determined.

2 Interested parties

11. Wizz Mobile Interactive B.V. provides subscriptions via the internet for ringtones and wallpapers⁵ to the consumer. Both of these are also indicated as '*item*'. A wallpaper may also be referred to as an '*image*'.
12. According to the trade register of the Chamber of Commerce, Wizz Mobile Interactive B.V. has its registered offices in Maastricht. It emerged from the investigation that Wizz Mobile Interactive B.V. operates in Sittard.⁶ The shareholders of Wizz Mobile Interactive B.V. are Mr. [L] who holds [CONFIDENTIAL]% of the shares and Holdvest Investments B.V. [the a major shareholder]⁷. Mr. [L] is also the sole Managing Director of Wizz Mobile Interactive B.V.⁸
13. According to the extract from the trade register, Wizz Mobile Interactive B.V. engages in: "the operation of one or several websites, providing services relating to mobile content and internet".⁹

14. The domain names mobqo.nl, 2game.nu and bluemonq.com are registered under the name of Wizz Mobile Interactive B.V.¹⁰. The website www.mobillo.net is also registered under the name of Wizz Mobile Interactive B.V..¹¹ The names Mobqo, mobqo.nl, 2game.nu and bluemonq.com are not registered as trading names with the Chamber of Commerce.¹²
15. According to the trade register, Holdvest Investments B.V. has its registered offices in Limbricht and Mr. [H] is the sole shareholder and Managing Director.¹³
16. Holdvest Investments B.V. is the sole shareholder of [X] and Mr. [H] is the sole Managing Director of [X]. The domain names spele.nl, clipjes.nl and goalll.nl are registered by [X].¹⁴ These three names are stated as affiliates of Wizz Mobile Interactive in the registration system www.bluemonq.com (see item number 26).¹⁵
17. Wizz Mobile Interactive B.V. uses the services of [X] to design banners and wallpapers.¹⁶
18. According to the trade register, [X] has its registered offices in Limbricht and on the website of [X], the address Poststraat 10-2 in Sittard is given as the address for visitors.
19. Where Wizz Mobile is named in this decision, this shall refer to Wizz Mobile Interactive B.V. and Holdvest Investments B.V.. The Consumer Authority will provide a more detailed explanation of the interrelationship between both companies under item number 221. Where one of the both companies is specifically referred to, the full name of that company will be stated.

3 The report

20. It was determined in the report that Wizz Mobile did not meet
 - the statutory information requirements that apply to the provision of a service that forms part of the information society (Articles 3:15d, paragraph 1, subsections a, b, c and f and 3:15d, paragraph 2 of the Dutch Civil Code [*Burgerlijk Wetboek*], hereinafter referred to as BW. These requirements state that items of information including the identity, the address and the contact details of the service provider must be accessible in a simple, direct and permanent manner.
 - the statutory information requirements relating to distance purchasing (Articles 7:46c, paragraph 1, subsections a, b, c, e, f and i of the Dutch Civil Code (BW) and 7:46c, paragraph 2, subsections a and c of the Dutch Civil Code). These statutory information requirements state, among other things, that a consumer must be informed as to the identity of the vendor, the most important aspects and the charge for the service as well as the cooling-off period.

- the prohibition of unsolicited sending as described in Article 8.5 of the Act on enforcement of consumer protection law [*Whc – Wet handhaving consumentenbescherming*] and Article 7:7, paragraph 4, in conjunction with paragraph 2 of the Dutch Civil Code.

4 *Actual scope*

21. Wizz Mobile offers ringtones, wallpapers and games (memory games and poker) on its own websites www.mobqo.nl and www.2game.nu. These services are offered by means of banners on third-party websites (see item numbers 25 below and the following item). There are various kinds of banner for each specific offer. During the period in which the investigation was being conducted, Wizz Mobile offered approximately 40 ringtones, 3 different memory games, a poker game and 9 wallpapers.¹⁷
22. Wizz Mobile concluded contracts with consumers in which Wizz Mobile provided a subscription service for ringtones or wallpapers.
23. Consumers could take up a service provided by Wizz Mobile in three ways:
 - a) via a banner¹⁸ that leads to a landing page¹⁹ on the website www.mobqo.nl
 - b) via a banner that leads to a landing page on the website www.2game.nu
 - c) via an order banner that allows the service to be ordered directly.
24. Consumers could also go directly to the websites www.mobqo.nl or www.2game.nu and order a service from Wizz Mobile. A more detailed description of the ordering process and the manner of delivery is given under item number 30 and in the following item.
25. Banners for services provided by Wizz Mobile are displayed on the websites of third parties, known as affiliates. For each instance that a contract comes into being through its website, the affiliate receives a fee from Wizz Mobile. This fee is basically €5 for each contract, but this may be higher under certain circumstances.²⁰ The consumer pays the subscription fee of €3 per ringtone or wallpaper directly through his/her mobile provider to Wizz Mobile.²¹
26. Potential affiliates can register on the www.blumonq.com website²² and an affiliate may choose from a selection of different banners on the www.blumonq.nl website. On 12 November 2007, a selection of well over 40 different products and services was available.²³ The affiliate subsequently places the selected banner on its website. Wizz Mobile is able to use the registration system of www.blumonq.com to see which affiliates have placed banners on their website, how many consumers have clicked on a banner and how many consumers have entered into a contract after clicking on a banner.
27. It emerged from the investigation that banners that are available through the affiliate system www.blumonq.com direct users to the landing pages of www.mobqo.nl and

www.2game.nu. The affiliate system www.blumonq.com is therefore used for services provided by www.mobqo.nl as well as www.2game.nu.²⁴

28. During the visit to the company's premises, it became apparent from the registration system www.blumonq.nl that 29 affiliates were registered in the period between June 2007 up to and including 12 November 2007.¹ According to a statement by Wizz Mobile, the sales from the websites www.mobqo.nl and www.2game.nl during 2007 amounted to □[CONFIDENTIAL].²⁶

29. The findings relating to the banners and the websites will be examined in more detail under the item numbers that follow.

¹ Document 64/6.

Re. a) Mobqo banner and landing page

30. During the internet sweep that took place on 24, 25 and 26 September and on 2 and 9 October 2007, it was determined that banners advertising ringtones were displayed on the website www.spele.nl.²⁷ These banners displayed the word 'Free' in large, bold and sometimes flashing letters and sometimes the text 'Click here' also appeared. These banners did not contain any information about the service. The banners directed the user by means of a deep link²⁸ to landing pages on www.mobqo.nl, which offered the chance to listen to the ringtone in question and to order it by entering a mobile phone number (hereinafter: 06-number) and clicking on a 'Send' button. The landing pages also displayed the word 'Free' in large letters. An asterisk was displayed afterwards that referred to a text, which at the highest possible screen resolution is not immediately visible²⁹. In order to view this text, the user must scroll down past an empty space. The text, which was displayed in small letters and for the most part in a colour that was difficult to read against the background being used, read as follows:

*"*The first realtone is free. This is a subscription service. Realtones are charged at €3 each (+ SMS download charges). You will receive 3 realtones per week. No longer want this service? Text [keyword] STOP to 5858. In order to register and to use this service, you must be 16 or over and/or have permission from (one) parent and/or the bill-payer. If you register and/or use this service, you acknowledge and confirm that you have read the General and Specific Terms and Conditions, that you have accepted these and that you shall meet the terms and conditions that apply to you as stated above. Mobqo operates in accordance with the Netherlands Code of Conduct for SMS services".*

31. Underneath the text, links to each of General Terms and Conditions - Specific Terms and Conditions - Privacy policy - Copyright policy - Compatible handsets were displayed. These links are examined in more detail under item number 41 and the following item.
32. It was determined on the day after the visit to the company premises that the spare space under the images on the landing pages had been removed. The text accompanying the asterisk was therefore immediately visible.³⁰

Re. b) 2game.nu banner and landing page

33. On 13 and 30 November 2007, it was determined that the website www.2game.nu offered the chance to win an iPhone by playing a memory game.³¹ Links to 3 different memory games were displayed on the homepage. Links to each of Contact – Frequently asked questions – General Terms and Conditions - Specific Terms and Conditions - Privacy policy - Copyright policy - Compatible handsets -, were displayed underneath. These links are examined in more detail under item number 41 and the following item.
34. On the page on which consumers could play the memory game, “*Play the memory game and...Win this iPhone!*” was displayed at the top in large letters. Underneath, the text “*+ always get technochick wallpaper free!*” was displayed in smaller letters. An asterisk was displayed after this last text, which, on 13 November, referred to text that initially was not immediately visible (see item number 30). On 30 November, however, the text appeared directly below the memory game. This text read as follows:
- “*The first image is free. This is a subscription service. Images are charged at €3 each (+ SMS download charges). You will receive 3 images per week. No longer want this service? Text [keyword] STOP to 5858. In order to register and to use this service, you must be 18 or over and/or have permission from (one) parent and/or the bill-payer. If you register and/or use this service, you acknowledge and confirm that you have read the General and Specific Terms and Conditions, that have accepted these and that you shall meet the terms and conditions that apply to you as stated above. Mobqo operates in accordance with the Netherlands code of conduct for SMS services”.*
35. Underneath the text, links to each of General Terms and Conditions - Specific Terms and Conditions - Privacy policy - Copyright policy - Compatible handsets – Supplementary Terms and Conditions of Play were displayed. These links are examined in more detail under item number 41.
36. Once the memory game had been completed, the message “*Congratulations! What number can we reach you on?*” was displayed in large letters. Underneath, the opportunity was offered to enter and submit a 06-number. An asterisk appeared after the aforementioned sentence, which referred to the text referred to in item number 34. On 13 November 2007, this text became visible on scrolling down past an empty space. On 30 November 2007, however, the text was immediately visible. On 30 November 2007, a 06-number was entered and submitted. A page subsequently opened containing the following text in large letters: “*Text OK to 5858 now if we can reach you on this number if you win the iPhone*”.

Re. c) Mobqo order banners

37. On 5 October 2007 and 13 November 2007, it was determined that ringtones were being offered on the websites www.beltonen.net and www.clipjes.nl by means of order banners.³² These order banners offered the opportunity to listen to and to order a ringtone by entering a 06-number and clicking on the 'Send' button. The order banners also displayed the word 'Free' in large letters. After this word, an asterisk (*) was displayed that referred to a 'Disclaimer' link shown in small letters in the foot of the banner on the left-hand side. The link in the order banner that was opened on 5 October 2007 was initially not immediately visible and the user had to scroll down past an empty space in order to view the link. The link entitled 'Disclaimer' directed the user to a page of www.mobqo.nl that contained the text and the links in small letters, which also appeared on the aforementioned landing pages of the website [mobqo.nl](http://www.mobqo.nl).³³
38. Otherwise, the banner in question sometimes contained the name of an artist and a ringtone that corresponded to the name of the displayed clip, though sometimes a different ringtone from the same artist or even a different artist with a different ringtone was displayed.³⁴

The Mobqo website

39. On 12 November 2007, it was determined that 40 ringtones were on offer on the main homepage of www.mobqo.nl.³⁵ The various ringtones were offered by means of images containing the word 'Free' in large letters. The opportunity was offered on the images to listen to and to order the corresponding ringtone by entering a 06-number and clicking on the 'Send' button. The following text appeared alongside the images:

"FREE [name of ringtone] on your mobile!

Register: Text [keyword] SIGN UP to 5858

Unsubscribe: Text [keyword] STOP to 5858

This is a subscription service.

Images are charged at € 3.00 each.

A maximum of 3 items is sent per week

[Click here to register](#)"

40. The link entitled 'Click here to register' directed the user to a subsequent page on the website www.mobqo.nl. This page also functioned as the landing page for the banners for the ringtone in question. The layout of this page was identical in the case of all ringtones to

the layout of the landing pages that were previously examined, as well as the text appearing at the foot of the page and the links.

