

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Friday 8 June 2012

TRIBUNAL SITTING No. 101 / CASE 2

CASE REFERENCE: 06704

Level 2 provider:	Mobile Minded BV
Type of service:	Djummer and Momoxio- Competition services
Level 1 provider:	Mobile Interactive Group Limited
Network operator:	All Mobile Network Operators

THIS CASE WAS BROUGHT AGAINST THE LEVEL 2 PROVIDER UNDER PARAGRAPH 4.4 OF THE CODE

BACKGROUND

The Executive received 84 complaints regarding two different competition services operated by the Level 2 provider Mobile Minded BV ("**Mobile Minded**"). The first service, Djummer, was charged per quiz question answered (£3 per entry), and the second, Momoxio, was charged based on a subscription fee of £4.50 per week. The services were operated on two separate shortcodes, both supplied by the Level 1 provider, Mobile Interactive Group Limited ("**MIG**").

Both services were promoted using banner advertisements, 'pop ups' and promotions on established websites and by using website domain names which were very similar to popular websites (known as typosquatting or domain name traffic) (**Appendix A**). In the 'pop ups' and on the mistyped webpage, consumers were either told that they had won a prize or had won the opportunity to win a prize (**Appendices A-E**). On attempting to claim the prize, consumers were ultimately asked for their mobile phone number in order to participate in a premium rate competition service.

The Investigation

The Complaint Resolution team undertook a Fast Track procedure against the Level 2 provider in relation to both services in December 2011. Although some compliance steps were taken by the Level 2 provider, further examples of non compliance with the Code were observed in February 2012. As a result, the Executive conducted this matter as a Track 2 procedure investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12th Edition) (the "**Code**").

The Executive sent a breach letter to the Level 2 provider on 30 April 2012. Within the breach letter the Executive raised the following potential breach of the Code:

- Rule 2.3.2- Misleading

The Level 2 provider responded on 14 May 2012. On 8 June 2012, following informal representations by the Level 2 provider, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

Rule 2.3.2

“Premium rate services must not mislead or be likely to mislead in any way.”

1. The Executive submitted that the Level 2 provider had breached rule 2.3.2 in relation to both the Djummer and Momoxio competition services.

Djummer

The Executive conducted monitoring of the service, which uncovered promotions involving typosquatting (or domain name traffic) and misleading banner or ‘pop up’ advertising.

Example 1- Appendix A

On 8 March 2012, the Executive noted that when it mistyped certain popular domain names, for example www.faebook.com, it was directed to a webpage displaying a promotion, which stated, *“Congratulations! Are you London’s Winner? **How to claim.** Please select a prize, enter your info and fill out your shipping information.”* The Executive submitted that a consumer, who may not have noticed that s/he had mistyped the domain name, was instantly given the impression that they had done something to warrant being congratulated.

The Executive submitted that the promotion was misleading, or was likely to mislead, consumers into believing that they could claim a prize by following the instructions to select a prize, entering their information and filling out their shipping information. The request for shipping details appeared to confirm that a claim for a prize was being made and that the information was required for delivery of that prize. However, in reality the Djummer service was a prize draw, and by following the instructions, the consumer would have been entered into the monthly draw, at a cost of £3. Therefore the Executive submitted that the initial promotion was misleading, or was likely to mislead consumers, as it did not introduce the prize draw element, but instead suggested that the consumer need only claim the prize.

Example 2- Appendices B and C

Monitoring by the Executive also revealed that the Djummer service was being promoted on banner advertisements on websites such as Blue Mountain (an online card shop). On the Blue Mountain site, a banner observed by the Executive stated, *“**CONGRATULATIONS!** You are today’s **iPad 2** winner! Click ‘Yes’ button below to claim before **time runs out**” (Appendix B).* A second banner observed on the Blue Mountain site (Appendix C) stated, *“Congratulations You Won!!! It is not a joke. You are the 100,000th visitor of the day! Claim your winnings?”*

The Executive stated that both banner promotions suggested that the user had won a prize and that s/he simply needed to claim the prize. In addition, the Executive submitted that the reference to “time runs out” was misleading as, in reality, given the nature of the competition service and the frequency of the prize draws, there was no time pressure to participate in the service.

