

**THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS  
TRIBUNAL DECISION**

**Thursday 15 March 2012  
TRIBUNAL SITTING No. 95 / CASE 1  
CASE REFERENCE: 04237**

Network operator: All mobile Network operators  
Level 1 Provider: Zamano Solutions Limited, trading as Everneo  
Level 2 Provider: Zamano Solutions Limited, trading as Everneo

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

**BACKGROUND**

**(i) Summary**

During the period from 1 September 2011 to 16 February 2012, PhonepayPlus received 277 complaints relating to a subscription service called 'Zingtones', which was also referred to as 'Play n' Win'. The service operated for several years. Following notification by the Executive of its concerns relating to the service, the Level 2 provider voluntarily suspended the promotion of the service and billing mechanic on 1 February 2012.

The Level 2 provider's marketing campaign for the service involved the use of various affiliate marketers, who provided lead-in web pages encouraging consumers to visit the service and enter a competition.

**(ii) Sample of complainants' accounts**

Taken together, the complainants suggested that they were engaging with some form of promotion via either the internet or mobile internet and that they were receiving text messages that they did not expect or fully understand. The complainants were therefore stating that the charges made via premium short message service ("**PSMS**") messages were unexpected and caused bill shock.

Some complainants suggested that the charges were completely unsolicited. However, the majority acknowledged some link between entering some form of online activity and the charges later received to their mobile phone accounts.

Those that did acknowledge interaction with some form of website claimed the following:

- the promotion suggested they were claiming a prize owed to them; and
- the competition appeared to be free to enter and / or the cost was not clearly visible.

The evidence suggested that these consumers did not make a link in their own minds between the service and the online activity with which they thought they were interacting.

One complainant stated:

*"Service Description: A pop up window appears while browsing on the internet presenting itself under the YOUTUBE logo. It claims that YouTube is doing a survey with the*

purpose of improving their services. At the end they ask for a phone number. They also claim that some of the users who have filled the survey will win an iPhone, Mac or an iPad.

*Transcript of Text: Message 1: "Reply OK to 60699. This is a free message from Zing" Message 2: "Thank for using Zink! Remember to check out wap.txtuk.tv to collect your content", Message 3: "www.funzoo.co.uk - For top mobile games like Pro Evo, Call of Duty, Tetris, Farmville and Facebook offers", Message 4: "Zing: To download your content, go to <http://wap.txtuk.tv/collect.aspx?guid=8a2fac45-da99-410c-9410-0355360bac81>".*

Trigger Word: OK

Phone Number: 07403766837

A second complainant reported the following:

*"[transcript from PhonepayPlus complaints resolution records] Consumer complaining that she has been mislead (sic) into a service and ha now been charged at £4.50 per week, she has tried to get in touch with Zamano but has had no luck, she has also mentioned Zing. She mentioned doing a survey but cannot remember what it was related to or what the website was about."*

A third complainant stated:

*"I was downloading a magazine in pdf format from fileserve when I got a message that I won an iphone 4s, all I needed to do was forward my no to receive the code to forward to make my claim (with a time limit of 4 mins) I received the code1692 above and as soon as I forwarded the code I recieved (sic) 2 reverse charge premium rate text messages from ZING. I immediately sent stop to 81002 as I was conned into this scam. There was no mention of charges or signing up for anything"*

### **(iii) Description of the service**

The service operated over several years and involved a weekly subscription charge of £4.50. The service appeared to have two parts:

- a monthly prize draw for all subscribers; and
- access to downloadable items for mobile phones, such as ringtones, games, pictures, and videos.

### **(iv) Promotion of the service**

Consumers began to interact with the service by reference to affiliate marketing material put out on the internet and mobile internet, such as pop-up advertising windows, banner adverts, and other promotional website links on the internet, such as web-based email accounts and search engines.

The Level 2 provider indicated that various affiliate marketers were used for the purpose of co-ordinating and presenting the lead-in pages across the internet and mobile internet. The Level 2 provider confirmed stated that these affiliate marketers could use a range of publishers to generate leads. These leads were paid for by the Level 2 provider under contract with the affiliate marketers. The Level 2 provider stated that they did not have direct relationships with these publishers and held the affiliate marketers responsible for the promotional material which generated the leads.

The Level 2 provider further explained that internet domain names associated with complaints and Executive monitoring that were shared with the Level 2 provider by the Executive in a letter dated 30 January 2012, were all managed by the affiliate marketer Mundo Media. Mundo Media supplied the vast majority of the leads. Affiliate marketing lead-in pages varied in terms of presentation and content although the purpose remained the same throughout, which was to introduce the opt-in process to the consumer focussing on the competition and the prize(s) available within the service.

After visiting the affiliate lead-in page, the customer was required to complete three further steps of the promotional process before they entered the service or received a charge from the Level 2 provider. The steps were as follows:

### **Step 1 : Question Page**

- The emphasis was placed upon the question itself, which gave two possible answers and invited the user to click or press the correct option. Pressing the wrong option usually resulted in the user being informed of their mistake and given the option to try again.
- The question was presented as part of the competition entry system.
- The competition was not given a clear name, and the name of the Level 2 provider was only found in the service Terms and Conditions.
- Pricing was present in the service Terms and Conditions.
- Pricing was present in the main body of the website above the call to action: *“Compete to Win the new iPhone4S”*.

### **Step 2 : Enter Mobile Number**

- The webpage indicated the successful answer to the question with its headline: *“Well done! Enter your details for your chance to win the iPhone 4S!”*
- There was an unchecked tick box requesting users to accept the Terms and Conditions and provide a link to them. Where it was left un-ticked, an alert was shown asking the user if they were willing to accept the Terms and Conditions.
- Pricing was present in the Terms and Conditions, which are at the foot of the page.
- Pricing was presented directly above the, *“Enter Mobile”* call to action.

### **Step 3 : Enter PIN or Reply Mobile Originating (“MO”) Text Message**

- The webpage indicated that a text message had been sent, saying *“Check your phone for a text message. We’ve just sent your PIN.”*
- Pricing was present in the Terms and Conditions, which were at the foot of the page.

The Executive’s reference in Step 3 above to “Reply Mobile Originating (“MO”)” related to consumers who were on the 3 network in the UK. The Level 2 provider stated that it operated an MO opt in mechanic for these particular consumers as this had been recommended by that Network operator. The Level 2 provider said it noted PhonepayPlus also recommended the use of MO opt-in in section 2.7 of the Guidance Note, *‘Privacy and Consent to Charge’*. In these instances, the Level 2 provider stated that the message sent to the customer was designed so that it did not promote the service, pricing information, or any

detail that could connect the message to the website where the mobile number was originally entered.

#### **(v) Monitoring and data analysis**

The Executive captured screen shots which showed an affiliate marketing lead-in page that appeared to make various statements suggesting there was a prize to be claimed by the consumer. There was also a 'previous winners' section provided. The Executive observed the same names and pictures were used for these winners on different web pages; however, the location of winners changed depending on the readership of the promotion.

The Executive also observed that within the examples of Mundo Media 'lead-in' pages provided by the Level 2 provider the affiliate marketing showed the same photograph against the name 'Jesse Wong', and 'Eric P' on various different examples of promotional material.