Information given under the links on the Mobqo and 2game websites

41. On 9 October, 13 November and 30 November 2007, the various links to the General Terms and Conditions, including those on the websites www.mobqo.nl and www.2game.nl were examined.³⁶
42. On 9 October 2007, the link entitled 'General Terms and Conditions' on a landing page of www.mobqo.nl was opened. This link directed the user to a different page of the website www.mobqo.nl that displayed the *General Terms and Conditions of 27 June 2007*. The same links as were displayed on the landing page appeared at the foot of this page. The link entitled 'Specific Terms and Conditions' on this page was accessed and this link directed the user to a page of the website www.mobqo.nl that displayed the *Specific Terms and Conditions for the Netherlands*. Wizz Mobile was stated as the service provider on this page and alongside this text was stated the address Kruisdonk 64a, Maastricht. On 30 November 2007, the registration number at the Chamber of Commerce (Chamber of Commerce number) and the VAT registration number of Wizz Mobile were displayed next to the aforementioned details.
43. On 30 November 2007, the links entitled 'Products', 'Partners', 'F.A.Q' and 'Contact' were accessed. These links appeared at the top of all the pages on the website www.mobqo.nl. The link entitled 'Products' directed the user to the homepage of www.mobqo.nl. The link entitled 'Contact' directed the user to a page on the website www.mobqo.nl which displayed frequently-asked questions and subsequently offered the opportunity to submit a name, address, telephone number, e-mail address and a question. It was also possible to send an e-mail directly to info@mobqo.nl.
44. On 13 November 2007, the link entitled 'Supplementary Terms and Conditions of Play' relating to the memory game on www.2game.nl was accessed. This link directed the user to a different page of the website www.2game.nu that displayed the *Supplementary Terms and Conditions of the Memory Game*. This contained a link entitled 'General Terms and Conditions of Play' and this link directed the user to a subsequent page of the website www.2game.nu that displayed the *General Terms and Conditions of Play on 2game*. Wizz Mobile was stated as the service provider on this page. Alongside this text was stated the address Kruisdonk 64a, Maastricht. The links that also appeared on the homepage of the website www.2game.nu were displayed at the foot of this page. Next, the links entitled 'Frequently Asked Questions', 'Privacy Policy', 'Copyright Policy' and 'Contact' were accessed. The link entitled 'Privacy Policy' directed the user to a page on the website www.2game.nu which displayed the *Privacy Policy of 22 October 2007*. The link entitled

'Copyright Policy' directed the user to a page on the website www.2game.nu which displayed the *Copyright Policy of 22 October 2007*. The link entitled 'Contact' directed the user to a page of the website www.2game.nu which firstly displayed the frequently asked questions, followed by an opportunity to submit a name, telephone number, e-mail address and a question. This last page was also accessed on 30 November 2007 and the facility to send an e-mail directly to info@mobqo.nl had been made available.

45. On 30 November 2007, the link entitled 'General Terms and Conditions' relating to the memory game were accessed. This link directed the user to a page of the website www.mobqo.nl that displayed the *General Terms and Conditions of 27 June 2007*. From there, other links to the website www.mobqo.nl were accessed. This has already been described.

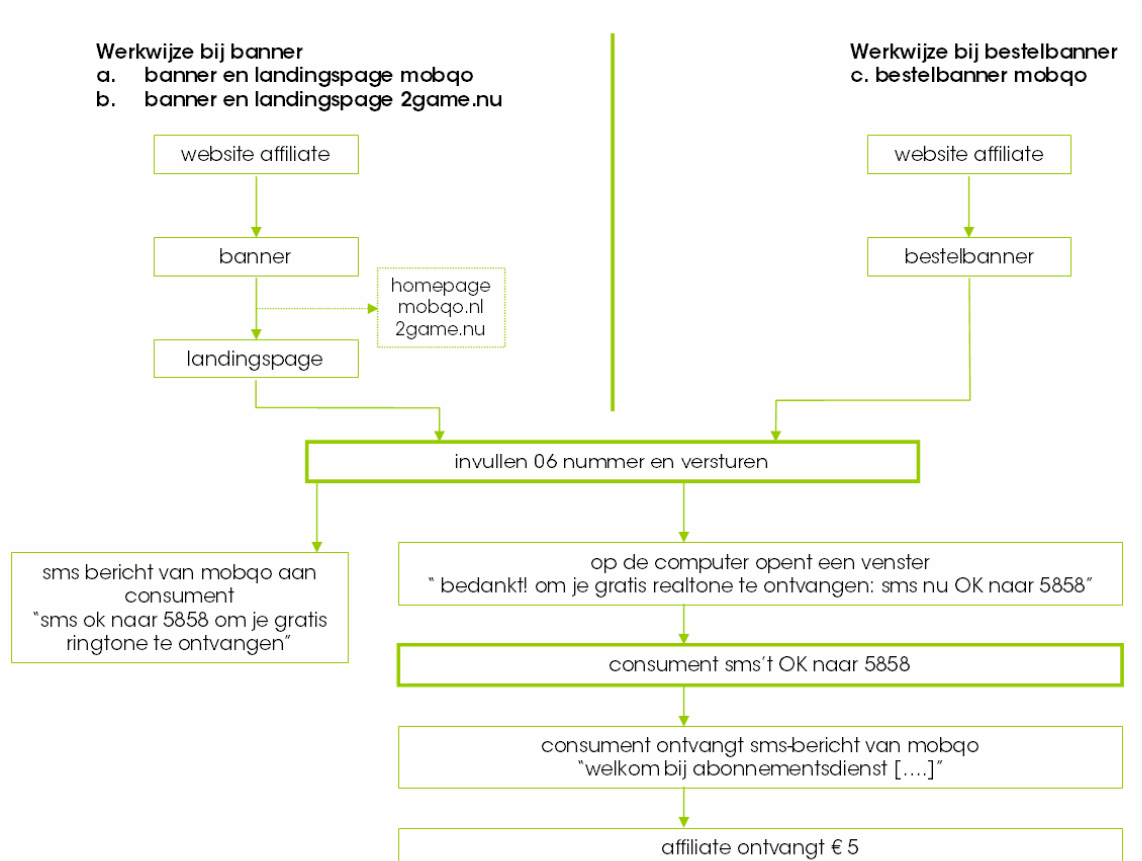
Content and layout of the text messages

46. On 6 November 2007, a ringtone was ordered through the website www.ringtonekado.nl.³⁷ After a 06-number had been entered and submitted on a webpage, the text "*Thanks! To receive your free realtone, text OK to 5858 now*" appeared on the computer screen. A message from sender "5858" was also received on the mobile telephone stating: "*Reply now with OK to 5858 to receive your free ringtone!*" It became apparent that the text message also contained the text "*stop: pop3stop. 3 realtones/week*" and also "*Max. 6 SMS at 150c prm. mobqo.nl*"³⁸ These items of text were not immediately visible. The texts only became visible if the user scrolled down twice past an empty space.
47. After a text message containing the word "OK" had been sent to 5858, a text message containing what is known as a service message was received.³⁹ A text message was also received containing the text: "*Welcome to the *POP3* subscription service! Enjoy your *[*...]* ringtone. Do you want the *coolest images*? Then text IMAGE ON now to 5858*". The sender of the message appeared as 5858. The consumer is charged by his/her provider for the last received message⁴⁰.
48. On 13 November 2007, a new service message containing a download link for a ringtone was received.⁴¹ However, this ringtone could not be downloaded and the message "*Your download has been expired*" [sic] appeared on the screen of the mobile phone. Shortly afterwards, another service message containing a download link for a ringtone was received. This ringtone, entitled 5858-1828418 could actually be downloaded. It could only be determined which ringtone it related to once the ringtone had been downloaded. During the period following 13 November 2007, various text messages containing download links for a ringtone were received. The majority of these ringtones could not be downloaded.

49. On 20 December 2007, the subscription was cancelled⁴² by sending a text message containing the text “*pop3stop*” to 5858. Shortly afterwards, a text message was received from sender “5858” containing the message: “*You have unsubscribed from the *pop3* service, mobqo.nl*”

50. The mode of operation of Wizz Mobile is summarised schematically in the following diagram.

Figure 1:



The view regarding the description of the ordering procedure

51. At the hearing of 24 June 2008, Wizz Mobile claimed that the representation of the ordering procedure in the report was inaccurate. Prior to entering into the subscription, the consumer received a text message stating that a subscription service was involved. The subscription service only took effect once the consumer had sent back a text message stating “OK”.

Assessment of the view stated with regard to the description of the ordering procedure

52. The Consumer Authority determined that the ordering procedure stated in the report (under item numbers 160-162 of the report) was indeed described correctly. There was no mention

of a subscription service in the text message being referred to by Wizz Mobile, which appears on the left in Figure 1. Moreover, the other limited information in this text message was displayed in such a way that the user had to scroll down twice past an empty space in order to view the information (see item number 46).

Investigation of 2 April

53. On 2 April 2008, it was determined that a banner advertising a ringtone was displayed on the website www.spele.nl.⁴³ This banner stated the word 'Free' in large and bold letters. The banner directed the user to a landing page of www.mobqo.nl which offered the opportunity to order a ringtone (or more specifically, a 'nametone'). The text "*Enter your name and receive this nametone for free*" was displayed in large letters. The last words of this text "*nametone for free*" were displayed separately and in considerably larger letters than the first part of the statement. The user was invited to enter a name and search for this in a window entitled "*Step 1*". Underneath, the following text was displayed: "*To download your NAMETONE, enter your forename in STEP1 to view the available NAMETONES.*" At the foot of the landing page, the following text was displayed:

"Looking for something original for your phone? Well, now you can have it with your original Nametone from Mobqo. With a Nametone, your name can be heard whenever someone calls you and it also plays all kinds of cool tunes! There's a Nametone to suit all tastes. So be original and order one of these cool Nametones now. The various tunes available include for example, Pop, Rasta, Bubbling, Hardcore, Hiphop and 'De Jordaan'. Surprise yourself and your friends every time with the sound of your name whenever someone calls you.

This service is provided by Mobqo.nl [General Terms and Conditions](#) | [Helpdesk](#) | [Privacy Policy](#) | [Compatible handsets](#)"

54. Once a name had been entered and the user clicked on the 'Search' button, a second window appeared entitled "*Step 2*". In this window, the various options for the nametone were displayed. The text in large letters became: "*Select your favourite and receive this nametone for free*". The last words of this text "*nametone for free*" were displayed in the same way as separately and in noticeably larger letters than the first part of the statement. Underneath the window, the text "*To download your NAMETONE: Click on one of the search results in STEP 2 to listen to that NAMETONE.*" The text at the foot of the landing page had not been changed.
55. After an option had been selected, a third window appeared in which it was possible to enter a 06-number and download the nametone. The text in large letters also became: "*Subscribe now and receive this nametone for free*". The last words of this text "*nametone for free*" continued to be displayed in the same way as separately and in noticeably larger

letters than the first part of the statement. Underneath the windows displaying the different steps, the following text was displayed: *This is a paid subscription service. Items are charged at €3 each. No longer want this service? Text NAMETONE stop. First item is free*. A maximum of 3 items is sent per week.* The text at the foot of the landing page had changed to:

**You will receive this realtone for free on signing up to a realtone subscription. Information: You receive 3 realtones per week as part of a realtone subscription. Realtones are charged at €3 each (exclusive of SMS download charges). You will be charged by your telecom provider. To sign up to a realtone subscription: (1) Enter your mobile number and click on the 'Send' button. (2) You will receive a text message requesting confirmation of this. (3) Confirm by texting OK to 5858. (4) The subscription sign-up is complete. You will receive confirmation of this by text message. Important: If you are under 16, please ask permission from your parents first. To cancel to a realtone subscription: Text NAMETONE STOP to 5858 or see mobqo.nl.*

This service is provided by [Mobqo.nl](#) [General Terms and Conditions](#) | [Helpdesk](#) | [Privacy Policy](#) | [Compatible handsets](#)"

56. After a 06-number had been entered and the user clicked on the 'Download' button, the text "Text OK to 5858 now otherwise you will not be able to complete the download". Underneath, the following text was displayed:

"Problems with downloading? Before the realtone is sent to you, you must first activate the service by texting 'OK' to '5858'. You will then receive the realtone as a service message. To be able to download, your handset must have the correct GPRS settings. These settings vary between providers. View the settings of each provider here:

[KPN](#) | [Vodafone](#) | [T-Mobile](#) | [Telfort](#)"

57. The link entitled 'General Terms and Conditions' at the foot of the landing page was also accessed. This link directed the user to a different page of the website www.mobqo.nl that displayed the *General Terms and Conditions of 27 June 2007*. Next, the link entitled 'Helpdesk' at the foot of the landing page was accessed. This link directed the user to a page of the website www.mobqo.nl which firstly displayed the *frequently asked questions*, followed by an opportunity to submit a name, telephone number, e-mail address and a question. It was also possible to send an e-mail direct to info@mobqo.nl or to telephone on 0909-4030030. Finally, Wizz Mobile Interactive was stated as the service provider. Alongside this information, the address Kruisdonk 64a, Maastricht was stated, as well as the Chamber of Commerce number and the VAT registration number.