Accordingly, the Executive submitted that both promotions were misleading, or likely to have misled consumers, as they did not introduce the prize draw element, but instead suggested the consumer need only claim the prize they had won.

Momoxio

The Momoxio service was a subscription competition service. Following subscription to the service, a consumer had to visit a personalised webpage and answer questions in order to have a chance of winning a prize. The Executive raised concerns that the promotional material did not clearly set out the requirement that consumers had to both subscribe and answer questions online in order to have a chance of winning a prize.

Example 3- Appendix D

On 22 February 2012, the Executive observed a banner or 'pop up' advertisement, which promoted the Momoxio subscription service. The banner stated, "**CONGRATULATIONS!** *You are today's iPad 2 winner! Click 'Yes' button below to claim before **time runs out.***" The Executive submitted that the banner suggested that a prize had already been won, and that the consumer simply needed to claim the prize. The Executive maintained that, in reality, the Momoxio service was a competition, and by following the instructions given in subsequent webpages, the consumer was entered into the subscription service, at a cost of £4.50 per month. In addition, the Executive submitted that simply paying the subscription was not sufficient to have a chance of winning a prize, subscribers had to compete for the prize each week by answering 10 questions found on the internet at a URL address given in one of the subscription messages. Therefore, if a consumer did not go onto the website they had no chance of winning a prize. The Executive therefore submitted that the initial banner advert was misleading, or likely to have misled consumers, as it did not introduce the competition element, but instead suggested the consumer need only claim the prize.

Example 4- Appendix E

During monitoring, the Executive observed a promotion for the Momoxio service on the website www.prizegiveaway.org. The lead-in page of this promotion appeared to congratulate the user for having the opportunity to win a prize, stating, "*You may have (1) prize unclaimed.*" Further, the page stated, "*Please respond NOW before other visitors have a chance to win the prize.*" The Executive submitted that given that the service was not operated in a manner that gave priority to those entering the competition service first, the suggestion that a consumer was required to act quickly was misleading.

Prize winners

The Executive noted that the promotional material for both the Djummer and Momoxio services contained photographs and quotes from 'previous winners' (**Appendix F**). One quote stated, "*I was just browsing online and got a notice I have a chance to win, I couldn't believe it (Jennifer Layton, London).*" Monitoring conducted by the Research and Market Intelligence Team of PhonepayPlus identified other webpages, unrelated to the two services, which had photographs of the same 'previous winners' as those contained on promotions relating to Djummer and Momoxio.

The Executive submitted that the prize winners information, and in particular the quotes, contained in promotional material for both services, was false and misrepresented the success of previous entrants to the competition. The Executive stated that the information on prize winners was likely to have made the services appear genuine and would have induced consumers into participating in the services. Given the information was false, the Executive submitted that consumers had been misled.

The Executive concluded that for the reasons outlined above, both services were operated in breach of rule 2.3.2 of the Code.

2. The Level 2 provider stated that it was committed to transparency towards the regulatory body and, most importantly, the consumer. It maintained that it had fully co-operated with the Executive and had implemented all advice received.

The Level 2 provider accepted that it was responsible for the entire marketing chain of both the Djummer and Momoxio services. However, the provider outlined that, *“It has direct relationship with affiliate partners, who, in turn, have direct relationships with publishers. When a customer clicks on a banner promoted by the publisher they are brought to the lead-in page hosted and controlled by the publisher. By clicking on the call to action on the publisher lead-in page, the customer is then brought to the Mobile Minded landing page. This is the cumulative promotional process.”*

The Level 2 provider stated that it regards its obligation to comply with the Code, including its responsibility to control affiliates, seriously. The Level 2 provider gave a detailed account of both the compliance measures it had in place before the investigation and those currently in place. Specifically, the provider stated that it now pre-approves all promotional material from affiliates and publishers, has an internal monitoring team to check “creatives” on a daily basis and robustly deals with any non-compliance on the part of affiliates. The Level 2 provider stated it had implemented a more robust compliance regime since the investigation, including the provision of an amended “Compliance Guideline”.