### **THE INVESTIGATION**

The complaints suggested that consumers were misled into entering the service, and that consumers were not adequately informed of the costs associated with the subscription service. The Executive believed that this service contravened the PhonepayPlus Code of Practice (12<sup>th</sup> Edition, dated 1 September 2012) (the "Code") and raised the following potential breaches under the Code.

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

- **Outcome 2.2 (Transparency and Pricing):**

*"That consumers of premium rate services are fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made."*

- **Rule 2.2.5**

*"In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means or access to the service".*

- **Outcome 2.3 (Fairness):**

*"That consumers of premium rate services are treated fairly and equitably".*

- **Rule 2.3.2**

*"premium rate services must not mislead or be likely to mislead-in any way".*

- **Rule 2.3.12(d)**

*"For all subscription services, once a month, or every time a user had spent £17.04 plus VAT if that if that occurs in less than a month, the following information must be sent free to subscriber:*

- i. *The name of the service;*
- ii. *Confirmation that the service is subscription-based;*

- iii. *What the billing period (e.g. per day, per week, or per month) or, if there is no applicable billing period, the frequency of messages being sent;*
- iv. *The charges for the service and how they will or can arise;*
- v. *How to leave the service; and*
- vi. *Level 2 provider contact details.*

A formal response to the Breach Letter was provided by the Level 2 provider on 1 February 2012 and on the same day the Level 2 provider voluntarily suspended the service on the recommendation of the Executive while the investigation proceeded. Following an exchange of correspondence and a meeting on 15 February 2012 between PhonepayPlus and the Level 2 provider the Level 2 provider decided to reactivate the billing mechanic for 96% of its current subscribers, which the Level 2 provider suggested were not affected by the potentially misleading promotional material being considered as part of the investigation.

While the Executive maintained its earlier recommendation to suspend the service throughout the investigation, it did provide additional advice in relation to any proposed reactivation of the billing mechanic. This advice included a recommendation that current subscribers were sent a free message, 24 hours prior to reactivation, with the intention to notify subscribers of the service, as to its cost and how to leave the service. By an email dated 17 February 2012, the Level 2 provider confirmed that it intended to follow that advice when it chose to reactivate the billing mechanic for 96% of subscribers.

The Tribunal made a decision on the alleged breaches following informal representations by the Level 2 provider during a hearing on 15 March 2012.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **Outcome 2.2 (Transparency and Pricing):**

*“That consumers of premium rate services are fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made.”*

#### **Rule 2.2.5**

*“In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means or access to the service”.*

1. The Executive referred to a large number of complainants who all provided similar evidence of receiving charges without any awareness of any cost associated with online websites with which they interacted. The Executive submitted that consumers were not fully and clearly informed of all information likely to influence the decision to subscribe to the service. The Executive was also concerned that in some instances the pricing was absent from the promotional material entirely, or, when it was present, the pricing was not prominent, clearly legible, visible and proximate to the given means of access to the service.

The Executive submitted that, in this particular promotional campaign, the absence of pricing from affiliate marketing lead-in pages was such that greater efforts were needed to ensure the pricing was provided transparently before any purchase was

made. The Executive further submitted that the impression given by the affiliate lead-in pages was that there was a prize to be claimed, and that there was no cost associated with such a claim being made. This impression was created in various ways as set out below (and as shown in Appendix A):

- Use of the words ‘congratulations’, ‘winner’, or similar;
- Use of the words ‘claim’ or ‘unclaimed’;
- No reference to subscription charges or any cost for the service;
- Alternative reasons for an entitlement to a prize, other than payment for entry to a draw, such as location, web browsing activity, or otherwise.

The Executive submitted that this impression may have had an impact on consumers who went on to read the service landing page. On the first landing page (Appendix B) the question posed was the focal point. On the second landing page (Appendix C) the mobile phone number entry point and the prize were clear focal points. In addition, the words, “*for your chance*” were smaller than the remaining parts of the headline text which referred to “*Entering your details*” and “*win the iPhone 4S!*”

With regard to the lack of reference to subscription charges or any cost for the service the Level 2 provider stated that it was not technically possible to include pricing on the affiliate lead-in page. The reason for this was that these pages connected to multiple companies which in turn offered different pricing models. In support of this argument the Level 2 provider referred to the PhonepayPlus Guidance and general guide note 2.2.1:

*“Referencing general guide notes 2.18 and 2.19 it is our opinion that the customer is clearly informed of the price prior to purchase on the Zamano landing pages. We accept there is no pricing on the affiliate lead-in page; however, as per note 2.18 there is no need to inform the customer in each individual part of a cumulative promotional process. The Zamano service is a cumulative promotional process and we do inform the customer on step 1 and step 2 of the Zamano landing page process prior to purchase.”*

The Executive submitted that what had been done by the Level 2 provider on its landing page had been shown by complainant evidence to be ineffective in bringing the pricing information to the attention of consumers who had already been given a false impression by the affiliate marketers lead-in pages. The size of font and contrast between the other focal points and emboldened information on the landing page compared with the pricing information and references to a subscription service meant that consumers were not seeing these key pieces of information. When charges were later received by consumers, the complainants indicated such charges were unexpected.

The Executive further submitted that where affiliate marketers used technology, such as i-framing to obscure the consumer’s view of the landing page in some way, consumers did not see any pricing information at all (Appendix E). In such cases, the only access to such pricing information and other key terms was found in the full Terms and Conditions, which were accessed using a link within the landing page itself labelled ‘Ts&Cs’.

When the i-framing technology (or similar) was used and/or when users were given an impression of the service that was not sufficiently challenged by the presentation of key information on the landing pages, the Executive submitted that the cost was not

prominent, clearly legible, visible and proximate to the given means of access to the service.

For the reasons specified above, the Executive believed that the service was in breach of Rule 2.2.5 of the Code and, as such, the Level 2 provider had failed to meet Outcome 2.2 of the Code.

2. In response to the alleged breach of Rule 2.2.5 of the Code, the Level 2 provider made the following submissions which were also clarified during informal representations at the Tribunal hearing on 15 March 2012:

The Level 2 provider stated that it promoted subscription based competition services, billed via PSMS, through affiliate marketing channels. The Level 2 provider had a direct relationship with affiliate partners, who, in turn, had direct relationships with publishers. Publishers were independent entities from the affiliates who bought online advertising space to promote the advertiser's service and in this case, the advertiser was the Level 2 provider. When a customer clicked on a banner promoted by the publisher they were brought to a lead-in page hosted and controlled by the publisher. By clicking on the call to action on the publisher lead-in page, the customer was then brought to the advertiser's landing page. This was the cumulative promotional process.

The Level 2 provider asserted that all customers were fully and clearly informed of all information likely to influence their decision to purchase in relation to the service. During informal representations the Level 2 provider presented the consumer journey in a presentation to the Tribunal and clarified that pricing, billing frequency and the subscription nature of the service were detailed on the initial service landing page above the headline "*Compete to Win the new iPhone 4s*". Full Terms and Conditions were detailed at the foot of this page above the web page fold (Appendix B).