5 The view of Wizz Mobile

58. The following is a brief summary of what was put forward at the hearing of 24 June 2008 on the basis of the report⁴⁴:
- a. Following the visit to the company premises on 12 November 2007 and a complaint being submitted by the Consumer Authority to the Dutch Advertising Code Authority [*Stichting Reclame Code*], Wizz Mobile made various amendments to its statements in November 2007.
 - b. In January 2008, further amendments were made on the basis of the ruling of the Advertising Code Committee [*Reclame Code Commissie*].
 - c. In March 2008, amendments were made once again following the introduction of the Code of Conduct for SMS services 2008.
 - d. The order banners have no longer been in use for some time.
 - e. The Consumer Authority has not fully taken these amendments into consideration and the report has therefore not been compiled with sufficient accuracy.
 - f. The cooling-off period as referred to in Article 7:46d of the Dutch Civil Code [*BW-Burgerlijk Wetboek*] does not apply.
 - g. The websites www.spele.nl and www.clipjes.nl are not children's websites, but they are aimed at all age groups.
 - h. Only a small number of complaints that came in to the information hotline were in connection with Wizz Mobile and the reliability of the complaints is doubtful in other respects. It is possible that the complaints were lodged by, for example, competitors.
 - i. In the case of all affiliates, Wizz Mobile supplies the banners that affiliates may place on their website. Are these affiliates considered to be co-offenders?
 - j. The term 'disclaimer' on the order banners is an incorrect translation of the term 'terms and conditions'.
 - k. There is no minimum duration for the subscription. A subscription may be cancelled immediately at any time.
 - l. A mobile telephone is a permanent data storage medium. The user of the telephone may him/herself choose which text messages he/she keeps.
 - m. Work is also carried out at the address Kruisdonk 64a in Maastricht.
 - n. Unsolicited sending does not take place because the consumer receives a text message that states that this is a subscription service.
59. Wizz Mobile has not provided any grounds for disputing the aforementioned facts. As if to qualify the contraventions, it has been determined that, in the months prior to the hearing, it has made amendments to the website www.mobqo.nl and that since no longer uses the order banners or the website www.2game.nl. Apart from the amendments that were observed, the layout and the text has, by its own admission, remained the same.⁴⁵

60. In the legal considerations, the Consumer Authority will examine what was discussed during the hearing in greater detail.

6 Legal considerations

6.1 Powers

61. On the grounds of Article 2.2 of the Act on enforcement of consumer protection law [*Whc – Wet handhaving consumentenbescherming*], the Consumer Authority is charged with enforcing the statutory provisions, as referred to in subsections a and b of the Annex to the Act on enforcement of consumer protection law. The contraventions that were established in the report are stated in subsection b of the Annex to the Act on enforcement of consumer protection law, whose stipulations may be enforced by the Consumer Authority in accordance with administrative law.

62. The Consumer Authority takes action only if there is evidence of actions or failings that cause harm or may cause harm to consumers' collective interests. The actions of Wizz Mobile are characterised by the fact that a number of consumers have been harmed or may be harmed in the same way, which means it is the case that consumers' collective interests may potentially be harmed.

6.2 Information requirements as part of the information society

6.2.1. General points

63. Article 3:15d, paragraph 3 of the Dutch Civil Code [*BW- Burgerlijk Wetboek*] stipulates that a service that forms part of the information society shall be deemed to be any service that is generally provided in return for payment, is provided by electronic means, at a distance and on the request of an individual consumer, without the parties being present at the same location. The online provision of subscriptions for ringtones and wallpapers is a service that forms part of the information society in the sense referred to above.

64. Article 3:15d, paragraph 1 of the Dutch Civil Code stipulates that an entity that provides a service as part of the information society shall provide the details as stated in subsections a to f inclusive of that paragraph in a simple, direct manner and in a manner that is permanently accessible to those who use the service.

65. The Explanatory Memorandum to Article 3:15d, paragraph 1 of the Dutch Civil Code states that the requirements with regard to permanent access are satisfied if the details are provided in a location that is permanently accessible for consumers and are updated as necessary, for example on a website that can be accessed by the general public. The one-off provision of information in this regard is not sufficient.⁴⁶

66. The Explanatory Memorandum also states that details are deemed as accessible in a simple and direct manner if these details and their location are displayed in a manner that is both clear and recognisable to users. The service provider may not create obstructions that prevent direct access or that diminish the transparency of the provision of information. Consumers who have little or no experience of using the services of an information society must be able to retrieve these details. The requirements of this Article are, for example not satisfied if the access to details is directed via a series of links, the required details are displayed without an overview of their content or if something is requested in return for providing access to the details.⁴⁷

6.2.2. Accessibility of information in the ordering procedure

67. In previous items, it was explained that Wizz Mobile offered its subscriptions to ringtones and wallpapers to consumers by means of banners and order banners on affiliate websites. The banners directed users to landing pages on the websites www.mobqo.nl and www.2game.nu on which the ringtones and wallpapers could be ordered. The order banner offered the opportunity to order ringtones and wallpapers without visiting these websites.

68. (Order) banners and landing pages are temporary in nature. In order to meet the statutory obligations relating to permanent accessibility of information, the details must be available at any time in a permanent location as referred to in Article 3:15d of the Dutch Civil Code [BW- Burgerlijk Wetboek]. In the mode of operation as used by Wizz Mobile, the permanent elements of the website www.mobqo.nl and www.2game.nu are therefore deemed to be the most suitable. The details that must be provided pursuant to Article 3:15d, paragraph 1 of the Dutch Civil Code, must be accessible at the point at which a person uses the service.⁴⁸ This entails that, if these elements of the websites are not to be bypassed during the ordering procedure, a proper reference to these elements of the website must be displayed on the (order) banners or the landing page.

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

69. Article 3:15d, paragraph 1 of the Dutch Civil Code stipulates that an entity that provides a service as 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 the registered office*
- b. Details that enable swift contact and direct and effective communication with the company, including an e-mail address*
- c. In so far as the company is registered in a trade register or a similar public register the register in which the company is registered and its registration number or, or a similar means of identification in that register (the Chamber of Commerce number) and [...]*
- f. In so far as the company carries out activities that are subject to VAT, the VAT*

registration number as referred to in Article 2a, paragraph 1, subsection g of the Turnover Tax Act 1968.

The mobqo.nl homepage

Identity and address of the registered office (under Article 3:15d, paragraph 1, subsection a)

70. The name of Mobqo is given on the homepage of mobqo.nl. Wizz Mobile Interactive B.V. was stated as the service provider under the link entitled 'Specific Terms and Conditions'. The relationship between Mobqo and Wizz Mobile Interactive B.V. was not stated explicitly.

Other details (under Article 3:15d, paragraph 1, subsections b, c, and f)

71. The details as referred to in subsection b, c, and f were not stated on the homepage of the www.mobqo.nl website, at least not before 12 November 2007. On 30 November 2007, it was determined that the Chamber of Commerce number and the VAT registration number had been included under the link entitled 'Specific Terms and Conditions'. The e-mail address had been included under the link entitled 'Contact' on the homepage, which opened the 'Frequently asked questions' page. A contact form was provided at the foot of this page.⁴⁹ On 2 April 2008, it was determined that by clicking on the link entitled 'Helpdesk' a 'frequently asked questions' page opened, in which an e-mail address, a telephone number, the Chamber of Commerce number and the VAT registration number had been included.⁵⁰

72. In the opinion of the Consumer Authority, the details as referred to in Article 3:15d, paragraph 1, subsections a, b, c and f of the Dutch Civil Code were not accessible in a simple and direct manner on the homepage of the www.mobqo.nl website.

Banners and landing pages of mobqo.nl and 2game.nu (subheadings a and b from Figure 1)

Identity and address of the registered office (under Article 3:15d, paragraph 1, subsection a)

73. On the landing pages of mobqo.nl the identity and the address of the registered office had been included under the link entitled 'Specific Terms and Conditions', while these details appeared under a link entitled 'Supplementary Terms and Conditions of Play' and for 'General Terms and Conditions of Play' on the landing pages of 2game.nu.⁵¹ These links had been included underneath a block of text in small letters, in many cases in a colour that was difficult to read against the background being used. During the period up to and including 12 November 2007, this text always only became visible once the user had scrolled down past an empty space. The name of Mobqo was stated within the block of text. The name of Wizz Mobile Interactive B.V. was stated under these links.

Other details (under Article 3:15d, paragraph 1, subsections b, c, and f)

74. The details as referred to in subsection b, c, and f were not stated on the landing pages of the www.mobqo.nl website at all before 12 November 2007. On 30 November 2007, the

Chamber of Commerce number and the VAT registration number were stated under the link entitled 'Specific Terms and Conditions'.⁵²

75. According to the view of the Consumer Authority, the details given via the landing pages of www.mobqo.nl and 2game.nu as referred to Article 3:15d, paragraph 1, subsections a, b, c and f of the Dutch Civil Code were not accessible in a simple and direct manner.

Order banner (sub-heading c from Figure 1)

76. A link entitled 'Disclaimer' had been included on the order banners. A disclaimer means 'freedom from liability' or 'refusal to accept liability'. The disclaimer directed the user to a link entitled 'Specific Terms and Conditions' as described above.
77. In the opinion of the Consumer Authority, the details as referred to Article 3:15d, paragraph 1, subsections a, b, c and f of the Dutch Civil Code were not accessible in a simple and direct manner via the banner either.

The view with regard to the address of the registered office.

78. Wizz Mobile stated at the hearing that its address at Kruisdonk 64a in Maastricht may be sufficient as an address of a registered office as referred to in 3:15d, paragraph 1, subsection a of the Dutch Civil Code [*BW- Burgerlijk Wetboek*]. According to Wizz Mobile, this address is more than simply a postal address and actual work is carried out there. Meetings are held at this address as well as presentations and discussions with clients. Wizz Mobile states that only a programmer actually works at the address of Poststraat 10-2 in Sittard.

Assessment of the view with regard to the address of the registered office.

79. The fact that, according to Wizz Mobile, work is carried out at the address Kruisdonk 64a in Maastricht, does not detract from the fact the information about this address was not accessible in a direct and simple manner. The Consumer Authority therefore ascertains that no other conclusion may be reached on the basis of this view, irrespective as to whether the address Kruisdonk 64a in Maastricht may be considered a registered office.

View stated with regard to stating the VAT registration number

80. At the hearing, Wizz Mobile requested that attention be drawn to the fact that in the report, stating of the VAT registration number was incorrectly linked to Article 3:15d, paragraph 1, subsection d of the Dutch Civil Code [*BW- Burgerlijk Wetboek*].

Assessment of the view stated with regard to stating the VAT registration number

81. The Consumer Authority determined that Wizz Mobile was correct in claiming that the stating of the VAT registration number under item numbers 120 and 121 of the report was

incorrectly linked to Article 3:15d, paragraph 1, subsection d of the Dutch Civil Code. According to the view of the Consumer Authority, it is evident that a mistake was made.