The Level 2 provider disputed any allegation that any of its own landing pages were not compliant with the Code. Specifically, the provider stated that the landing pages of all its services had clear pricing. The provider also noted that the number of complaints in comparison with the revenue level was relatively low.

Typosquatting

The Level 2 provider noted that some of its affiliates and/or publishers had taken advantage of domain name traffic. The provider stated that the pages could not be confused for genuine well-known websites, such as Facebook. In support of this, the provider gave details of a YouGov poll that appeared to suggest that approximately 7% of consumers would believe that the promotional material contained in **Appendix A** was associated with Facebook. Notwithstanding this, during informal representations, the provider stated that it had taken the decision to stop promotions on such sites, thereby losing traffic to its competitors.

Djummer

Example 1- Appendix A

The Level 2 provider stated that it did not approve of the use of promotions on sites which take advantage of domain name traffic. However, it did not accept that the promotion was misleading. The provider maintained that the use of the word “congratulations” was a marketing tool and was not misleading in the context of promotions similar to **Appendix A**.

In relation to the reference to the request for shipping details, the Level 2 provider maintained that the page promoted a number of advertisers and that the, “filling out shipping information is not relevant in our case”. Further, the provider stated that its own landing pages clearly informed the consumer of the type and cost of its services.

Example 2, 3, 4 and 5 (Appendices B, C, D and E)

The Level 2 provider accepted that the use of any wording that explicitly referred to a consumer being a winner without having entered the competition service was

misleading. The provider stated that it did not approve of promotional material containing any such claims. The provider stated that the non-compliant banners and 'pop ups', which were created by its affiliates, were only live for a short period and that it had taken action against the affiliates (ultimately by ending their business relationship).

The Level 2 provider stated that, notwithstanding the misleading promotional material, in its opinion the cumulative promotional process was compliant and consumers were not misled into using the services.

Prize winners

In informal representations, the Level 2 provider accepted that the information relating to prize winners was false, could be misleading and that the testimonials were "not appropriate". However, it did not accept it could cause any consumer harm as both services had regular winners and therefore it had not deceived users regarding the existence of actual prize winners. The provider stated that promotions did not display the actual winners for logistical reasons.

3. The Tribunal considered the evidence and noted the Level 2 provider's detailed submissions and admissions. On the basis of the reasons advanced by the Executive and the admissions made by the Level 2 provider, the Tribunal held that the promotions contained in Appendices A, B, C, D and E were misleading. Specifically, the Tribunal held that given the competition element of the services, the use of the word "congratulations", references to the consumers having "won a prize" and references to the need to act quickly, when there was no time pressure, were misleading. The Tribunal noted the Level 2 provider's admission that the "prize winners" contained in promotional material were fabricated and concluded it was therefore misleading. The Tribunal considered that quotes which are intended to induce consumers into using a service, and which are fictitious, are prima facie misleading. The Tribunal concluded that, for the above reasons, consumers had been misled, or were likely to have been misled. Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

The Tribunal's initial assessment of the breach of the Code was as follows:

Rule 2.3.2- Misleading

The initial assessment of rule 2.3.2 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The services generated substantial revenue through wilfully non compliant promotions that misled consumers for which the Level 2 provider is ultimately responsible.

The Tribunal's initial assessment was that, overall, the breach was **serious**.

Final Overall Assessment

In determining the final overall assessment for the case, the Tribunal took into account the following two aggravating factors:

- During a complaint resolution procedure in December 2011, the Level 2 provider was made aware of potential breaches of the Code in promotional material associated with its services. The Executive specifically referenced issues in relation to misleading banners indicating that consumers had “won a prize”. The Tribunal also noted a significant spike in service revenue post the complaint resolution procedure.
- PhonepayPlus gave notice to industry by way of three adjudications which were similar in respect of the use of misleading promotional material in February and March 2012 (R & D Media Europe (case ref 03604, decided 02/02/2012), Unavalley BV (case ref 02733, decided 02/02/2012) and Zamano Solutions Limited T/A Everneo (case ref 04237, decided 15/03/2012).