If the customer correctly answered the question, they linked through to the mobile entry page (Appendix C). The primary call to action on this page was the "Enter Your Number" section located in the centre of the page. Directly above this call to action the customer was again informed that this was a subscription service and that it cost £4.50 per week. In order to subscribe to the service and enter the competition, the customer was then required to enter their mobile number, select their network and accept the Terms and Conditions. The Level 2 provider submitted that the pricing and subscription nature of the service was proximate to the main call to action on the page and was prominent, that is to say that it was in the centre of the page. The competition entry process was therefore an involved one and required the customer to take a number of steps before they were entered into the service or charged. Within the pages controlled by the Level 2 provider it argued that the pricing was present, proximate to the main call to action and prominent on the page.

Having analysed the complaints provided by PPP, the Level 2 provider stated that it wished to categorically state that all users opted in to the service either using a pin, or MO signup route on the 3 network. All subscribers received a free welcome message, which detailed pricing, frequency of billing, that they were subscribed to a service, how to unsubscribe and customer care contact information.

The Level 2 provider further stated that the Executive had expressed their concern that in some instances the pricing was absent from the promotional material entirely. As detailed in its response dated 6 February 2012, the Level 2 provider was completely unaware that this publisher was marketing services in this fashion until screenshots were provided by PhonepayPlus in an email of 30 January 2012. The Level 2 provider stated that it did not condone this method of marketing and was of the opinion that it was completely inappropriate. In this instance, the Level 2 provider's landing pages were manipulated by the publisher using a practice referred to in previous correspondences as 'iFraming'.

In order to prove this point the Level 2 provider referred to screenshots supplied by one of the complainants (Appendix D). The Level 2 provider stated that the manipulation of its landing page resided on the domain [mypromocenter.com/v/lander.php](http://mypromocenter.com/v/lander.php). This domain was not hosted, owned, or controlled by the Level 2 provider. All the Level 2 provider's hosted landing pages resided on [bonus.zingtones.tv](http://bonus.zingtones.tv). Until this evidence was presented to the Level 2 provider, they did not think manipulation of a landing page in this manner was technically possible or was a practice that was undertaken. During informal representations, and order to explain i-framing technology, the Level 2 provider showed that the landing page was hosted on its platform and not copied. The Level 2 provider had sent the correct and compliant page to the customer but the page was dynamically manipulated by the publisher on the customer's browser. Furthermore, certain parts of the page (mainly the top with pricing and the bottom with Terms and Conditions) were hidden and scrolling was removed. The customer was actually looking at two pages, one inside the other.

Upon receipt of the evidence above from the Executive, the Level 2 provider stated that it linked back all subscriber mobile numbers that interacted with this service to the affiliate partner and publisher. The Level 2 provider then linked the publisher details to lead-in page URLs. In doing this the Level 2 provider stated that it was able to isolate the subscribers that had been acquired through the mypromocentre publisher or through other publisher lead-in pages that had not been seen by the Level 2 provider for pre-approval or scraped on a daily basis for compliance checks. Based on this data, the Level 2 provider claimed that 4% of the subscriber base may have been exposed to potentially misleading marketing on behalf of the affiliate lead-in page. The 4% outlined above was also the maximum extent to which subscribers could have been exposed. To clarify, this percentage included publishers that did not supply a lead-in page and were not necessarily marketing in an inappropriate manner. The methodology used in calculating the 4% figure was presented to PhonepayPlus during a meeting on 15th February 2012. The Level 2 provider stated that as a result of this presentation, PhonepayPlus permitted the Level 2 provider to resume billing the subscriber base.

To further illustrate this point (that iFraming was not widespread and that the Level 2 provider always displayed pricing on its own landing pages in the URL [bonus.zingtones.tv](http://bonus.zingtones.tv)), the Level 2 provider stated that the same complainant who supplied the screen shots of mypromocentre also supplied screen shots of the cumulative promotional process taken one hour after the absent pricing screen shots were taken. The complainant at the time expressed the opinion that after contacting



the Level 2 provider's customer care team, it had updated its landing pages with pricing. The Level 2 provider stated that this was not however the case as pricing was always present on its own landing pages. The Level 2 provider stated that the complainant had, in fact, clicked on a banner hosted by a different publisher who had complied with lead-in page guidelines as outlined by the Level 2 provider, and linked to its landing pages that were not manipulated in any way and were displayed as intended, with pricing and Terms and Conditions present.

The Level 2 provider stated that the complainant who took the screen shots of the manipulated landing page subscribed to the competition service on 27 October 2011, made and made their complaint on 31 October 2011. The screen shots were then provided by this complainant to PhonepayPlus on 2 November 2011. The Level 2 provider stated that it had not been made aware of this complaint or the fact that this promotional material was in the public domain until 30 January 2012. Considering the serious nature of the publisher's actions, the Level 2 provider believed it would have been beneficial if PhonepayPlus had contacted it in November when they received this information. The Level 2 provider stated that this would have made it aware that this type of activity was possible. It would also have allowed it to deal with the matter and remove the publisher in a much speedier fashion, thus limiting the level of consumer harm. The Level 2 provider therefore submitted that by withholding this evidence for three months, PhonepayPlus may have contributed to the causing of further customer harm.

The Level 2 provider stated that, on the PhonepayPlus webpage called, "About Phone Pay Plus", it stated, "We focus on pre-empting and preventing problems". Furthermore, the 12th code of Practice stated:

*"This Code of Practice, our twelfth, is based on over twenty years' experience of regulating this market and we have refined the Code to focus on the underlying principles of consumer protection to achieve a regulatory regime that gives greater clarity and more flexibility to providers of premium rate services."*

The Level 2 provider submitted that by withholding information relating to i-frames for three months, PhonepayPlus had ignored the principles of its own Code. Withholding this information did not focus therefore on the underlying principle of consumer protection, nor did it afford any flexibility to providers of premium rate services. The Level 2 provider believed that it had been presumed guilty and a case was then built up around this assumption.

The Level 2 provider further stated that, in a telephone conversation with the Executive on 10 January 2012, the Level 2 provider was informed that there were web pages in the public domain that did not contain pricing and furthermore, the complainant had gone to the effort of taking screen shots and sent them to PhonepayPlus. During this call, the Level 2 provider confirmed that it was in control of the landing page and that pricing and Terms and Conditions were present at all times. The Level 2 provider expressed deep concern about the possibility of landing pages existing without pricing and requested on three separate occasions during the call, that this evidence be sent to it in order to deal with it head on, as opposed to waiting a couple of weeks. The

Level 2 provider stated that on each occasion the Executive declined to share this information despite recognising the seriousness of the issue. The Level 2 provider stated that a transcribed quote from the investigations Executive with regards to the Level 2 provider's request was as follows:

*"Obviously it's a red flag, it's a red flag for us and also a flag for you to respond to and make your own enquires, and I really do understand that having cited those landing pages it would assist you in your enquires but I just, just for clarity sake, I won't delay it for much after you've had your chance to respond to this initial query and indeed, if you respond earlier to this request then obviously that may prompt the next stage even quicker".*

The Level 2 provider stated that it did not receive these screen shots until 30 January, 20 days after the conversation took place and three months after PhonepayPlus initially received this evidence. Zamano do not believe it was in the best interests of the public, or the premium rate industry, for this information to be withheld.