82. Furthermore, the Consumer Authority found that there is otherwise no evidence of an unclearly defined contravention in the report. The Consumer Authority has therefore determined that Wizz Mobile has suffered no harm as a result of this error.

View stated with regard to the disclaimer on the order banners

83. At the hearing, Wizz Mobile claimed that the word ‘Disclaimer’ is an unintentionally incorrect translation of the phrase ‘terms and conditions’.

Assessment of the view stated with regard to the disclaimer on the order banners

84. The Consumer Authority is of the opinion that placing the information referred to in Article 3:15d, paragraph 1 of the Dutch Civil Code under a ‘disclaimer’ or under a link entitled ‘Terms and Conditions’ may not be regarded as providing that information in a simple and directly accessible manner.

85. Otherwise, the Consumer Authority does not concur with the claim of Wizz Mobile. The term ‘disclaimer’ has become established in the Dutch language and is defined in the Dutch language dictionary *Groot woordenboek hedendaags Nederlands* (otherwise known as ‘de Dikke van Dale’ – the complete van Dale) as follows: “*a statement in a publication in which a company places sets limits on its responsibilities*”.

Conclusion of the Consumer Authority with regard to Article 3:15d, paragraph 1 of the Dutch Civil Code [BW- Burgerlijk Wetboek]

86. Wizz Mobile displayed the text “*Mobqo (or 2game) operates in accordance with the Netherlands Code of Conduct for SMS services*” in small letters at the foot of the homepages of the websites www.mobqo.nl and www.2game.nu, at the foot of the landing pages of these websites and on the page that opened when the user clicked on the link entitled ‘Disclaimer’ in the order banner. The Consumer Authority is of the opinion that by doing this, Wizz Mobile does not meet its obligations to state its identity as referred to in Article 3:15d, paragraph 1, subsection a of the Dutch Civil Code. This text was not displayed in a clear and recognisable manner and furthermore it is not clear to consumers that they are dealing with Wizz Mobile and what the nature of the relationship is between Mobqo and Wizz Mobile. It is also important in this regard that the names Mobqo and 2game are not registered as trading names in the trade register of the Chamber of Commerce.
87. The Consumer Authority has determined that Wizz Mobile did not comply with the stipulations of Article 8.2, paragraph 1 of the Act on enforcement of consumer protection

law [*Wet handhaving consumentenbescherming*] in conjunction with Article 3:15d, paragraph 1, subsections a, b, c and f of the Dutch Civil Code.

6.2.4. Denotation of the price and the associated charges (Article 3:15d, paragraph 2 of the Dutch Civil Code [BW- Burgerlijk Wetboek])

88. Article 3:15d, paragraph 2 of the Dutch Civil Code stipulates that the service provider shall state prices for a service that forms part of the information society in a clear and unambiguous manner, stating explicitly whether taxes and delivery charges are included in the price, and if possible, which ones.
89. Wizz Mobile offers a service that forms part of the information society by means of banners that direct users to landing pages of the websites www.mobqo.nl and www.2game.nu and by means of order banners. In the opinion of the Consumer Authority, in the case of such an ordering process, prices must be denoted in a clear and unambiguous manner on those banners or landing pages or on the order banners.
90. The word 'Free' was displayed in large letters on the banners and the landing pages as well as on the order banners. The consumer was only able to know that a subscription for 3 ringtones or wallpapers per week charged at €3 each was involved by viewing the block of text that was not immediately visible at all up until 12 November 2007. This block of text only became visible if the user scrolled down the landing page past an empty space. The text was displayed in small letters and for the most part in a colour that was difficult to read against the background being used. This same text block was displayed under a link entitled 'Disclaimer' on the bottom-left of the order banners.
91. Furthermore, it was not stated whether and which taxes and delivery charges were included in the price, as required by Article 3:15d, paragraph 2 of the Dutch Civil Code. On the landing pages and order banners, it was only stated that "SMS download charges" applied in addition to the €3 for a ringtone or a wallpaper. It was not stated whether VAT was included.
92. The Consumer Authority has determined that there was evidence that the cost of signing up to the subscription was stated in a clear and unambiguous manner, in so far as Wizz Mobile offered subscriptions for ringtones through the homepage of the website www.mobqo.nl. There was, however, no evidence that taxes and delivery charges were expressly stated and whether or not these were included in the price. The text "*This is a subscription service. Images are charged at €3 each. A maximum of 3 items is sent per week*" was however displayed with the offers on the homepage www.mobqo.nl.

Conclusion of the Consumer Authority with regard to Article 3:15d, paragraph 2 of the Dutch Civil Code [BW- Burgerlijk Wetboek]

93. The Consumer Authority has determined that Wizz Mobile did not comply with the stipulations of Article 8.2, paragraph 1 of the Act on enforcement of consumer protection law [*Wet handhaving consumentenbescherming*] in conjunction with Article 3:15d, paragraph 2 of the Dutch Civil Code [*BW- Burgerlijk Wetboek*].

6.2.5. Cessation of the contraventions relating to statutory information requirements as part of the information society.

94. The Consumer Authority determined that Wizz Mobile has made such amendments to the homepages of the websites www.mobqo.nl and www.2game.nu and the landing pages of these websites that the contraventions of the stipulations of Article 3:15d, paragraph 1, subsections a, b, c, and f and Article 3:15d, paragraph 2 of the Dutch Civil Code have ceased.

95. The order banner is no longer used by Wizz Mobile.⁵³ The address www.2game.nu currently (at the time that the report was drawn up) links directly to the homepage of the website www.mobqo.nl. On this website, Wizz mobile has met the obligations as referred to in Article 3:15d, paragraph 1, subsections a, c, and f of the Dutch Civil Code by displaying the following passage on the homepage and the landing page:

*"This service is provided by Wizz Mobile Interactive B.V., Kruisdonk 64a, 6222 PH Maastricht, Netherlands. Chamber of Commerce number – 17207642. VAT number: NL818091551B01. Mobqo is a division of Wizz Mobile Interactive B.V."*⁵⁴

96. Wizz Mobile has displayed a link entitled 'Helpdesk (contact)' at the foot of the homepage and landing pages. This link is visible without the user needing to scroll down past an empty space. Wizz Mobile states a telephone number and an e-mail address on the page that opens through this link, and by having done so, this meets the obligation as referred to in Article 3:15d, paragraph 1, subsection b of the Dutch Civil Code.

97. Wizz Mobile has met its obligation as referred to in Article 3:15d, paragraph 2 of the Dutch Civil Code by displaying the following text on the landing pages:⁵⁵

"This is a paid subscription service. The charge is €9 per week. No longer want this service? Text RINGTONES STOP. First item is free*."

**You receive this realtone for free on signing up to a realtone subscription.*

Information: You receive 3 realtones per week as part of a realtone subscription. Realtones are charged at €3 each (including VAT, exclusive of SMS download charges and WAP GPRS charges). You will be charged by your telecom provider stating 5858. To sign up to a

realtone subscription: (1) Enter your mobile number and click on the 'Send' button. (2) You will receive a text message requesting confirmation of this. (3) Confirm by texting OK to 5858. (4) The subscription sign-up is complete. You will receive confirmation of this by text message. A cooling-off period does not apply to this subscription. Important: If you under 16, please ask permission from your parents first. To cancel to a realtone subscription: Text RINGTONE STOP to 5858, use our Helpdesk or call 0909-4030030 (35ct/pm)

6.3. Statutory information requirements applying to distance purchasing

98. A distance contract in accordance with Article 7:46a, subsection a of the Dutch Civil Code [BW- *Burgerlijk Wetboek*] is deemed to be a contract which involves the exclusive use of one or more means of remote communication up to and including the point at which the contract is concluded, within the scope of a system organised by the vendor or service provider for the purpose of distance selling or service provision. Article 7:46a, subsection b of the Dutch Civil Code stipulates that if the contract is concluded at a distance as part of a consumer purchase, this is deemed to be distance purchasing.
99. Wizz Mobile concludes contracts over the internet by means of placing offers on affiliate websites and on its own website (www.mobqo.nl and www.2game.nu). Wizz Mobile therefore concludes contracts with consumers as referred to in Article 7:46a, subsection b of the Dutch Civil Code.
100. Article 7:46i, paragraph 1 of the Dutch Civil Code stipulates that Article 7:46c of the Dutch Civil Code shall apply *mutatis mutandis* to the services being carried out.
101. The statutory information requirements stated under Article 7:46c of the Dutch Civil Code on distance purchasing therefore apply to Wizz Mobile. Paragraph 1 of this provision stipulates the statutory information requirements that apply prior to a purchase coming into being. Paragraph 2 contains the statutory information requirements that apply to the vendor with regard to the fulfilment of the contract. The manner in which the vendor is able to meet these requirements depends for some part on the manner in which the vendor has provided information to the consumer prior to the purchase being completed at a distance.

6.3.1. Statutory information requirements that apply prior to the purchase

102. Article 7:46c, paragraph 1 of the Dutch Civil Code [BW- *Burgerlijk Wetboek*] stipulates that the information as referred to in subsections a to i inclusive shall be provided to the other party by all means that are appropriate to the long-distance communication technology employed and in a manner that is clear and comprehensible, at the appropriate time prior to the purchase being completed.

103. This provision has been written in order to prevent the use of technology for the remote provision of information causing the information to be provided to the consumer being diminished.⁵⁶

6.3.2. Provision of information at the appropriate time prior to the purchase during the ordering process with Wizz Mobile

104. Once the consumer has entered and submitted his/her mobile number, a new window appeared on the consumer's computer which displayed the message: "*Thanks! To receive your free realtone, text OK now to 5858*". If the consumer sent this text message, this concluded the contract.

105. After entering and submitting his/her mobile telephone number, the consumer received a text message on that number. That message began with some text that is similar to the text that could be read by the consumer on the computer screen immediately after entering and submitting his/her mobile number.

106. During the ordering process, it was not pointed out to consumers that they would receive a text message containing relevant information that they should read prior to concluding the contract. Consumers will not have been aware during the ordering process of Wizz Mobile that supplementary information would be provided to them in the form of a text message. Moreover, a received text message needs to be opened before the content can be read. The text message sent by Wizz Mobile contained some limited information that would suggest to the consumer that he/she would be signing up to a subscription service. In order to view this information, however, he/she had to scroll down twice past an empty space in the text message (see item number 46).

107. The Consumer Authority is of the opinion that this method of providing information may not be regarded as provision of information that meets the requirements as stipulated in paragraph 1 of Article 7:46c of the Dutch Civil Code [*BW- Burgerlijk Wetboek*]. It is highly doubtful whether the consumer received the text message from Wizz Mobile, prior to entering into the contract by sending a text message him/herself with the word 'OK'. If it may be assumed that this is the case, it is unlikely that the consumer read the text message sent by Wizz Mobile from beginning to end due to the layout of the message. The Consumer Authority therefore does not concur with the view of Wizz Mobile that the provision of information by means of a text message from Wizz Mobile takes place in good time prior to the distance purchase and is clear and comprehensible. The Consumer Authority will not examine the issue of whether the textual content of the text message sent by Wizz Mobile was sufficiently clear and comprehensible.

108. The Consumer Authority is of the opinion that the provision of information in good time in the ordering process used by Wizz Mobile entails that the information must be provided on the landing pages or the order banner on mobqo.nl and 2game.nu. The following items will refer to each of the information requirements that apply before a distance purchase is made and will ascertain whether the information has been provided in the required manner.

6.3.3. Information provided prior to purchasing in relation to the identity of the vendor (Article 7:46c, paragraph 1, subsection a of the Dutch Civil Code [BW- Burgerlijk Wetboek])

109. The vendor is required to inform the other party in a clear and comprehensible manner, in good time prior to the distance purchase being completed, as stipulated in Article 7:46c, paragraph 1, subsection a of the Dutch Civil Code.

110. A text block was displayed at the foot of the landing pages on mobqo.nl and 2game.nu in small letters and in a colour that was difficult to read against the background being used. This text block only became visible if the user scrolled down past an empty space in the open window.

111. This text contained a number of links, namely General Terms and Conditions – Specific Terms and Conditions – Privacy Policy – Copyright Policy – Compatible handsets.

112. The text block contained the text “*Mobqo operates in accordance with the Netherlands code of conduct for SMS services*”. In the ‘Specific Terms and Conditions’, the consumer reads the following text in Article 2: “*The Service is provided by Wizz Mobile Interactive B.V., Kruisdonk 64a, 6222 PH Maastricht, Netherlands*”⁵⁷ Mobqo is a trading name of Wizz Mobile but this trading name is not registered in the trade register held by the Chamber of Commerce.

113. A link entitled ‘Disclaimer’ was displayed on the order banner. On opening this link, the same text as the aforementioned block of text on the landing pages could be viewed.

Conclusion of the Consumer Authority with regard to Article 7:46c, paragraph 1 of the Dutch Civil Code [BW- Burgerlijk Wetboek]

114. The Consumer Authority has determined that Wizz Mobile did not provide information with regard to its identity in good time and in a clear and comprehensible manner on the landing pages and on the order banners of mobqo.nl and 2game.nu

115. The Consumer Authority has furthermore determined that Mobqo and Wizz Mobile Interactive B.V. were both denoted as companies, without it being made clear whether one or two companies were involved. Furthermore, the names were not stated in a clear and

comprehensible manner. The names were displayed in a block of text that was not immediately visible at all before 12 November 2007, and these also appeared under a link within this block of text (see item number 84).

116. The Consumer Authority has determined that Wizz Mobile did not comply with the stipulations of Article 8.5, paragraph 2 of the Act on enforcement of consumer protection law [*Whc - Wet handhaving consumentenbescherming*] in conjunction with Article 7:46c, paragraph 1, subsection a of the Dutch Civil Code.

6.3.4. Information provided prior to purchasing in relation to the main features of the service (Article 7:46c, paragraph 1, subsection b of the Dutch Civil Code [BW- Burgerlijk Wetboek])

117. Article 7:46c, paragraph 1, subsection b of the Dutch Civil Code stipulates that information relating to the main features of the service shall be supplied to the other party in a manner that is clear and comprehensible, in good time prior to the distance purchase being completed.

118. The main features of the services provided by Wizz Mobile are namely:

- a. the fact that the service involves a subscription
- b. the content of the subscription

The service involves a subscription

119. The landing pages of mobqo.nl and 2game.nu and also the order banners offered a ringtone or wallpaper and state that this is 'Free'. The information relating to the fact that a subscription is actually involved and that only the first item of this is free, was not supplied in a clear and comprehensible manner. This text appeared in a block of text that was not immediately visible at all before 12 November 2007. Furthermore, no clear reference was provided to this block of text and this text was usually displayed in a colour that was difficult to read against the background being used, or was displayed on pages that could only be accessed by means of links that were not immediately visible.

The content of the subscription

120. When signing up to the subscription, it was unclear to the consumer as to what kind of ringtones or wallpapers could be downloaded. There was no mention of an artist, music genre or theme for example, on the websites, the landing pages or the order banners. During the term of the subscription, the consumer received text messages on his/her mobile telephone that contained an eleven-digit number, beginning with 5858. The consumer could not infer what he/she would receive from this message either. Once the consumer had selected the 'Get' option, he/she could select a link and store the ringtone. Only then was the consumer able to see which specific item had been sent.

Conclusion of the Consumer Authority with regard to Article 7:46c, paragraph 1, subsection b of the Dutch Civil Code [BW- Burgerlijk Wetboek]

121. The Consumer Authority has determined that information relating to the main features of the service were not supplied in good time prior to the distance purchase being completed or in a clear and comprehensible manner on the landing pages of Mobqo.nl and 2game.nu, this information being:
- a. the fact that the service involves a subscription
 - b. the content of the subscription, particularly the content of the items to be supplied.
122. The Consumer Authority has determined that Wizz Mobile did not comply with the stipulations of Article 8.5, paragraph 2 of the Act on enforcement of consumer protection law [*Whc - Wet handhaving consumentenbescherming*] in conjunction with Article 7:46c, paragraph 1, subsection b of the Dutch Civil Code.

6.3.5. Information provided prior to purchasing regarding the price inclusive of taxes (Article 7:46c, paragraph 1, subsection c of the Dutch Civil Code [BW- Burgerlijk Wetboek])

123. Article 7:46c, paragraph 1, subsection c of the Dutch Civil Code stipulates that information relating to the price of the service, including all taxes, shall be supplied to the other party in a manner that is clear and comprehensible, in good time prior to the distance purchase being completed.
124. The word 'Free' was displayed on more than one occasion, and repeatedly in large letters and eye-catching colours on the (order) banners and landing pages. The price of the subscription service was displayed in a text block on the landing pages of Mobqo.nl and 2game.nu and also on the order banners, which was not immediately visible at all to the consumer before 12 November 2007. Furthermore, no clear reference was provided to this block of text. This text box only became visible if the user scrolled down past an empty space or if the user referred to the 'Disclaimer' text. The text was usually displayed in a colour that was difficult to read against the back ground being used.
125. In the opinion of the Consumer Authority, wherever the word 'Free' is prominently displayed while charges are involved in the contract that the consumer is about to enter into, information relating to these charges should be visible at a glance, without any further actions being necessary to view this information.

Conclusion of the Consumer Authority with regard to Article 7:46c, paragraph 1, subsection c of the Dutch Civil Code [BW- Burgerlijk Wetboek]

126. The Consumer Authority has determined that information relating to the price of the service, including all taxes, were not supplied in good time prior to the distance purchase

being completed or in a clear and comprehensible manner on the landing pages of Mobqo.nl and 2game.nu.

127. The Consumer Authority has determined that Wizz Mobile did not comply with the stipulations of Article 8.5, paragraph 2 of the Act on enforcement of consumer protection law [*Whc - Wet handhaving consumentenbescherming*] in conjunction with Article 7:46c, paragraph 1, subsection c of the Dutch Civil Code.

6.3.6. Information provided prior to purchasing regarding the method of payment, delivery and execution of the service (Article 7:46c, paragraph 1, subsection e of the Dutch Civil Code [BW- Burgerlijk Wetboek])

128. Article 7:46c, paragraph 1, subsection e of the Dutch Civil Code stipulates that information relating to the method of payment and the delivery or execution of the service, shall be supplied to the other party in a manner that is clear and comprehensible, in good time prior to the distance purchase being completed.
129. During the subscription term, the consumer received 3 items per week. The consumer received a service message on his/her mobile telephone containing a link that he/she could use to download the item. The item had to be downloaded within a certain period of time. If the consumer did not download the item within this period, the message “*Your ringtone has been expired*” [sic] appears.
130. Information regarding the dates on which the service messages would be sent or the period in which the item must be downloaded was not provided to the consumer.
131. The consumer had to meet the costs of these sent messages, even if he/she had not downloaded the item or could not download it.

Conclusion of the Consumer Authority with regard to Article 7:46c, paragraph 1, subsection e of the Dutch Civil Code [BW- Burgerlijk Wetboek]

132. The Consumer Authority has determined that Wizz Mobile did not comply with the stipulations of Article 8.5, paragraph 2 of the Act on enforcement of consumer protection law [*Whc - Wet handhaving consumentenbescherming*] in conjunction with Article 7:46c, paragraph 1, subsection e of the Dutch Civil Code.

6.3.7. Information provided prior to purchasing regarding the cooling-off period (Article 7:46c, paragraph 1, subsection f of the Dutch Civil Code [BW- Burgerlijk Wetboek])

133. The cooling-off period is defined as the period in which the consumer may dissolve an contract without providing grounds for doing so (Article 7:46d of the Dutch Civil Code). Article 7:46c, paragraph 1, subsection f of the Dutch Civil Code stipulates that information in relation to whether or not the option of dissolving the contract as referred

to in Article 7:46d of the Dutch Civil Code applies shall be provided to the other party in a manner that is clear and comprehensible, in good time prior to the purchase being completed. In accordance with Article 7:46d of the Dutch Civil Code, the consumer may dissolve the contract within the seven-day cooling-off period. Article 7:46i of the Dutch Civil Code stipulates that the seven-day cooling-off period shall begin from the point at which the contract is concluded.

134. Wizz Mobile did not provide consumers with any information with regard to whether or not a cooling-off period applied.

View with regard to the cooling-off period

135. At the hearing of 24 June 2008, Wizz Mobile claimed that the cooling-off period does not apply to their service.

Assessment of the viewpoint with regard to the cooling-off period

136. Article 7:46c, paragraph 1, subsection f of the Dutch Civil Code stipulates that it shall be stated whether or not the cooling-off period applies to the service in question.

Conclusion of the Consumer Authority with regard to Article 7:46c, paragraph 1, subsection f of the Dutch Civil Code [BW- Burgerlijk Wetboek]

137. The Consumer Authority has determined that, Wizz Mobile did not provide information relating to whether or not the option to dissolve the contract within seven days, as referred to in Article 7:46d of the Dutch Civil Code applied, in good time prior to the distance purchase being completed. The Consumer Authority has determined that Wizz Mobile did not comply with the stipulations of Article 8.5, paragraph 2 of the Act on enforcement of consumer protection law [*Whc - Wet handhaving consumentenbescherming*] in conjunction with Article 7:46c, paragraph 1, subsection f of the Dutch Civil Code in conjunction with Article 7:46c of the Dutch Civil Code.

6.3.8. Information provided prior to purchasing regarding the minimum duration of the contract (Article 7:46c, paragraph 1, subsection i of the Dutch Civil Code [BW- Burgerlijk Wetboek])

138. Article 7:46c, paragraph 1, subsection i of the Dutch Civil Code stipulates that, if a distance purchase relates to a continued or periodic delivery of items, information relating to the minimum duration of the contract shall be provided in a clear and comprehensible manner, in good time prior to the distance purchase being completed.

139. The consumer enters into an contract for an indefinite period of time when ordering a ringtone or taking part in a game as referred to under item number 34. The consumer is required to actively unsubscribe from the service.⁵⁸

Landing pages

140. On the landing pages of Mobqo.nl and 2game.nu as well as on the order banners, the block of text as referred to under item numbers 30 and 34 only stated that a subscription service was involved and as part of this, consumers received 3 ringtones or wallpapers per week at €3 each. The text “*No longer want this service? Text <product name> STOP to 5858*” was also displayed.

General Terms and Conditions and frequently asked questions

141. The following is stated under Article 10 of the General Terms and Conditions of Mobqo⁵⁹:
“The Provider shall offer the user the opportunity to discontinue the information that is received by means of the text messaging service.” A minimum duration of the contract was not stated. The Consumer Authority is also of the opinion that ‘discontinue’ does not mean the same as ‘terminate’.

142. In the 'Frequently asked questions' section of the Mobqo website⁶⁰, the following text was displayed: *"Our services are subscription services. These will continue until you unsubscribe."* This information is formulated in the same way in the General Terms and Conditions⁶¹ and the 'Frequently asked questions'⁶² section of 2game.nu.
143. Consumers received the services of Wizz Mobile for a considerable period of time without realising that a subscription was involved. The information with regard to entering an contract and the manner of unsubscribing was not provided in good time or in a clear and comprehensible manner, which meant that consumers only noticed that they had entered into a subscription because they received expensive bills or a were left with very low pre-paid credit. Consumers subsequently had difficulty in unsubscribing because they did not possess the correct keyword, among other reasons.⁶³

Consumers made the following comments about unsubscribing:

- *"I want to cancel this immediately. I have already attempted 23987301 times by sending the keyword 'Stop' but then I receive a message stating that my text message has not been recognised."*⁶⁴
- *"[Consumer] continues to receive text messages from the number 5858 every night stating that she can download a ringtone. She does not know how she can unsubscribe"*⁶⁵
- *"I am unable to unsubscribe from the service provided by the 5858 text messaging company, who sends me text messages at □3 each containing ringtones, wallpapers etc. I have sent various keywords back to unsubscribe [...] but nothing happens."*⁶⁶
- *"I have been receiving a text message every night for a number of weeks now. No number is stated. Then it says: <http://mobillo.net?>... The text message also contained a series of numbers such as 5858-3164340. The first 4 numbers are always the same. I have tried a few times to unsubscribe, but it doesn't work"*⁶⁷

View with regard to minimum duration

144. At the hearing of 24 June 2008, Wizz Mobile claimed that the contract did not have a minimum duration. Consumers could cancel the subscription at any time.