In determining the final overall assessment for the case, the Tribunal took into account the following two mitigating factors:

- Although the Level 2 provider accepted responsibility for its entire marketing chain, it stated that any breaches were attributable to the actions of its affiliates and/or publishers. The provider outlined that before the investigation by the Executive, to ensure compliance with Code, it had pre-approved all promotional material and investigated any spikes in traffic from a particular affiliate and/or publisher. Since the investigation, the provider stated that in addition to its pre-investigation regime, it had implemented a robust compliance regime, including an amended “Compliance Guideline” and the provision of an internal monitoring team to check “creatives” on a daily basis. Further, where any non-compliant material is found, the provider “pauses” the specific affiliate and a warning is given. Only after a “creative” is changed can the affiliate re-launch. If an affiliate is responsible for a second compliance issue, the provider stated that it would cease any relationship with it permanently. In support of its current robust approach to compliance, the provider stated that it had “pulled” a number of promotions and terminated the contracts of three of its affiliates.
- The Level 2 provider submitted that it had a comprehensive refund policy and had proactively refunded consumers.

The revenue in relation to this service was within the range of Band 1 (£500,000+).

The Tribunal noted the similar adjudication against Mobile Minded dated 24 May 2012. However, the Tribunal decided not to take that adjudication into account given the proximity in time to this adjudication.

Having taken into account the aggravating and mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **serious**.

Sanctions Imposed

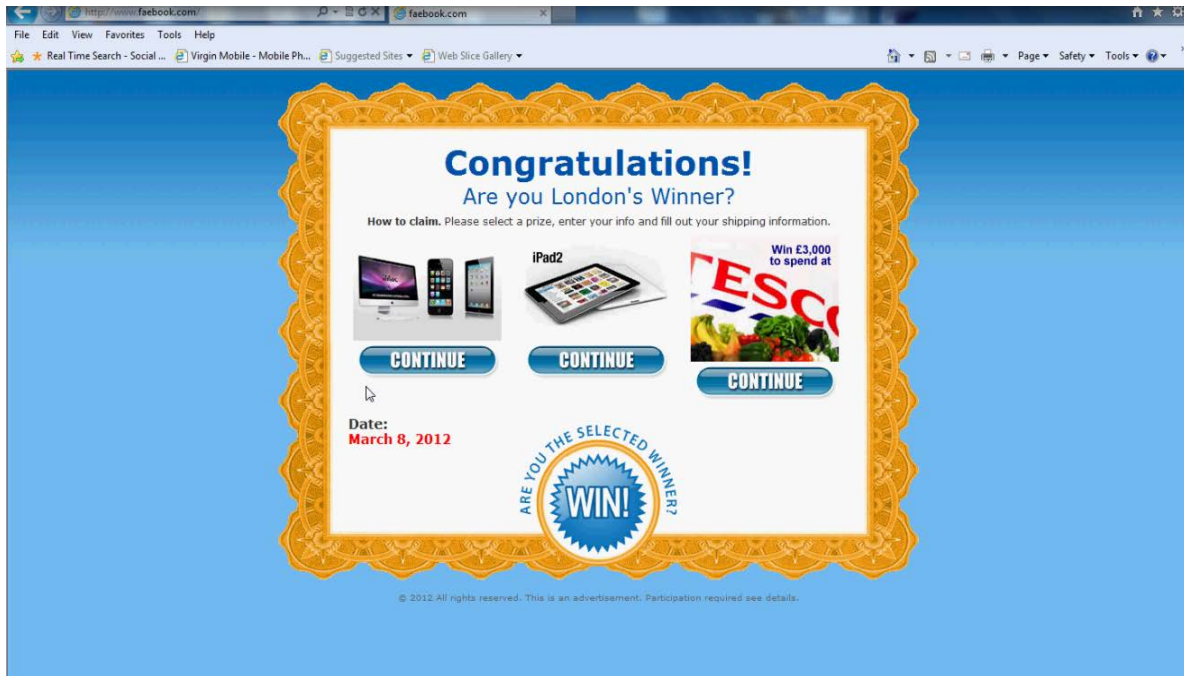
Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- A formal reprimand;
- A warning that in the event of any future similar breach the Tribunal would have regard not only to this breach but also to the complaint resolution procedure in December 2011 and the adjudication in similar circumstances in May 2012;
- A fine of £85,000;
- A requirement that the Level 2 provider must refund all complainants who claim a refund, within 4 weeks of receipt of the claim, for the full amount spent by them on the service, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