The Level 2 provider argued that in all previous dealings with PhonepayPlus, it had always acted on any advice received in a timely and complaint fashion. The Level 2 provider believed that, had the issue of absent pricing, or any other concerns PhonepayPlus may have had about the service in October 2011 been raised with the Level 2 provider at the time, it would have been dealt with immediately and removed the potential for any consumer harm.

The Level 2 provider maintained that, with the exception of the i-frame case highlighted above, pricing was transparent before any purchase was made. All information relating to pricing, the subscription nature of the service, and the service Terms and Conditions, were all present on the service landing pages and were prominent and proximate to the main call to action on each page.

The publisher lead-in pages did not state that there was a prize to be claimed, nor did they state that no cost was associated with such a claim being made. All publisher lead-in pages that had been submitted to the Level 2 provider for approval were conditional and any statement made on them needed to be taken in their full context. The Level 2 provider asserted the following:

- the word "winner", needed to be viewed in its full context as intended in the wording, "*you could be the lucky winner*", or "*you are a potential winner*". These statements were conditional and did not state that the site visitor had already won something.
- with regard to "claim" or "unclaimed", the Level 2 provider stated that these words should have been viewed in the full context of the lead-in page which contained the wording. "*you may have (1) prize unclaimed*". This statement was in the conditional and did not state that the site visitor had an unclaimed prize.
- The Level 2 provider agreed that no reference to subscription charges or costs of the service were detailed on the publisher lead-in page. The Level 2 provider asserted that it was not necessary for pricing to be present on the publisher lead-in pages as they were only one step in the cumulative promotional process. This was in compliance with the General Guidance Note (*'Promotions and Promotional Material'*), section 2.18, where it is stated:

*"As long as the consumer is clearly informed of the price prior to purchase, then there is no need to inform the consumer in each individual part of the cumulative promotional processes."*

- The Level 2 provider confirmed that the publisher used the customers' IP addresses to determine their locations and their lead-in pages were tailored for that specific country. The Level 2 provider contested the assertion that a page viewer's location resulted in an entitlement to a prize. The Level 2 provider further stated that the landing pages clearly and visibly informed consumers that they were entering into a subscription service that charged £4.50 per week.

With regard to the service landing page the Level 2 provider did not contest that the prize on offer was the clear focal point. As with any advertisement, the key benefit of the service was promoted as the focal point of the campaign. On both the question and mobile number entry page, the pricing and subscription nature of the service were present, prominent and proximate to the call to action. On the mobile number entry page, the Executive pointed out that the mobile entry point was another focal point. The Level 2 provider stated that it placed the pricing detail adjacent to this mobile entry point to ensure that it was proximate and prominent. The term "*for your chance*" was font size 15 and was clearly visible and legible.

The wording on the Level 2 provider's landing page clearly stated that visitors could "Compete to Win" an iPhone 4. The Level 2 provider did not therefore believe that the customer was led to believe that they had already won a prize. The customer was also informed that they would need to enter their details for a chance to win the prize. The customer was informed that by entering their details there was a "chance" they could win and they were not given any assurances that the prize was already theirs to claim.

The Level 2 provider further contested the submission that it had been ineffective in bringing the pricing to the attention of customers as it was prominent and proximate to the main call to action. The Level 2 provider also contested that consumers had been given a false impression on the publisher lead-in pages for the reasons outlined above. The Level 2 provider further stated that, notwithstanding its views on pricing prominence, when the Executive pointed out their concerns regarding pricing prominence it reviewed its landing pages and darkened the font in Appendix A. The Level 2 provider requested that this be considered as a mitigating factor.

The Level 2 provider acknowledged that the use of i-frame technology by the publisher detailed above was highly inappropriate and it did not condone its use. As previously stated, the Level 2 provider had isolated the customers impacted by this, immediately deleted them from the database, and was issuing refunds. The Level 2 provider had outlined in a presentation to PhonepayPlus, at a meeting on 15 February 2012 that this practice could be prevented in the future by using an i-frame blocker script. In response to the Compliance Update on Digital Marketing of 16 February 2012, the Level 2 provider also sent an email to the Head of Regulatory Development on 22 February 2012, outlining further steps that it believed should be adopted as industry guidelines when dealing with affiliate marketing. The Level 2 provider further asked that these points also be considered as mitigating factors.

3. The Tribunal considered all the evidence including the oral representations and associated presentation and concluded that, having taken the service as a whole, on a balance of probabilities the service landing pages that had not been i-framed did fully and clearly inform consumers of all information likely to influence the decision to purchase. With regard to the wording, "congratulations", "winner" or similar, and "claim" or "unclaimed", in the affiliate marketing lead-in pages, the Tribunal determined that this issue was a matter for consideration of the potential breach under Rule 2.3.2 of the Code. The Tribunal further concluded that the practice of i-framing the Level 2

provider's landing pages in order to obscure pricing information and service Terms and Conditions, prevented consumers from being fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase was made.

Accordingly the Tribunal concluded that the service was in breach of Rule 2.5.5 of the Code and, as such, the Level 2 provider had failed to meet Outcome 2.2 of the Code.

**Decision: Upheld**

**ALLEGED BREACH TWO**

**Outcome 2.3 (Fairness):**

*"That consumers of premium rate services are treated fairly and equitably".*

**Rule 2.3.2**

*"premium rate services must not mislead or be likely to mislead-in any way".*

1. The Executive submitted that the promotional campaign was operated in such a way as to mislead consumers into thinking the service was free and any prize simply required the consumer to claim it by following the instructions given. Those instructions were simple and specific. Overall, the affiliate marketers lead-in pages appeared to give an impression of the service to consumers which was false. Having considered the complainants' evidence, the Executive submitted that such an apparently false impression appeared to influence how the consumers considered the landing page and its contents.

The affiliate marketer's banner advertising, pop-ups, and pre-website alert windows (prior to the actual lead-in pages) included the suggestion that consumers had already won a prize.

The impression given by the affiliate lead-in pages was that there is a prize to be claimed, and that there is no cost associated with such a claim being made. This impression was created in various ways as set out below (and in Appendix A):

- Use of the words 'congratulations', 'winner', or similar;
- Use of the words 'claim' or 'unclaimed' in relation to the prize;
- No reference to subscription charges or any cost for the service;
- Alternative reasons given for an entitlement to a prize, other than payment for entry to a draw, such as:
  - Location like Coventry, Newhaven, etc,
  - Web browsing activity, or,
  - Completion of a survey or quiz.

The Executive submitted that this impression may have had an impact on consumers who went on to read the service landing page. On the first landing page (Appendix B) the question posed was the focal point. On the second landing page (Appendix C) the

mobile phone number entry point and the prize were clear focal points. In addition, the words, “*for your chance*” were smaller than the remaining parts of the headline text which referred to “Entering your details” and “win the iPhone 4S!”

The Executive further submitted that consumers were likely to be influenced by the quotes attributed to ‘previous winners’ (Appendix E) which suggested consumers could claim the prize with confidence. The quotes were tailored to the wording of the promotional material, including some quotes reiterating that a person simply needed to claim the prize already won by the website visitor. However these did not relate to the ‘Play n’ Win’ competition, ‘Zingtones’ subscription, or the Level 2 provider, nor were the names, photos, locations, or quotes an accurate representation of other genuine consumers. This was inherently misleading to consumers viewing the affiliate marketing lead-in pages in association with the service.