² Document 64/14, annex 2069025.

Assessment of the view with regard to minimum duration

145. The Consumer Authority is of the opinion that, if the contract continues until it is cancelled, this must be understood to involve a minimum duration. Such essential information may not be withheld from consumers by means of an inadequate explanation of the terms 'minimum duration'.
146. The Consumer Authority is of the opinion that Wizz Mobile ought to have provided consumers with information relating to the minimum duration in good time and in a clear and comprehensible manner prior to the distance contract being concluded. As demonstrated in the aforementioned items, consumers were not informed of this, however.

Conclusion of the Consumer Authority with regard to Article 7:46c, paragraph 1, subsection i of the Dutch Civil Code [BW- Burgerlijk Wetboek]

147. The Consumer Authority has determined that Wizz Mobile did not provide information relating to the minimum duration of the contract in good time prior to the distance purchase being completed, namely that the contract continued up until this was cancelled.
148. The Consumer Authority has determined that Wizz Mobile did not comply with the stipulations of Article 8.5, paragraph 2 of the Act on enforcement of consumer protection law [*Whc - Wet handhaving consumentenbescherming*] in conjunction with Article 7:46c, subsection i of the Dutch Civil Code.

6.3.9. Cessation of the contraventions relating to statutory information requirements prior to the distance purchase

149. The Consumer Authority has determined that the contravention of the stipulations of Article 7:46c, paragraph 1, subsections a, b (in relation to the subscription service), c, e, f and i of the Dutch Civil Code [*BW- Burgerlijk Wetboek*] with regard to the landing pages of Mobqo.nl and 2game.nu has ceased⁶⁸. The offer contains information that clearly states that a subscription is involved and directly underneath, the text referred to under item number 97 is displayed.
150. The contraventions caused by the ordering process by means of order banners have now ceased as order banners have not been used since 6 January 2008.⁶⁹
151. The Consumer Authority has determined that the contravention of the stipulations of subsection e (manner of execution of the subscription service) has ceased now that information provided by Wizz Mobile has shown that the consumer has unlimited access to information about downloads.⁷⁰ Information is also provided as to the content of the

download⁷¹, which means that the contravention of Article 7:46c, paragraph 1, subsection b of the Dutch Civil Code (relating to the content of the subscription) has ceased.

6.3.10. Statutory information requirements in compliance with the contract

152. Paragraph 2 of Article 7:46c of the Dutch Civil Code [*Burgerlijk Wetboek*] stipulates more specific requirements with regard to the manner in which the vendor shall provide information when fulfilling a contract, at least in so far as delivery is concerned. The information shall be clear and comprehensible and provided in writing or by means of a different accessible and permanent data storage medium, except in so far as this has already been provided in the aforementioned form prior to the distance purchase being completed.
153. The statutory information requirements that relate to the identity of the company, the main features of the service, the price and the taxes, the method of payment, delivery and execution of the service, the cooling-off period and the minimum duration of the contract (Article 7:46c, paragraph 1, subsections a, b, c, e, f and l of the Dutch Civil Code). The address for visitors of the registered office must also be stated in compliance with the contract (Article 7:46c, paragraph 2, subsection c of the Dutch Civil Code).

6.3.11. Use of mobile telephones for the provision of information in compliance on the part of Wizz Mobile.

154. In relation to this, a description of the text messages sent by Wizz Mobile once the consumer had entered and submitted his/her mobile number is given under item number 104 and in the subsequent items. The issue as to whether the statutory information requirements that must be met by the vendor in fulfilling with the contract can be met by means of sending a text message will be examined next.
155. A mobile telephone is by its nature a tool that enables information to be exchanged directly and rapidly. The mobile telephone is not a suitable means of storing contractual information, certainly in the cases involving children and young people.
156. At the hearing of 24 June 2008, Wizz Mobile claimed that a mobile telephone is a permanent data storage medium, as the user may determine him/herself which text messages he/she wants to keep. Conversely, the Consumer Authority is of the opinion that the option to keep a text message is insufficient for a mobile telephone to be considered as a permanent data storage medium in the sense of Article 7:46c, paragraph 2 of the Dutch Civil Code [*Burgerlijk Wetboek*]. For that matter, in the case of contracts that are concluded by means of a mobile telephone, information may be provided by referring to another data storage medium in a clear and comprehensible manner by using a text message, for example, a website from the consumer can download the information and store this on his/her own computer.⁷²

6.3.12. The provision of information relating to items such as identity of the vendor in fulfilling with the contract (Article 7:46c, paragraph 2, subsection a, in conjunction with Article 7:46c, paragraph 1, subsections a, b, c, e, f and i of the Dutch Civil Code [BW- Burgerlijk Wetboek])

157. The Consumer Authority has determined that Wizz Mobile did not provide the information as referred to in Article 7:46c, paragraph 1, subsections a, b, c, e, f and i of the Dutch Civil Code in clear and comprehensible manner prior to the purchase being completed. The Consumer Authority has also determined that this information was subsequently not provided during the fulfilment of the contract as a whole. Text messaging was the sole method used in providing this information (see item number 47). This information was incomplete and only stated that a subscription service was involved and stated 5858 as the sender.

Conclusion of the Consumer Authority with regard to Article 7:46c, paragraph 2 of the Dutch Civil Code [BW- Burgerlijk Wetboek]

158. Wizz Mobile did not provide the details as referred to in Article 7:46c, paragraph 2, subsection a of the Dutch Civil Code in a clear and comprehensible manner, neither in writing nor using a permanent data storage medium as far as its fulfilment of the distance purchase was concerned.

159. The Consumer Authority has determined that Wizz Mobile did not comply with the stipulations of Article 8.2, paragraph 1 of the Act on enforcement of consumer protection law [*Wet handhaving consumentenbescherming*] in conjunction with Article 7:46c, paragraph 1, subsections a, b, c, e, f and l of the Dutch Civil Code.

6.3.13. Provision of information relating to the address for visitors of the registered office in compliance with the contract (Article 7:46c, paragraph 2, subsection c of the Dutch Civil Code).

160. In accordance with Article 7:46c, paragraph 2, subsection c of the Dutch Civil Code, in fulfilling with the contract, information with regard to the address for visitors of the registered office to which the consumer may file a complaint, must be provided in writing and in a clear and comprehensible manner. The address for visitors must be stated for the purpose of complaints and service provision.⁷³

161. The address Kruisdonk 64a, 6222 PH Maastricht was displayed on the landing pages of Mobqo.nl and 2game.nu, as well as on the order banner under the disclaimer link and under the link entitled 'Specific Terms and Conditions'. Stating information in this manner is not deemed to be sufficiently clear and comprehensible in this regard.

View with regard to the address Kruisdonk 64a, Maastricht

162. Wizz Mobile claimed that work-related activities, such as holding meetings, are carried out at the address Kruisdonk 64a in Maastricht, in addition to the address Poststraat 10-2, Sittard.

Assessment of the view with regard to the address Kruisdonk 64a, Maastricht

163. The Consumer Authority points out that enforcement officials from the Consumer Authority who visited the premises at Kruisdonk 64a in Maastricht, were refused access to this address, having been told: “You have just come in here unannounced. I haven’t got time for this. See if I care.”⁷⁴
164. The Consumer Authority is of the opinion that Wizz Mobile may evidently not be visited at the address Kruisdonk 64a in Maastricht.

Conclusion of the Consumer Authority with regard to Article 7:46c, paragraph 2, subsection c of the Dutch Civil Code [BW- Burgerlijk Wetboek]

165. The Consumer Authority has determined that in fulfilling the distance purchase, information relating to the address for visitors at the company’s registered address as referred to Article 7:46c, paragraph 2, subsection c of the Dutch Civil Code was not provided. The Consumer Authority has determined that Wizz Mobile did not comply with the stipulations of Article 8.5, paragraph 2 of the Act on enforcement of consumer protection law [*Whc - Wet handhaving consumentenbescherming*] in conjunction with Article 7:46c, paragraph 2, subsection c of the Dutch Civil Code.

6.4.1. Unsolicited sending (Article 7.7, paragraph 4 in conjunction with paragraph 2 of the Dutch Civil Code [BW- Burgerlijk Wetboek])

166. Article 7.7, paragraph 2 of the Dutch Civil Code stipulates that the sending of an item to a natural person who did not order that item, requesting payment of a fee shall not be permitted. The Explanatory Memorandum states that sending of items is deemed to be unsolicited, if the consumer has not requested the item, and if the consumer has not expressly agreed for the item to be sent to him/her.⁷⁵ Article 7:7, paragraph 4 states that paragraph 2 applies *mutatis mutandis* to the execution of a service that was not ordered.

Consumers have made the following comments regarding Wizz Mobile:

- *“I have just been subscribed on a shit website to your subscription service, but I did not want that”.*⁷⁶
- *“The lady’s son requested a free ringtone but he’s now found himself tied into a subscription.”*
- *My daughter registered for a free realtone from Mobqo last month on 13 September. After her pre-paid credit (amounting to around €10) had suddenly disappeared, we looked for the cause of this together, on the website internetoplichting.nl, among others.”*
- *“On closer examination, it became apparent that, unbeknown to me, I had become a member of these two ringtone companies and that, also unbeknown to me, they had sent me text messages that they charged me for.”*

- *"I requested a free ringtone once and I was subsequently bombarded with unsolicited ringtones, and from looking at my monthly bill, I also seem to have been charged for these ringtones."*⁷⁷
 - *"I was surfing on the internet and an advert for ringtones appeared. I had subscribed without knowing it. It was only after a few weeks that I discovered that my credit had been debited numerous times".*
 - *"As I had downloaded a ringtone a while ago from 5858, I have subsequently been bothered by text messages from 5858 requesting me to visit their website. I did this only once, unbeknown to me, but I never signed anything or agreed to anything. My monthly phone bill was €40 higher than usual until I discovered how to stop this nuisance"*⁷⁸
167. The express consent of the consumer for a subscription was neither requested on the landing pages of www.mobqo.nl and www.2game.nu, nor on the order banners.

View with regard to unsolicited sending

168. At the hearing of 24 June 2008, Wizz Mobile claimed that the text messages always stated that the service provided by Wizz Mobile involved a subscription service. For this reason, the sending of items could not be deemed as unsolicited.

Assessment of the view with regard to unsolicited sending

169. The consumer entered into the contract by sending a text message with the word 'OK' to Wizz Mobile during the ordering process of Wizz Mobile. This consumer did this in response to the invitation on his/her computer screen on which the text *"Reply now by texting OK to 5858 to receive your free ringtone"*. The 'OK' sent by the consumer therefore related exclusively to the free ringtone.
170. Furthermore, there was no mention of a subscription service in the text message being referred to by Wizz Mobile, as shown on the left in Figure 1. Moreover, the otherwise limited information in this text message was displayed in such a way that the user had to scroll down twice past an empty space in order to view the information (see item number 46).
171. The Consumer Authority also does not consider the invitation in the text message entitled *"Welcome to the subscription service"* as forming the express consent to enter into a subscription either.

Conclusion of the Consumer Authority

172. The Consumer Authority has determined that the stipulations of Article 8.5, paragraph 1 of the Act on enforcement of consumer protection law [Whc - *Wet handhainvg consumentenbescherming*] in conjunction with Article 7:7, paragraph 2 in conjunction with paragraph 4 of the Dutch Civil Code [*BW- Burgelijk Wetboek*] were not complied with. Wizz Mobile undertook unsolicited services for which consumers were charged. This therefore involves unsolicited sending of items.

6.4.2 Cessation of the contravention

173. The Consumer Authority has determined that the contravention has ceased as order banners are now no longer used and information relating to the nature of the offer from Wizz Mobile, namely a paid subscription (see item number 97) is provided on the website and the landing pages of mobqo.nl and 2game.nu in a clear and comprehensible manner.

6.5 Other points from the verbal exchange of opinions

Reports from consumers

174. At the hearing on 24 June 2008, Wizz Mobile claimed that 27 of the reports could not be considered as clearly relating to them. Furthermore, Wizz Mobile claimed that the reliability of the reports was doubtful. It is possible that reports were not filed by consumers but by business competitors, for example.
175. The Consumer Authority agrees to some extent with the viewpoint of Wizz Mobile that it takes the basic assumption that in any case, 23 reports in which the name of the company or the shortcode 5858 was stated could be linked to Wizz Mobile.
176. The Consumer Authority points out that the complaints that were filed with the ringtones information hotline⁷⁹, the consumer forum on the television programme 'Kassa'⁸⁰ and with ConsuWijzer⁸¹ are to a large extent similar to and furthermore seamlessly link to the complaints that Wizz Mobile itself received.⁸² The Consumer Authority therefore does not concur with the claim of Wizz Mobile that the complaints were filed by business competitors.

Affiliates as co-perpetrators

177. Wizz Mobile has raised the issue of whether all 29 affiliates are designated as co-perpetrators, in view of the fact that all affiliates may place banners from Wizz Mobile on their website in the same manner.
178. The Consumer Authority notes that it emerged from the investigation that 3 of the 29 affiliates maintain a special relationship with Wizz Mobile Interactive B.V.. The Consumer Authority will examine the interrelationship between Wizz Mobile Interactive B.V. and Holdvest Investments B.V. in greater detail under item numbers 221 and in the subsequent items.

7 Conclusions

179. The Consumer Authority has concluded that Wizz Mobile 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 (company identity and address of its 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 registration 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 8.5, paragraph 2 of the Act on enforcement of consumer protection law [*Whc - Wet handhaving consumentenbescherming*] in conjunction with Article
6. 7:46c, paragraph 1, subsection a of the Dutch Civil Code (company identity)
 7. 7:46c, paragraph 1, subsection b of the Dutch Civil Code (main features of the service)
 8. 7:46c, paragraph 1, subsection c of the Dutch Civil Code (the price and taxes)
 9. 7:46c, paragraph 1, subsection e of the Dutch Civil Code (method of payment, delivery and execution of the service)
 10. 7:46c, paragraph 1, subsection f of the Dutch Civil Code (the cooling-off period)
 11. 7:46c, paragraph 1, subsection i of the Dutch Civil Code (the minimum duration of the contract)
 12. 7:46c, paragraph 2, subsection a of the Dutch Civil Code (provision of information in compliance with the contract)
 13. 7:46c, paragraph 2, subsection c of the Dutch Civil Code (address for visitors at the registered office)

and Article 8.5, paragraph 1 of the Act on enforcement of consumer protection law [*Whc- Wet handhaving consumentenbescherming*] in conjunction with

14. 7:7, paragraph 2 in conjunction with paragraph 4 of the Dutch Civil Code (unsolicited sending)

180. These actions are characterised by the fact that a number of consumers have been harmed or may be harmed in the same way, which means it is the case that consumers' collective interests may be harmed.

8 Measures

181. If the Consumer Authority is of the opinion that a contravention has taken place, it may impose a penalty on a daily basis (in case of non-compliance) and/or an administrative fine on the transgressor, pursuant to Article 2.9, paragraph 1 of the Act on enforcement of consumer protection law [*Whc – Wet handhaving consumentenbescherming*].
182. With regard to the contraventions referred to in Chapter 8, the Consumer Authority has satisfied itself that no situation applies that would prevent a penalty on a daily basis or an administrative fine being imposed, as referred to in Article 2.16, paragraph 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.
183. At the hearing on 24 June 2008, Wizz Mobile claimed that the facts that were identified in the report were outdated. The report covered the period between 1 July 2007 and 2 April inclusive. According to Wizz Mobile, amendments were made in November 2007, January 2008 and March 2008, which were given insufficient attention in the report and the report had therefore not been compiled with sufficient accuracy. Furthermore, in the opinion of Wizz Mobile, a penalty on a daily basis or an administrative fine should not be imposed.
184. The Consumer Authority does not share this view. The cessation of the contraventions that were identified in the report does not in itself form grounds for not imposing an administrative fine, in view of the fact that an administrative fine is punitive in nature. The cessation of the contraventions may only be of relevance to the amount of the fine and in so far as a penalty is imposed on a daily basis, if this is considered to serve the purpose of ceasing or preventing further contraventions.
185. The amendments that were made by Wizz Mobile in November 2007 have been included in the relevant file⁸³ in so far as these relate to the observations made by the enforcement officials. The Consumer Authority has added the documents relating to the other amendments demonstrated by Wizz Mobile to the file. In so far as the amendments did indeed cause the observed contraventions to cease, the Consumer Authority has taken this into consideration in the measures to be imposed.
186. Otherwise, the Consumer Authority noted in this matter that the reports and complaints from consumers were not found to have formed the basis for Wizz Mobile to make amendments. In actual fact, the visit to the premises on 12 November 2007, the rulings of

the Advertising Code Committee and ultimately the introduction of the new Code of Conduct for SMS services formed the grounds for this.

8.1 Penalty imposed on a daily basis

Introduction

187. The Consumer Authority is authorised to impose a penalty on a daily basis in order to rectify a contravention or to prevent a contravention being repeated (under 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.

188. From what was put forward in the written exchange of opinion, the Consumer Authority did not find any evidence that the contravention of Article 7:46c, paragraph 2, subsections a and c of the Dutch Civil Code [*BW- Burgerlijk Wetboek*] 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

189. The Consumer Authority orders Wizz Mobile Interactive B.V. to amend the information in accordance with Article 7:46c, paragraph 2, subsections a and c of the Dutch Civil Code. This means that the company, subject to a penalty, must provide information to consumers in the proper manner and in good time in fulfilling the contract, this information relating to:

- The identity of the company and the address for visitors of its registered office
- The main features of the service, namely that it involves a subscription, and the content of the subscription, namely the content of the items to be delivered
- The price of the service, including all taxes;
- The method of payment, delivery and execution of the service
- Whether or not the option to dissolve the contract within seven working days of entering into the contract applies
- The address for visitors of the registered office of Wizz Mobile Interactive B.V. to which consumers may file complaints.

Amount of incremental penalty

190. The incremental penalty that applies to the charge as described under the previous item number is fixed at €250 per working day up to a maximum of €25,000.

Period of grace

191. Wizz Mobile Interactive B.V. is given a period of four weeks with effect from the date on which the decision was published, within which it can carry out the required action without a penalty being imposed. This period is regarded as being sufficient to amend the information in compliance with the contract.

Consideration in the event of the penalty being superfluous

192. In order to prevent misunderstandings arising with regard to the issue as to whether the action has been carried out, Wizz Mobile Interactive B.V. is strongly advised to inform the Consumer Authority of this prior to the end of the period of grace.

8.2 Administrative fine

193. 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*]). At the time at which the investigation into the contraventions began, this amounted to €67,000.⁸⁴

194. In determining the level of the fine to be imposed, the Consumer Authority always takes into account the severity and the duration of the contravention and the extent to which the blame may be placed with the transgressor, pursuant to the provisions of Article 2.21 of the Act on enforcement of consumer protection law [*Whc- Wet handhaving consumentenbescherming*]. The Consumer Authority also takes into account as necessary, the circumstances under which the contravention was committed.

195. 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).

196. Pertaining to the contravention of Article 3:15d, paragraph 1, subsections c and f of the Dutch Civil Code [*BW- Burgerlijk Wetboek*] (failure to state of the Chamber of Commerce number and the VAT registration number), the Consumer Authority has decided not to impose a fine, in view of the specific circumstance that the harm caused to consumers by

this contravention is in all likelihood very limited, together with the fact that the contraventions have ceased.

197. In the case at hand, the Consumer Authority is of the opinion that, in view of both the number and 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 as part of the information society (Article 3:15d, paragraph 1, subsections a and b and Article 3:15d, paragraph 2 of the Dutch Civil Code [*BW- Burgerlijk Wetboek*] and Article 7:46c, paragraph 1, subsection a of the Dutch Civil Code
 - the information requirements relating to the conclusion of a contract as part of a distance purchase and in fulfilling this contract (Articles 7:46c, paragraph 1, subsections a, b, c, e, f and i of the Dutch Civil Code (BW) and 7:46c, paragraph 2, subsections a and c of the Dutch Civil Code).
 - Unsolicited sending (Article 7:7, paragraph 2 in conjunction with paragraph 4 of the Dutch Civil Code).

Severity and duration of the contravention and the extent of culpability

198. 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 stated under item number 179, the Consumer Authority is of the opinion that a distinction may be made as to the severity of the various contraventions.

Severity of the contraventions

Statutory information requirements

199. Non-compliance with statutory information requirements is deemed to be a serious contravention. Consumers are not sufficiently informed with regard to the content of the contract that they are entering into, the other party, the charges for the service and the manner in which they may terminate the contract. Consumers are therefore not in a position to thoroughly consider the pros and cons prior to entering into the contract.
200. In determining the severity of the contravention, the Consumer Authority has taken into account that, when playing the memory game, consumers are given the impression that they are entering a 06-number in order to be informed if they have won the prize, while in actual fact they have signed up to a subscription. This meant that consumers were severely misled.

201. It emerged from the statement of Wizz Mobile that was made at the hearing of the Advertising Code Committee [*Reclame Code Commissie*] that the information was of the utmost importance for consumers and that Wizz Mobile was aware of this⁸⁵. Wizz Mobile made a number of amendments on the basis of complaints that the Consumer Authority filed with the Advertising Code Committee with regard to the manner of the provision of the services by Wizz Mobile Interactive B.V. Wizz Mobile subsequently declared that “*there was no more money to be made from this*”.
202. At the hearing on 24 June 2008, Wizz Mobile noted that the phrase “*free realtone*” was amended to “*Subscribe now and receive this realtone for free*”, and that “*these amendments resulted in a noticeable decline in sales*”.⁸⁶
203. The Consumer Authority infers from this that consumers who have clear and comprehensible information available to them make a different choice to those consumers who do not have the clear and comprehensible information available to them.
204. The websites www.spele.nl, www.clipjes.nl and www.goall.nl are certainly *partly* aimed at children and young people.⁸⁷ The Consumer Authority places the blame fully with Wizz Mobile for the fact that the actions undertaken as described above involved a risk that children and young people would be duped⁸⁸.

Unsolicited sending

205. The Consumer Authority is of the opinion that the execution of services, namely the execution of a subscription to ringtones and wallpapers, without the express permission of the consumer, is a very serious contravention. The company performed a service without any evidence of permission having been expressly given, for which the consumer was charged directly and automatically by means of his/her phone bill, regardless of whether or not the consumer knew that had received the service. Consumers were duped by such a commercial practice. First of all, consumers only discovered that they had a subscription at the point at which they had already been charged. Secondly, although consumers had not given their express consent for a subscription, consumers were required to take action themselves in order to terminate the subscription and the associated charges. This was made all the more difficult for consumers due to the missing provision of information on the part of Wizz Mobile, which resulted in consumers not having access to the essential information that was needed in order to effectively terminate the subscription. This meant that the contravention caused financial loss on the part of the consumer. Furthermore, such a commercial practice causes a nuisance for consumers, in view of the considerable effort that they make in order to terminate the subscription.

Code of Conduct for the provision of SMS services

206. In determining the level of the fine, the Consumer Authority also takes in consideration that Wizz Mobile stated on the websites, on the landing pages and in the disclaimer that could be accessed via the order banners that they adhered to the Code of Conduct for the provision of SMS services (hereinafter referred to as: Code of Conduct). The compliance with the Code of Conduct was confirmed at the hearing of 24 June 2008.⁸⁹
207. At the time the contraventions were committed, the 2003 version of the Code of Conduct applied.⁹⁰
208. The Code of Conduct provides specific regulations for to SMS-subscription services, particularly with regard to transparent communication relating to the nature of the service, in this case a subscription service. The Code is based upon what is known as the 'opt-in' formula, in other words, messages for which the consumer is charged may only be sent if the consumer has agreed to this.
209. The Consumer Authority attributes the blame to Wizz Mobile that the company promoted itself using the Code of Conduct, which is intended to offer consumers a certain level of protection, while Wizz Mobile actually did not comply with important elements of the Code of Conduct, such as those described under item number 208.

Duration of the contravention

210. In determining the duration of the contravention, the Consumer Authority has taken the following into consideration.
211. Enforcement officials from the Consumer Authority Service observed in the report that the contraventions began on 1 July 2007.
212. Wizz Mobile argues that amendments were made to the statements on the websites and the landing pages in November 2007, in January 2008 and in March 2008. Furthermore, the order banners were no longer used since 6 January 2008.
213. The Consumer Authority determined that, while amendments were indeed made to the websites and the landing pages in particular, these were not carried out as quickly as they could have been. It is therefore not the case that the amendments led to a prompt and effective cessation of the contraventions.
214. In determining the level of the fines, the Consumer Authority has also focused on the extent of the business activities of Wizz Mobile and the number of consumers involved. With regard to the aforementioned contraventions, the fines to be imposed are as follows,

without taking account of any circumstances that may increase or decrease the sum of the fine:

- □10,000 for the contravention of the statutory information requirements relating to the company as a service provider as part of the information society.
- □40,000 for the contravention of the statutory information requirement relating to the contract arising from a distance purchase and the compliance with this
- □30,000 for the contravention of the prohibition of unsolicited sending of items.

Circumstances that may increase or decrease the sum of the fine

215. The Consumer Authority is of the opinion that there are circumstances in the case at hand that may result in the aforementioned fines being decreased.
216. In the opinion of the Consumer Authority, the fact that the contraventions have ceased generally forms grounds on which to decrease the fines to be imposed. In this regard, the Consumer Authority definitely takes into account how promptly and effectively the amendments that brought about the cessation of the contraventions were made.
217. The Consumer Authority determined that the contraventions of Article 3:15d of the Dutch Civil Code [*BW- Burgerlijk Wetboek*] and Article 7:46c, paragraph 1 of the Dutch Civil Code have ceased. The visit to the premises on 12 November 2007, the rulings of the Advertising Code Committee [*Reclame Code Commissie*] of January 2008 and the newly-introduced Code of Conduct for the provision of SMS services of May 2008 formed the grounds for the cessation of the contravention.
218. The Consumer Authority has furthermore determined that the amendments to the information provision were implemented prior to the hearing of 24 June 2008, although these could have been implemented sooner. These led to a reduction in the risk of damage to consumer confidence in general, as well as the risk of specific harm affecting individual consumers.
219. In view of the aforementioned details, the Consumer Authority considers a 5% reduction of the fines to be appropriate.

Determining the fines to be imposed

220. The Consumer Authority shall therefore impose fines of:

- €9,500 – for the contravention of the statutory information requirements relating to the company as a service provider as part of the information society (Article 3:15d, paragraph 1, subsections a and b and Article 3:15d, paragraph 2 of the Dutch Civil Code [BW- *Burgerlijk Wetboek*] and Article 7:46c, paragraph 1, subsection a of the Dutch Civil Code)
- €38,000 – for the contravention of the statutory information requirements relating to the conclusion of a contract as part of a distance purchase and in fulfilling this contract (Articles 7:46c, paragraph 1, subsections b, c, e, f and i of the Dutch Civil Code [BW- *Burgerlijk Wetboek*] and Article 7:46c, paragraph 2, subsections a and c of the Dutch Civil Code).
- €28,500 – for the contravention of the prohibition of unsolicited sending of items (Article 7:7, paragraph 2 in conjunction with paragraph 4 of the Dutch Civil Code [BW- *Burgerlijk Wetboek*]).

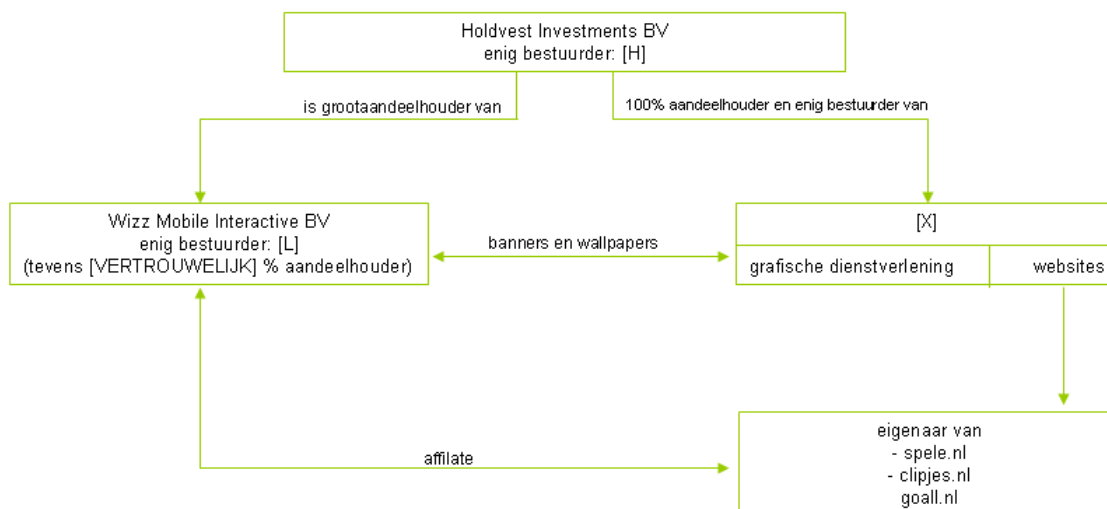
8.3 Imposition of the fines on Wizz Mobile Interactive B.V. and Holdvest Investments B.V.

Nature of the interrelationship between Wizz Mobile Interactive B.V. and Holdvest Investments B.V.

221. Holdvest Investments B.V. [as a major shareholder of] % of Wizz Mobile Interactive B.V. provided the funding as such to enable Wizz Mobile Interactive B.V. to expand its activities. This is also evident in the fact that Mr. Teeuwisse remarked during the visit to the premises that, “*Yes, the money comes from them.*”³
222. Holdvest Investments B.V. owns all shares in [X], as stated under item number 16. [X] is, among other things, the proprietor of the websites www.spele.nl, www.clipjes.nl and www.goall.nl, the latter being a major affiliate of Wizz Mobile Interactive B.V..⁹²
223. Mr. [H] is the Managing Director of both Holdvest Investments B.V. and [X].
224. The interrelationship between Holdvest Investments B.V. and Wizz Mobile Interactive B.V. is summarised schematically in the following diagram.

Figure 2:

³ Document 64/7, p.15.



225. The companies [X] and Wizz Mobile Interactive B.V. both operate in the same office at Poststraat 10-2 in Sittard.⁹³ During the visit to the premises on 12 November 2007, Messrs. [L] and [H] were both present at this address.⁹⁴
226. The activities relating to graphic design, such as creating wallpapers and designing websites for Wizz Mobile Interactive B.V. was carried out by [X].⁹⁵ The fact that a partnership existed in this regard was evident from the remark made by Mr. [L], this being *“That is done by our graphics guy”*⁹⁶
227. Moreover, Mr. [L] is a former employee of [X].⁹⁷
228. As a major shareholder in Wizz Mobile Interactive B.V., Holdvest Investments B.V. was able to intervene in the day-to-day management of the company, but neglected to do this, yet enjoyed the financial benefits.
229. As the proprietor of [X], Holdvest Investments B.V. was also in a position to make decisions with regard to whether or not to place banners of Wizz Mobile Interactive B.V. on its websites. Holdvest Investments B.V. made the decision to place the banners and in doing so, created a platform on which the activities of Wizz Mobile Interactive B.V. were based, and it also gained the financial benefits of these activities.
230. The relationship between Wizz Mobile Interactive B.V. and Holdvest Investments B.V. is a relationship based on ownership on the one hand and a contractual relationship through the company [X] on the other hand, which, in practice, involves close mutual relations.
231. In view of the aforementioned facts, the Consumer Authority sees fit to deem Holdvest Investments B.V. as the co-perpetrator of the contraventions as stated under item number 179.

232. At the hearing of 24 June 2008, Holdvest Investments B.V. challenged its involvement as a co-perpetrator but did not give reasons for doing so.

Joint and several liability

233. In view of the exceptional relationship between both companies, the Consumer Authority does not see any reason to impose a higher fine on Wizz Mobile Interactive B.V. and Holdvest Investments B.V. as individual and separate entities, or jointly on both companies, due to Holdvest Investments B.V. being designated as the co-perpetrator.

234. In view of this exceptional relationship, the Consumer Authority deems it appropriate to impose fines jointly on Wizz Mobile Interactive B.V. and Holdvest Investments B.V. for payment of which both companies are jointly and severally liable.

9 The Decision

:The Consumer Authority

a) Has determined that contraventions were committed of:

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*] (company identity and address of its 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 of the Dutch Civil Code (the price, taxes and delivery costs)

Article 8.5, paragraph 1 of the Act on enforcement of consumer protection law [*Whc- Wet handhaving consumentenbescherming*] in conjunction with Article

6. 7:46c, paragraph 1, subsection a of the Dutch Civil Code (company identity)
7. 7:46c, paragraph 1, subsection b of the Dutch Civil Code (main features of the service)
8. 7:46c, paragraph 1, subsection c of the Dutch Civil Code (the price and taxes)
9. 7:46c, paragraph 1, subsection e of the Dutch Civil Code (method of payment, delivery and execution of the service)
10. 7:46c, paragraph 1, subsection f of the Dutch Civil Code (the cooling-off period)
11. 7:46c, paragraph 1, subsection i of the Dutch Civil Code (the minimum duration of the contract)
12. 7:46c, paragraph 2, subsection a of the Dutch Civil Code (the provision of information in compliance with the contract)

13. 7:46c, paragraph 2, subsection c of the Dutch Civil Code (the address for visitors of its registered office)

And Article 8.5, paragraph 1 of the Act on enforcement of consumer protection law [*Whc-Wet handhaving consumentenbescherming*] in conjunction with Article

14. 7:7, paragraph 2 in conjunction with paragraph 4 of the Dutch Civil Code (unsolicited sending)

- b) deems Wizz Mobile Interactive B.V. and Holdvest Investments B.V. as perpetrator and co-perpetrator respectively of the contravention stated under section a)
- c) shall impose fines totalling €76,000 on both companies for these contraventions, the payment of which they are jointly and severally liable
- d) shall impose a penalty on a daily basis (in case of non-compliance) on Wizz Mobile Interactive B.V. until the contravention of Article 7:46c, paragraph 2, subsections a and c of the Dutch Civil Code cease. In this manner, the Consumer Authority orders the company subject to a penalty to provide consumers in good time and in the proper manner with information relating to
 - The identity of the company
 - The main features of the service, namely that it involves a subscription, and the content of the subscription, namely the content of the items to be delivered
 - The price of the service, including all taxes
 - The method of payment, delivery and execution of the service
 - Whether or not the option to dissolve the contract within seven working days of entering into the contract applies
 - The address for visitors of the registered office of Wizz Mobile Interactive B.V. to which consumers may submit complaints.
- e) the level of the penalty amounts to €250 per working day, up to a maximum of €25,000

This decision concerns Wizz Mobile Interactive B.V., with its registered office in Maastricht and Holdvest Investments B.V. with its registered offices in Sittard.

The Hague

On behalf of the Consumer Authority

(Signed)

Ms. A.C.M.P. Le Guellec
Head of the Legal Department

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.