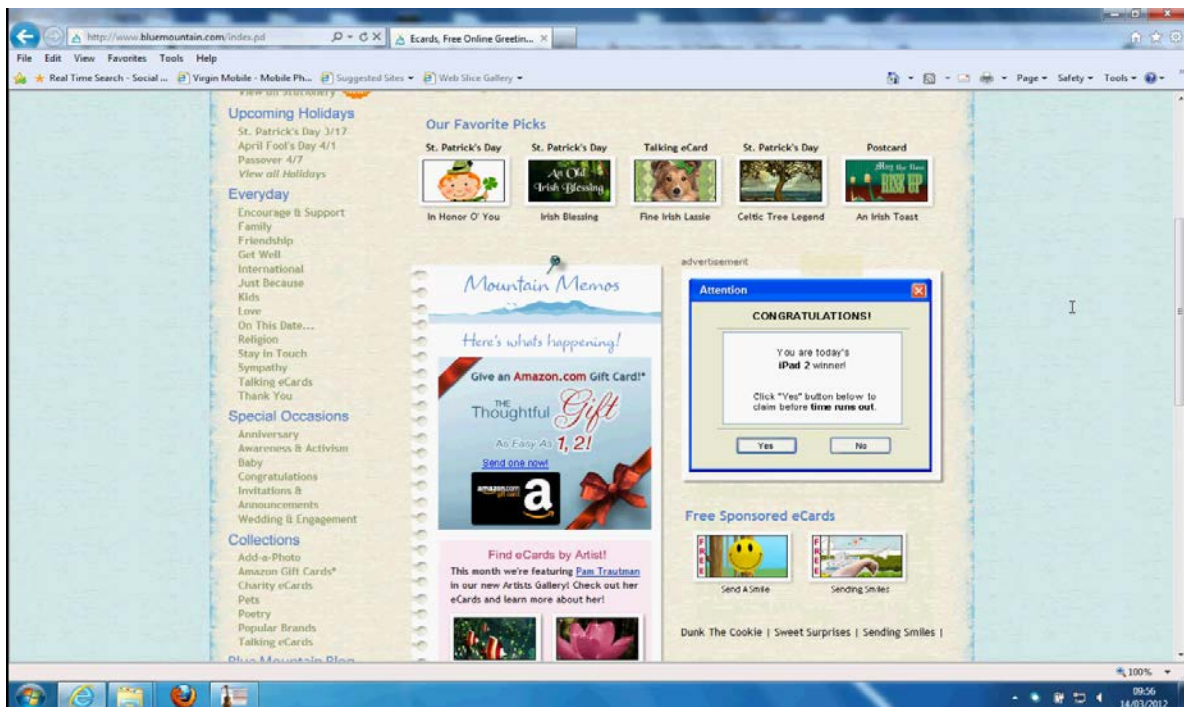
The Tribunal noted that in respect of the adjudication in May 2012, a sanction had been imposed on the Level 2 provider requiring it to submit all premium rate services and

promotional material to PhonepayPlus for compliance advice for a period of 12 months. In light of this no further compliance sanction was imposed.