The Executive further submitted evidence from complainants which suggested that when the consumers viewed the service landing pages they were not alerted to the true nature of the service. The Executive submitted that this was linked to the apparent lack of transparency of key information likely to influence the consumers decision to purchase (prior to entering the mobile number and PIN as instructed within the affiliate marketers lead-in pages), such as:

- Reference to a subscription service;
- Reference to a prize draw which is open to all subscribers; and
- Reference to a weekly charge of £4.50 for a monthly prize draw, or to the full cost of the service, which is over £18 per month.

The Executive submitted that the promotional material for this premium rate service, as a whole, was likely to mislead consumers into thinking they were entering their mobile numbers and the PIN code to claim a prize, whereas they were in reality signing up to a subscription service charged at £4.50 per week.

For the reasons specified above the Executive believed that the service was in breach of Rule 2.3.2 of the Code and, as such, the Level 2 provider had failed to meet Outcome 2.3 of the Code.

2. The Level 2 provider contested the submission that campaigns were operated in such a way as to mislead consumers into thinking the service was free and any prize simply required the consumer to claim it by following the instructions given. The Level 2 provider contended that promotional material did not, and was not likely to mislead consumers in any way. To demonstrate this, the Level 2 provider drew attention to the screenshots in which were also presented to the Tribunal during information representations at the hearing for this case on 15 March 2012.

In addition, as previously detailed to the Executive in its letter of 16 January, 2012 the Level 2 provider had outlined the marketing material associated with the service. During its meeting with the Executive on 15 February 2012 the Level 2 provider detailed in a presentation PhonepayPlus how this marketing represented at least 96% of customers acquired around this service. As a result of this presentation the Level 2 provider confirmed that it had been allowed turn on the billing mechanic for the subscriber base.

#### **Promotion of Competition Service:**

- **Affiliate Marketing:**

The affiliate marketing page that led customers onto the service competition pages promoted a product or service that directly related to the service being promoted by the Level 2 provider. At no point on this page could the customer subscribe to the Level 2 provider's competition services. Furthermore, the Level 2 provider had controls in place around affiliate marketing.

- **Level 2 provider's marketing**

On clicking the "Answer *THE SIMPLE TEST QUESTION*" button customers were then brought to a landing page hosted by the Level 2 provider (for example, at Appendix B), which detailed the following:

- what the service was, "Compete to WIN the new iPhone4S". Since January 2012 an additional draw for a £50 cash prize had also been promoted on the site for customers who entered the iPhone competition;
- entry into the iPhone competition;
- at the top of the page the Level 2 provider that this was a subscription service that cost £4.50 per week. Customers were also told that they would be entered into the draw and as an additional value all customers would have access to 10 mobile content downloads per week. Instructions on how to unsubscribe from the service were also included. The Level 2 provider now appreciated that this may have led to some confusion and it had excluded this mobile content download offer from competition promotions; and
- at the bottom of the page there was a full set of Terms and Conditions that detailed the price of the competition subscription service, the competition and the prize, how to unsubscribe and help line information.

The next page contained the following (for example, at Appendix C)):

- a request for users to enter their mobile number for a chance to win an iPhone;
- details that this was a subscription service by Zingtones and that it cost £4.50 per week;
- information regarding the requirement for the customer to complete the MSISDN entry field, together with a network selection drop down box, and a requirement to accept the service Terms and Conditions by ticking the tick box; and
- Full Terms and Conditions.

The next page contained the following (for example, at Appendix F):

- Customers were asked to enter the PIN sent to their phone. Full service Terms and Conditions were again detailed on this page which reinforced the competition pricing and detail.

## **Complainants' Evidence**

As part of its opt in process an independent third party captured the Level 2 provider's landing pages on a daily basis and this page copy provided evidence of the marketing presented to the customer at the point they entered their mobile number. The Level 2 provider asserted that this marketing material was not misleading, and nor was it likely to mislead-in any way.

The Level 2 provider further felt that it was important to point out that it had increased its advertising spend significantly since September 2011 and it believed that the increase in customer care calls was a direct result of a significant increase in this advertising spending. All of the affiliate lead-in pages that were sent to the Level 2 provider for pre-approval contained conditional wording such as "*You could be the lucky winner...*" and "*You may have (1) prize unclaimed*", and did not therefore claim that the viewer had already won a prize. Furthermore, in order to enter the subscription and incur charges, the customer was required to go to the service landing page where the pricing was clearly visible, prominent and proximate. Before making their decision to join the subscription the customer was informed of the associated cost.

The Level 2 provider further stated that, in a telephone conversation with the Executive on 18 January the typical affiliate lead-in page was discussed and compared to lead-in pages that the Executive had found through their own monitoring. The Level 2 provider said that the Executive stated they had viewed lead-in pages on their phone that were similar in style but the wording was completely different. The typical affiliate lead-in page wording would, in the Executive's view, have been unlikely to have generated complaints. The wording was as follows:

- You Could be today's Lucky Winner in [sic];
- You may have (1) prize unclaimed;
- Congratulations!
- Answer the test question and you could win a prize; and
- Potential Winner!

During the telephone conversation with the Executive the Level 2 provider confirmed its belief that publisher lead-in pages that had been sent to them for pre-approval were not in fact misleading in any way. The banners, pop-ups and pre-website alert windows presented, were not condoned or pre-approved by the Level 2 provider. The Level 2 provider stated that it sent banners to affiliates, who in turn gave them to the publishers in order to promote its campaigns. These banners promoted a competition with a chance to win an iPhone 4s and included the price per week. The Level 2 provider argued that, in the instances illustrated by the Executive, it appeared that the publisher did not use the banners provided to the Level 2 provider to promote the service. This was the same publisher who used an 'i-frame' to manipulate the service landing page in order to hide pricing and Terms and Conditions. The Level 2 provide re-iterated that, with the exception of the i-frame page detailed above, the pricing was prominent and proximate on all service landing pages and the people visiting the site were fully informed of the pricing and nature of the service before they completed the sign up process.

With regards to the service landing page the Level 2 provider did not contest that the prize on offer was the clear focal point. As with any advertisement, the key benefit of the service was promoted as the focal point of the campaign. On both the question and mobile number entry page, the pricing and subscription nature of the service were present, prominent and proximate to the call to action. On the mobile number entry

page, the Executive had pointed out that the mobile entry point was another focal point. The Level 2 provider stated that it had placed the pricing detail adjacent to this, ensuring that it was proximate and prominent. The term “for your chance” was font size 15 and was clearly visible and legible. However, bearing in mind the Executive’s concerns, the Level 2 provider stated that it would enlarge the font size used here in any future marketing undertaken by it.

The Level 2 provider further stated that the wording on the service landing page clearly stated that visitors could “Compete to Win” an iPhone 4. In stating that the viewer had to compete, or enter a competition, before they could win the promoted prize, the Level 2 provider stated that it did not believe that the customer was led to believe that they had already won a prize. The customer was also informed that they were required to enter their details for a chance to win the prize. The customer was informed that by entering their details there was a “chance” they could win and they were not given any assurances that the prize was already theirs to claim.

The Level 2 provider argued that the previous winners section was below the fold on the publisher lead-in page and was controlled by the publisher and was generic across many lead-in pages. Consequently, the Level 2 provider argued that this had a limited impact on the purchase decision. From the list of complainants provided by PhonepayPlus the Level 2 provider remarked that only one referenced the previous winners’ section in anyway influencing their decision to complete the sign up process. The Level 2 provider confirmed that publishers used models for these images and the lead-in page could connect through to multiple advertisers. While the winners were not directly linked to the service the Level 2 provider was keen to point out that any consumer who entered the competition managed by the Level 2 provider were becoming part of a legitimate online competition. The Level 2 provider confirmed that it was more than happy to supply monthly and weekly winners’ details for the previous months. All winners were selected from its database by an independent partner.

The Level 2 provider further stated that the Executive submitted that there was an apparent lack of transparency of key information likely to influence the consumers’ decisions to purchase prior to entering the mobile number and PIN as instructed within the publishers lead-in pages. The aforementioned lead-in pages were part of a cumulative promotional process, and according to General Guidance Note ‘*Promotions and Promotional material*’, section 2.18:

*“as long as the consumer is clearly informed of the price prior to purchase, then there is no need to inform the consumer in each individual part of the cumulative promotional process”.*

The Level 2 provider therefore stated that the customer was clearly informed of the price prior to purchase on the question landing page and on the mobile number entry landing pages.

3. The Tribunal concluded that consumers, who accessed the service via landing pages that had been i-framed by affiliate marketers, thereby obscuring pricing information and services Terms and Conditions, were misled-into believing that the service was free. The Tribunal further concluded that, notwithstanding the conditional wording contained in the Level 2 provider’s service landing pages, wording used in some affiliate marketing lead-in pages such as “winner”, and “congratulations!” was likely to mislead consumers into believing that they had already won a prize. The Tribunal also considered that the affiliate marketer’s previous winner’s page was likely to mislead consumers into believing that these were all genuine winners from the UK who had



participated in the Level 2 provider's service. The Tribunal noted the argument regarding the fact that the other pages were not intended to be seen by consumers but nevertheless considered that the fact that they were altered for different countries/regions was misleading.

Accordingly the Tribunal concluded that the service was in breach of Rule 2.5.5 of the Code and, as such, the Level 2 provider had failed to meet Outcome 2.3 of the Code.

**Decision: Upheld**

### **ALLEGED BREACH THREE**

#### **Outcome 2.3 (Fairness):**

*"That consumers of premium rate services are treated fairly and equitably"*

#### **Rule 2.3.12(d)**

*"For all subscription services, once a month, or every time a user had spent £17.04 plus VAT if that if that occurs in less than a month, the following information must be sent free to subscriber:*

- vii. The name of the service;*
- viii. Confirmation that the service is subscription-based;*
- ix. What the billing period (e.g. per day, per week, or per month) or, if there is no applicable billing period, the frequency of messages being sent;*
- x. The charges for the service and how they will or can arise;*
- xi. How to leave the service; and*
- xii. Level 2 provider contact details.*

1. The Executive submitted that this provision required Level 2 providers to issue a free message to subscribers, either once a month, or every time a user had spent £17.04 plus VAT if that occurred in less than one month. This was to ensure that those subscribers were fully aware of their ongoing membership to that subscription service. The transcript of a reminder message sent by the Level 2 provider in order to attempt to comply with Rule 2.3.12(d) of the Code was as follows:

*"FREE MESSAGE: As part of Zing U can get 10 Ringtones, Videos, Games & Graphics for £4.50 per week! Helpline:08452251808. SP.RedCircle. stop to 81002"*

The Executive submitted that this message did not meet the obligations set out in Rule 2.3.12(d) for the following reasons:

- The wording in general might have been read as a promotional message relating to a service to which the consumer was not associated;
- The message did not clearly set out confirmation that the service was subscription-based and that the consumers were subscribed. The Executive also submitted that, based on the information contained in the above message, consumers may not have understood that the price "£4.50 per week" directly related to their subscription to this service; and

- The instructions as to how to leave the service were not clearly set out and consumers were unlikely to understand what to do from the phrase 'stop to 81002'.
2. The Level 2 provider argued that it did comply with the Code by sending a free message to subscribers, either once a month, or every time a user had spent £17.04 plus VAT if that occurred in less than a month, to ensure that those subscribers were fully aware of their ongoing membership to that subscription service. The Level 2 provider submitted that the message clearly outlined the following:
- The name of the service as Zingtones or Play N'Win, where appropriate;
  - Confirmation that the service was subscription-based whereby the customer was informed that they were either part of the Zing or Play N'Win service, and that as part of this service they were charged £4.50 per week;
  - What the billing period was (i.e. per day, per week, or per month) or, if there was no applicable billing period, the frequency of messages being sent;
  - The charges for the service and how they would or could arise;
  - How to leave the service whereby the customer was informed that they could stop by sending Stop to either 81002 or 60699; and
  - Level 2 provider contact details.

The Level 2 provider asserted that the Executive's argument that the wording of the message in general might have been read as a promotional message relating to a service to which the consumer was not associated was false. The Level 2 provider asserted that in no way did this message promote a service and, furthermore, the message consumers received related directly to the service that they signed up for. The Level 2 provider contested the assertion that this message was promotional in any way as there was no call to action. Further, due to SMS character limitations of 160 characters it was not possible to detail the full nature of any service in a text message, along with the other regulatory requirements outlined above.

The Level 2 provider also contended that the message did set out confirmation that the service was subscription based by stating that the customer was part of Zing and was charged £4.50 per week. Further, the instructions on how to leave the service were clearly detailed in the message above. The Level 2 provider believed that consumers are well versed in "text speak" and that the detail on how to leave the service was clearly present in the message. The Level 2 provider further confirmed that it received a spike in subscribers sending in "stop" after receipt of spend reminders. Based on this observation, the Level 2 provider stated that it believed that the stop command was clear, and that customers did understand what to do from the phrase "stop to 81002".

In summary, the Level 2 provider strongly argued that no breach had occurred here as all necessary information was contained in the spend reminder message. Based on the concerns raised by the Executive, the Level 2 provider was however willing to amend this message to allay any concerns that the Executive might have had.

3. The Tribunal considered that the wording of the reminder message did not expressly state that the service was subscription based and the wording "stop to 81002" did not clearly inform consumers as to how to leave the service.

Accordingly the Tribunal concluded that the service was in breach of Rule 2.3.12(d) of the Code and, as such, the Level 2 provider had failed to meet Outcome 2.3 of the Code.

**Decision: Upheld**

## **SANCTIONS**

### **1. Service Revenue**

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

### **2. Initial Overall Assessment**

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

#### **Rule 2.2.5 (Transparency and Pricing)**

The initial assessment for the breach of Rule 2.2.5 of the Code was **serious**. In determining the initial assessment for this breach of the Code, the Tribunal applied the following criteria:

- The service contained promotional material that had been designed with the intention not to provide consumers with adequate knowledge of the service or the costs associated with it.

#### **Rule 2.3.2 (Misleading)**

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

- The service was purposefully promoted a way that impaired the consumer's ability to make a free and informed transactional decision.

- **Rule 2.3.12(d) (Subscription Reminder)**

The initial assessment for the breach of Rule 2.3.12(d) of the Code was **moderate**. In determining the initial assessment for this breach of the Code, the Tribunal applied the following criteria:

- The subscription reminder message, while easily remedied, was in its current form not sufficiently detailed and demonstrated evidence of some potential harm that was likely to affect consumers.

The Tribunal concluded that the initial overall assessment of the case was **serious**.

### **3. Final Overall Assessment**

The Tribunal determined that there were no aggravating factors that were relevant in this case.

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

- The Level 2 provider took a number of steps in advance to identify and mitigate against the impact of external factors and risks that might result in a breach of the Code, and notified PhonepayPlus of this action during the course of the investigation. Some of the steps taken by the Level 2 provider included:
  - all publisher lead-in pages were requested for pre-approval prior to any publisher promoting the Level 2 provider's campaigns;
  - upon receipt of lead-in pages the Level 2 provider instructed affiliate marketers to instruct publishers to remove a number of features of their lead-in pages, including countdown clocks and the quantity of prizes available; and
  - the Level 2 provider started to take daily scrapes of lead-in pages for the URL addresses that had been provided to the Level 2 provider for pre-approval;
- When the Executive recommended that the Level 2 provider suspend the service it did so. Later when the Level 2 provider decided to reactivate the billing mechanic for the service it took some steps to attempt to reduce the consumer harm.
- In an effort to relieve potential consumer harm caused the Level 2 provider proactively refunded consumers who had entered the service via unauthorised affiliate marketing.
- The Level 2 provider indicated that it was finding ways to manage affiliate marketing partners differently in the future and was willing to seek and obtain compliance advice from PhonepayPlus.

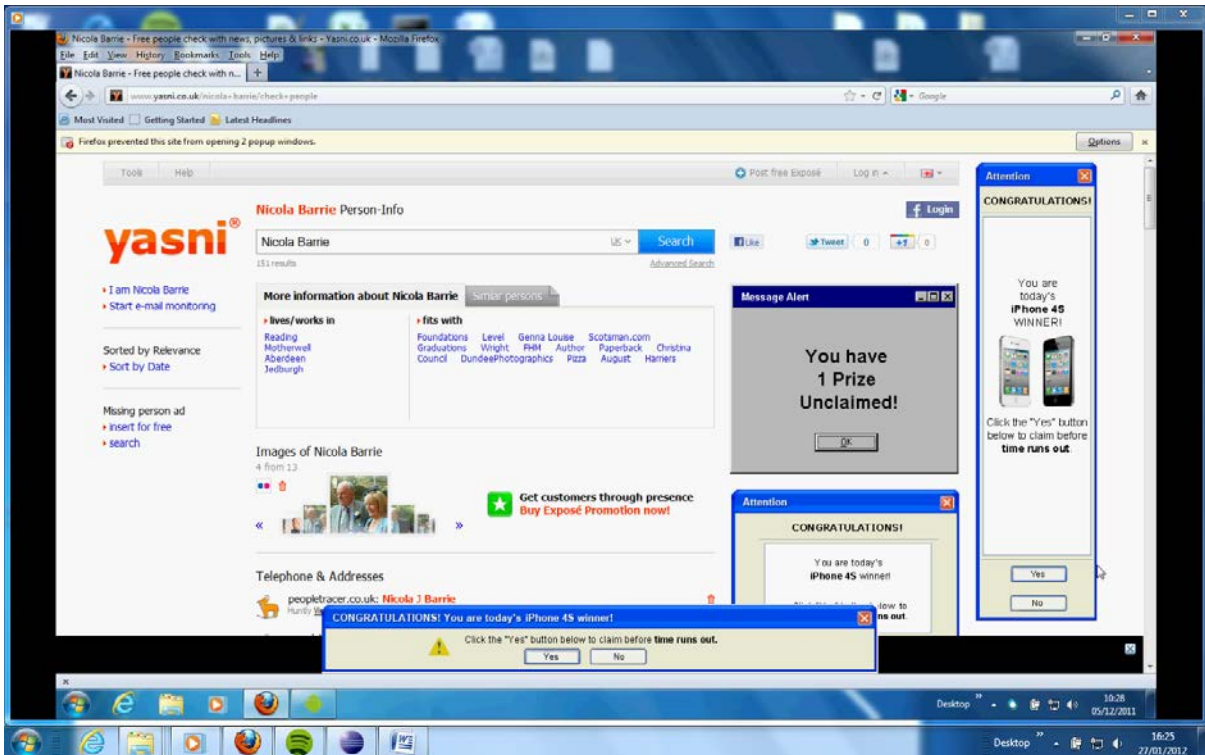
Having taken into account the mitigating factors, the Tribunal concluded that the final overall assessment of the case should be regarded overall as **significant**.

#### 4. Sanctions Imposed

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

- A Formal Reprimand;
- A Direction to Remedy the Breach;
- A Fine of £35,000; and
- A Direction to make refunds to all complainants who claim a refund, for the full amount spent by them for the service, save where there is good cause to believe that such claims are not valid, and to provide evidence to PhonepayPlus that any such refunds have been made.

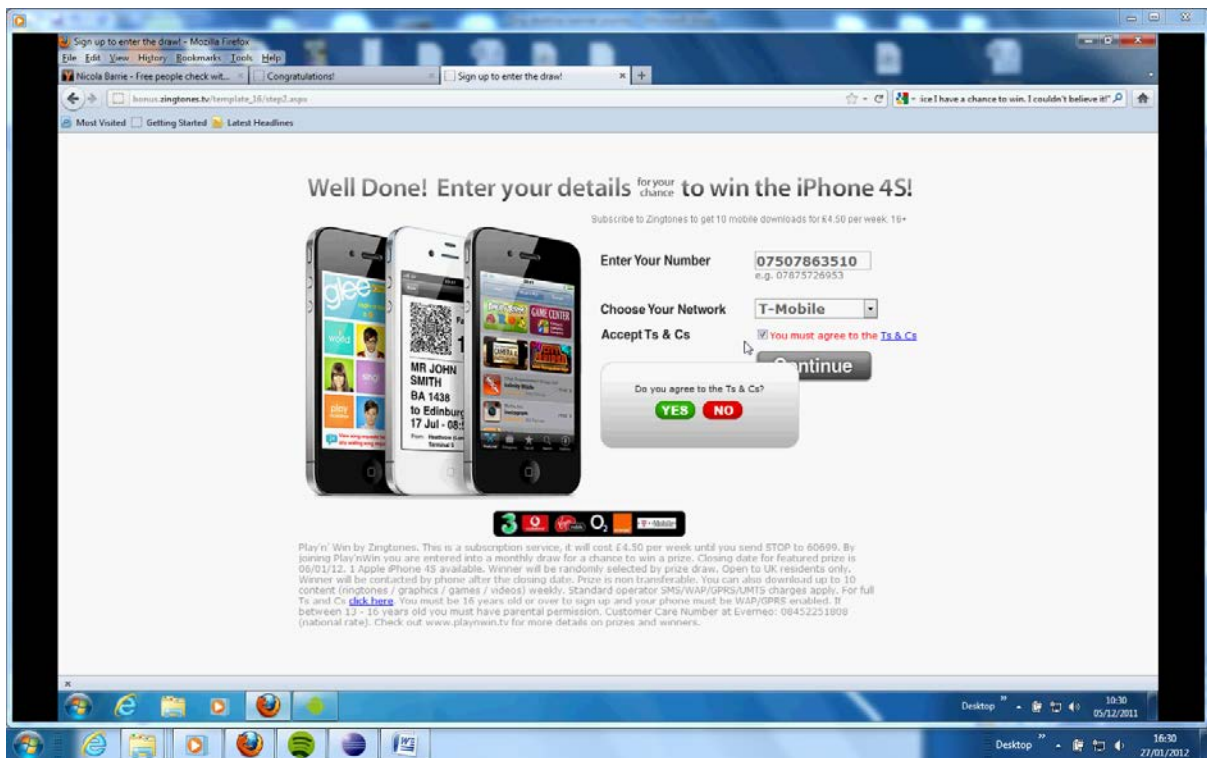
**Appendix A: The impression given by the affiliate lead-in pages was that there was a prize to be claimed, and that there was no cost associated with such a claim being made.**



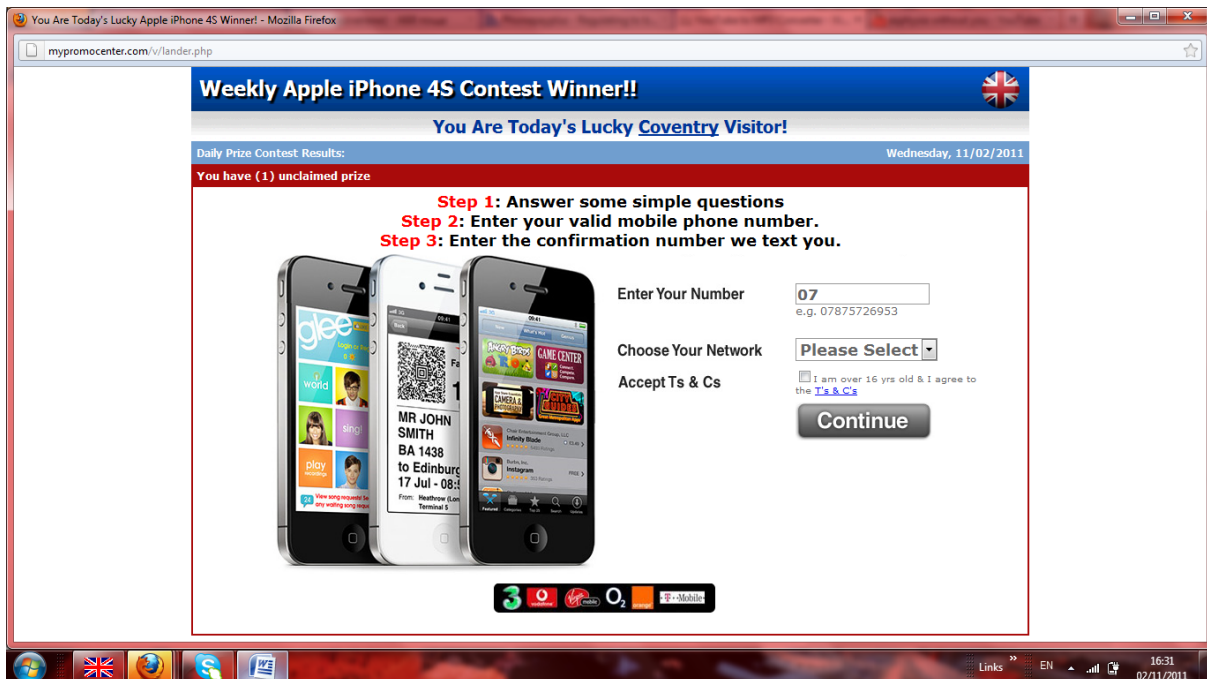
**Appendix B: The First Landing Page**



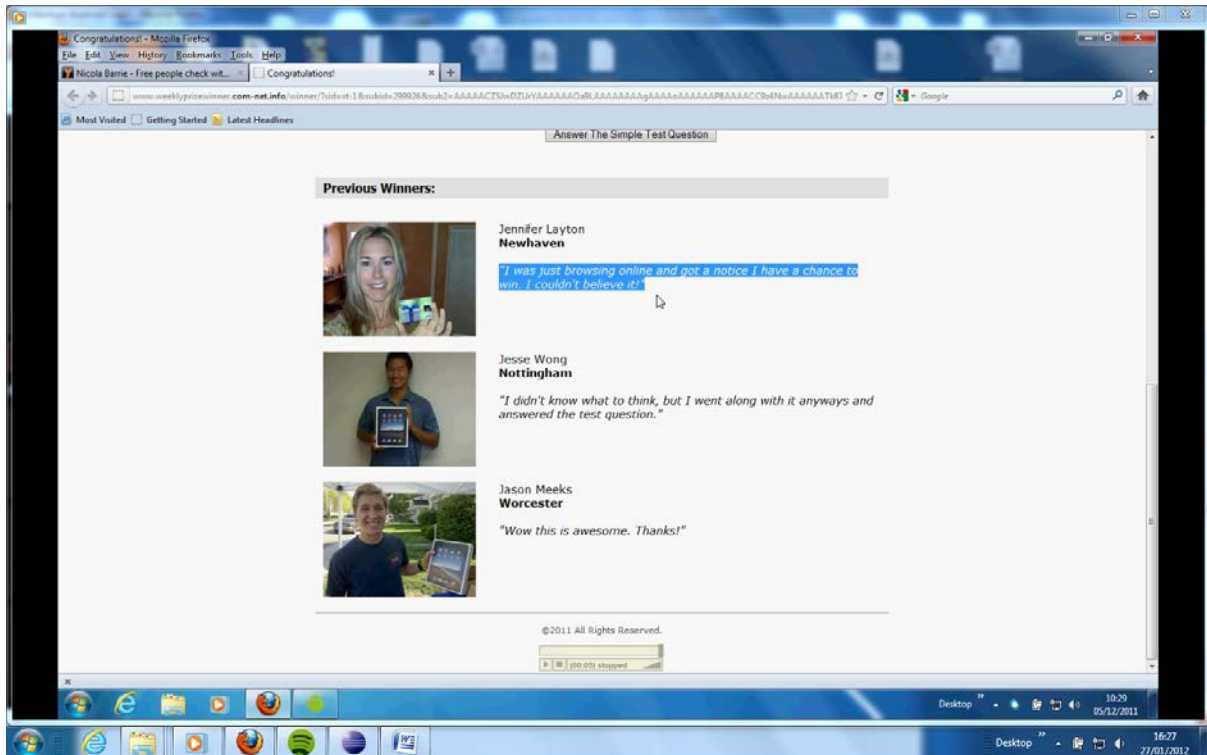
## Appendix C: The Second Landing Page



## Appendix D: I-Framing



**Appendix E: Consumers were likely to be influenced by the quotes attributed to 'previous winners' which suggested consumers could claim the prize with confidence.**



**Appendix F: Customers were asked to enter the PIN sent to their phone.**