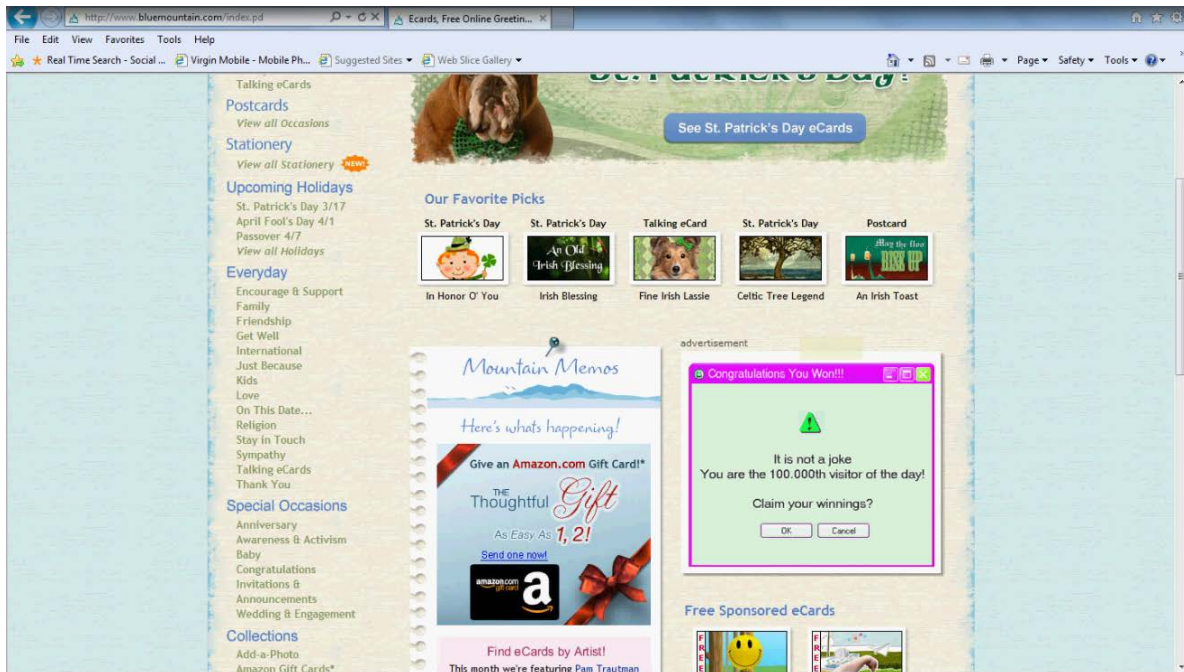
Appendix A- Screenshot of a 'Typosquatting' promotion for the Djummer service:



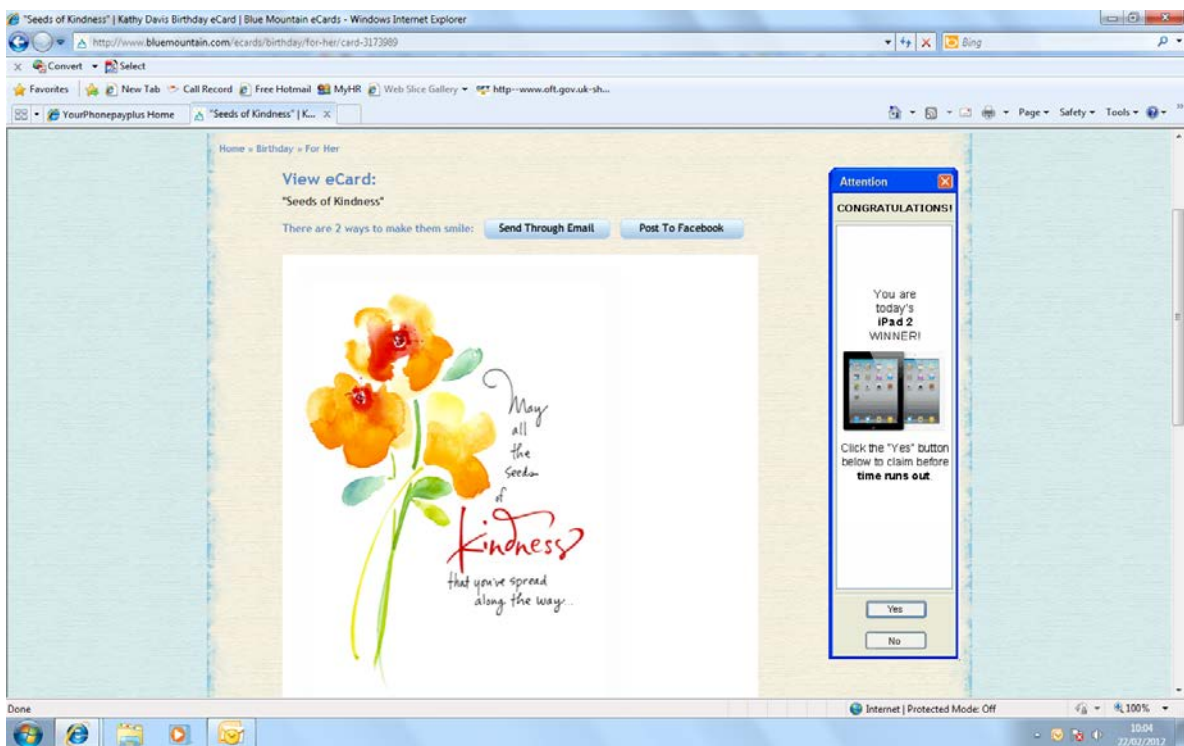
Appendix B- Screenshot of a banner promotion for the Djummer service:



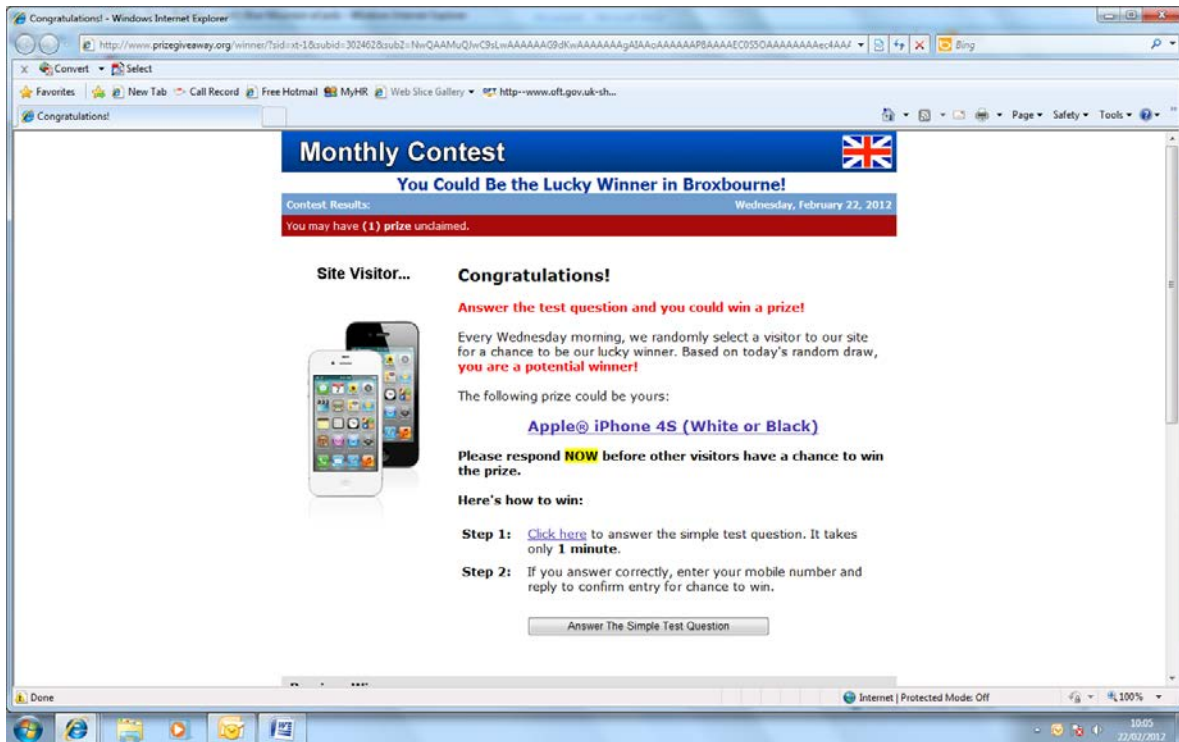
Appendix C- Screenshot of a promotion for the Djummer service:



Appendix D- Screenshot of a banner promotion for the Momoxio service:



Appendix E- Screenshot of a promotion for the Momoxio service:



Appendix F- Screenshot of an example of an affiliate marketer's website promoting the services:

