

**Tribunal Sitting Number 139 / Case 1**

**Case Reference:** 19673  
**Level 2 provider:** Lordas Limited, Saint Vincent and the Grenadines  
**Type of Service:** Competition - non-scratchcard  
**Level 1 provider:** Velti DR Limited  
**Network operator:** All Mobile Network operators

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

**BACKGROUND**

Between 11 March 2013 and 1 November 2013, PhonepayPlus received 71 complaints from consumers in relation to a subscription competition service, which operated under the brand name “Nekoj” (the “**Service**”), and was operated by the Level 2 provider Lordas Limited. The Service operated on a number of premium rate shortcodes including, 64055 and 79910, and via Payfort. Consumers were charged £10 every three days. The Level 1 provider was Velti DR Limited. The Service operated between December 2012 and 16 May 2013, when it was voluntarily suspended by the Level 1 provider following correspondence with PhonepayPlus. The Service was promoted online by affiliate marketers.

Consumers who subscribed to the Service were sent ten trivia questions every three days. The consumers with the highest score each week were entered into a monthly draw to win a prize. Advertised prizes included Apple products and Amazon vouchers.

Some complainants stated that they had been misled into entering the Service and, as a result, had inadvertently incurred premium rate charges. In addition, some complainants stated that they had not interacted with the Service but had incurred unsolicited charges. There were a significant number of complaints made on behalf of young people who had incurred large bills. In addition, PhonepayPlus conducted monitoring of the Service, which resulted in concerns regarding the technical quality of the Service.

**The Investigation**

The Executive conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12<sup>th</sup> Edition) (the “**Code**”).

The Executive sent a breach letter to the Level 2 provider on 1 November 2013. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.2 – Misleading
- Paragraph 3.1.7 – Adequate technical quality

A response was provided by the Level 2 provider’s named responsible person on 19 November 2013. On 28 November 2013, the Tribunal reached a decision on the breaches raised by the Executive.

**SUBMISSIONS AND CONCLUSIONS**

**ALLEGED BREACH 1**

**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 of the Code as a result of misleading affiliate marketing promotions that led consumers to interact with the Service.

The Executive commented that Level 2 providers are responsible for the promotion of their services, including promotions conducted by affiliate marketers. The Executive noted that, in written correspondence, the Level 2 provider accepted that it used affiliate marketing to promote the Service.

The Executive relied on monitoring conducted on 27 February, 1 March, 23 April, 26 April and 16 May 2013 by the Research and Market Intelligence Team (“**RMIT**”). On 27 February 2013, the RMIT searched Google using the search term, “spotify code”. The RMIT selected a search result which purported to contain a “Spotify Premium Code Generator”, and was directed to the ezhacks.net website, which stated, “Spotify Premium Code Generator is Free for all of the ezhacks.net members” (**Appendix A**). The RMIT was invited to select a link entitled “Download Now!” and was directed to the mediafire.com website that purported to contain a “Spotify Code Generator” download (**Appendix B**). Upon selecting the download button the RMIT was directed to the fileice.net website (**Appendix C**) and after selecting, “Regular download” the RMIT were presented with a pop-up which stated:

“Please complete a quick survey to continue!

The download will automatically begin when you successfully finish the survey you have chosen. If the file does not automatically unlock after a minute, please chose another survey and complete it.

Chance to win a brand new iPhone5 Colour

Chance to win an iPhone!

Chance to win an iPhone 5 or IPad!

Your chance to win the new Apple iPad!

Chance to win the New iPhone 5!

Offer name: Chance to Win an iPhone!

File unlocks after Pin number confirmed.”

(**Appendix D**)

The RMIT selected, “Chance to win a brand new iPhone 5 Colour,” and was redirected to the Service landing page which contained a pop-up showing the Service pricing information and terms and conditions (**Appendix E**). The RMIT agreed to the terms and conditions and was then able to view the full Service landing page beneath the pop-up (**Appendix F**). The RMIT subscribed to the Service by entering its MSISDN into the appropriate field on the Payforit webpage and inputting into the webpage the pin code sent to the MSISDN. The RMIT returned to the fileice website to retrieve the Spotify code but after waiting 30 minutes the Spotify code was not supplied (**Appendix C**).

The RMIT conducted an additional monitoring session on 1 March 2013. The RMIT searched Google for “free Google glasses”. In a similar manner to the previous monitoring session on 27 February 2013, the RMIT followed a search result for “free Google glasses” and was directed through several webpages until it was presented with a “survey” similar to the webpage detailed above (**Appendix D**). Upon selecting a prize, the Executive was directed to the Service landing page. After subscribing to the Service, the offer of “free Google glasses” did not materialise.

The RMIT also conducted monitoring on 23 April 2013 for “spotify codes”, on 26 April for “free facebook credits” and on 16 May 2013 for “habbo hotel coin generator”. During each monitoring session, the RMIT experienced a similar consumer journey to that detailed above on 27 February 2013 and 1 March 2013. On each occasion except for the last monitoring session on 16 May 2013, the RMIT subscribed to the Service. During all the monitoring sessions, the initial offer did not materialise.

The Executive asserted that consumers were likely to have been misled into believing that they were required to complete a “survey” in order to obtain the original offer of either, Spotify codes, Google glasses, Facebook credits or a Habbo Hotel cheat password. However, having completed a “survey” a consumer would have been directed to the Service landing page. In reality, the “survey” was a preliminary step to subscribe to the Service at a cost of £10 every three days. The Executive asserted that, whilst pricing for the Service was provided and there was a description of the actual service offered, it was misleading to state that a consumer could obtain the Spotify codes, Google glasses, Facebook credits or Habbo Hotel cheat password for “free” when that was not the case.

The Executive submitted that consumers had been or were likely to have been enticed to enter the Service through a route that had nothing to do with the actual service. Further, the original offer did not materialise even after subscribing to the Service.

The Executive submitted that consumers had been or were likely to have been misled into landing on the Service webpage and interacting with the Service as a result of being informed that that they had to complete a “survey”. In light of the above, the Executive submitted that consumers had been or were likely to have been misled into interacting with the Service and acted in breach of rule 2.3.2 of the Code.

2. The Level 2 provider denied the breach and generally stated that it did not believe that it had misled consumers. It also stated that it had not promised “free” codes, glasses, credits or cheat passwords to any of its consumers. In addition, it stated that it was not affiliated with the fileice website.

The Level 2 provider explained that the Service operated on the trusted Payforit platform and therefore it had ensured that pricing information was transparent and it obtained proper opt-in verification. The Level 2 provider stated that it was aware of previous PhonepayPlus adjudications that had dealt with issues involving consumers who had subscribed to one service believing that it was another service. In an effort to deal with those concerns, the Level 2 provider stated that it had decided to display a warning pop-up before the consumer reached the Service landing page to ensure that consumers had the pricing information and the terms and conditions before they entered the Service (**Appendix E**). The Level 2 provider highlighted that it required a positive action, agreement to the terms and conditions, before the consumer could proceed to the Service landing page. It asserted that the pop-up page would clarify the nature of the Service for any consumer who was in doubt and may have misunderstood the nature of the Service prior to arriving on the page.

The Level 2 provider stated that it had reviewed its records and verified that the RMIT had subscribed to the Service on 27 February 2013 at 15:11:37 and 1 March 2013 at 15:08.23 and that it had sent free subscription messages to the monitoring MSISDN. It was also able to confirm that the RMIT had cancelled the subscription on 1 March 2013 at 15:09:16.

The Level 2 provider provided a list of the complaints it had received about the Service and stated that it had not received any complaints about a “Spotify hack service” or similar. It reported that three out of 71 complainants raised a complaint about a, “promise given that was not delivered”. The Level 2 provider stated that on the balance of probabilities it did not believe that consumers had been misled into the belief that they had subscribed to a different service to the Service they had subscribed to. It noted that the majority of complaints related to minors interacting with the Service but it stated that it had taken all reasonable steps to ensure consumers were 18 years of age and over by not advertising on websites that specifically target minors, requiring consumers to confirm that they are 18 years of age or over before subscribing and utilising the Payfort platform to process transactions.

The Level 2 provider referred to a section of the affiliate marketing monitoring where the RMIT had been directed from the Google glasses promotion to the “survey” webpage (similar to screenshot **Appendix D**). It noted that the RMIT had selected an alternative “offer” which had led it to an entirely separate landing page operated by an unrelated Level 2 provider. The Level 2 provider stated that this demonstrated that the RMIT had not previously subscribed to the Service but had chosen to cancel the “offer” by returning to the “survey” webpage. In addition, the Level 2 provider highlighted that it was not connected to the second landing page.

3. The Tribunal considered the evidence and submissions before it. In particular, the Tribunal noted the Level 2 provider’s submissions in relation to the pop-up that gave pricing information which appeared before a consumer was directed to the Service landing page. It acknowledged the Level 2 provider’s efforts to ensure that there was greater clarity regarding the pricing information and key terms and conditions. However, the Tribunal found that the affiliate marketing which led consumers to interact with the Service was misleading and commented that the pop-up mitigated but did not negate the misleading nature of the affiliate marketing promotion. Further, the Tribunal noted that in some instances the pop-up text overlaid the text on the Service landing page and therefore the information was not clear (**Appendix E**). The Tribunal found that it was highly misleading to state that consumers can complete a “survey” and that they will obtain “free” codes, glasses, credits or a cheat password, when in reality, completing the “survey” was the first step into entering a premium rate service, especially when the original offer did not materialise. As a result, the Tribunal found that consumers had been or were likely to have been misled into subscribing to the Service and/or misled or likely to have been misled into believing that the promotions were for the initial offers rather than for a premium rate service. Consequently and for the reasons given by the Executive, the Tribunal found that consumers had been or were likely to have been misled into entering the Service. Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH 2**  
**Paragraph 3.1.7**

“All Network operators, Level 1 and Level 2 providers must use all reasonable endeavours in the context of their roles to ensure that all of the premium rate services with which they are involved are of adequate technical quality, including the mechanisms used to deliver services to and to enable exit from services by consumers.”

1. The Executive submitted that the Level 2 provider had breached paragraph 3.1.7 of the Code as the Service was not of adequate technical quality because, on some occasions, the boxes which should have contained the four multiple choice answers to the trivia questions were blank. Consumers were therefore unable to make an informed selection and, if they chose a random blank box (as they were obliged to do to proceed to the next question), they had a 25% chance of selecting the correct answer and a 75% of chance of selecting an incorrect answer.

The Executive relied on the monitoring conducted by the RMIT on 23 April 2013 as outlined above in relation to the breach of rule 2.3.2 of the Code. After subscribing to the Service, the RMIT interacted with the Service on the monitoring handset and was presented with a trivia question and four blank green boxes (**Appendix G**). The Executive noted that the boxes should have contained multiple choice answers. The RMIT selected the first box and was led on to the second quiz question, for which there were four possible answers in the green boxes. All other questions contained the answers in the green boxes. The Executive noted that, the screenshot containing the first question and the blank boxes showed that the monitoring handset had strong connectivity to a Wi-Fi connection and/or that it was extremely unlikely that the problem was related to bad connectivity and slow loading.

The Executive asserted that by not providing the multiple choice answers for the first question, consumers entering the Service were forced to randomly select one of the four blank green boxes, with a 75% chance of selecting an incorrect answer. It also asserted that this defeated the purpose of the Service which was intended to be a skill-based competition and not a chance-based competition service. Further, consumers would have been charged by the time they had viewed the initial question and therefore consumers would not have had the option to avoid the cost of the subscription upon realising that multiple choice answers were not provided for all ten questions.

The Executive stated that the correct display of questions was fundamental to the functioning of the service that consumers had been charged for. The Executive submitted that the Level 2 provider had an obligation to ensure that the Service worked correctly in order for it to operate fairly and according to the terms and conditions. As a result, it asserted that the Level 2 provider failed to use its reasonable endeavours to ensure that the Service was of adequate technical quality.

The Executive submitted that the Level 2 provider had acted in breach of paragraph 3.1.7 of the Code.

2. The Level 2 provider denied the breach. It agreed that the RMIT's monitoring showed blank boxes for the answers to the first question when it should have contained boxes with the answer options. The Level 2 provider stated that it could not be certain how this had occurred. However, it stated that the "answer" links were present and active because, if they had not been, a user would not be able to move on to the next question. The Level 2 provider asserted that the screenshot at **Appendix G**, must have been taken before the page was fully loaded and therefore, explained why this was only a problem with the first question.

The Level 2 provider also stated that this was not representative of the Service and described the incident as "unfortunate". The Level 2 provider provided statistics for the percentage of users that obtained a certain number of correct answers. It asserted that the statistics demonstrated that, it would be impossible for the Service to not be fully



functional. The Level 2 provider took issue with the Executive's assertion that consumers would have a 75% chance of selecting an incorrect answer and stated:

"Considered the statement from the Executive saying there is 75% chance of picking an incorrect answer. It is statistically impossible to have 58% of the users taking the quiz answer 4 or more questions correct."

3. The Tribunal considered the evidence and submissions before it. In particular, the Tribunal noted the Level 2 provider's comments in relation to loading of the Service's mobile webpage. The Tribunal noted that, the screenshot at **Appendix G**, showed that the monitoring handset had full connectivity to a strong Wi-Fi connection. Therefore, in the absence of evidence in support of the Level 2 provider's assertions and on the balance of probabilities the Tribunal did not accept the Level 2 provider's submission that the page had not loaded and found that it was highly unlikely that the mobile webpage had failed to load. The Tribunal noted that the Executive had only encountered the problem on one occasion, as it had not attempted to engage with the quiz during the other monitoring sessions after having subscribed. However, the proper display of the multiple choice answers in a quiz competition service is a fundamental technical requirement and as the RMIT had encountered the problem during its monitoring there was sufficient evidence to establish that the Level 2 provider had failed to use its reasonable endeavours to ensure that the Service was of adequate technical quality. Accordingly, the Tribunal upheld a breach of paragraph 3.1.7 of the Code.

## Decision: UPHELD

### SANCTIONS

#### Initial overall assessment

The Tribunal's initial assessment of the breaches of the Code were as follows:

#### Rule 2.3.2 – Misleading

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

- Very serious cases have a clear and highly detrimental impact, directly or indirectly, on consumers.
- The nature of the breach, and/or the scale of harm and potential harm to consumers, is likely to severely damage consumer confidence in premium rate services.
- The promotion was designed with the intention to mislead consumers by not providing consumers with adequate knowledge of the Service.

#### Paragraph 3.1.7 – Adequate technical quality

The initial assessment of paragraph 3.1.7 of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The nature of the breach was likely to have caused, or had the potential to cause, a drop in consumer confidence in premium rate services.

The Tribunal's initial assessment was that, overall, the breaches were **very serious**.

### **Final overall assessment**

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

- The Level 2 provider failed to follow Guidance on “Promotions and promotional material”.
- There have been a significant number of prior adjudications concerning misleading affiliate marketing.

Whilst it was not an aggravating factor, the Tribunal noted that the Level 2 provider had the same registered address and the same service mechanic as another Level 2 provider Upright Line S.A, who had previously been adjudicated against in relation to similar issues.

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

- The Level 2 provider asserted that it had paid refunds to those consumers who had made a complaint.

The Level 2 provider’s revenue in relation to the Service was in the range of Band 3 (£100,000 - £250,000).

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

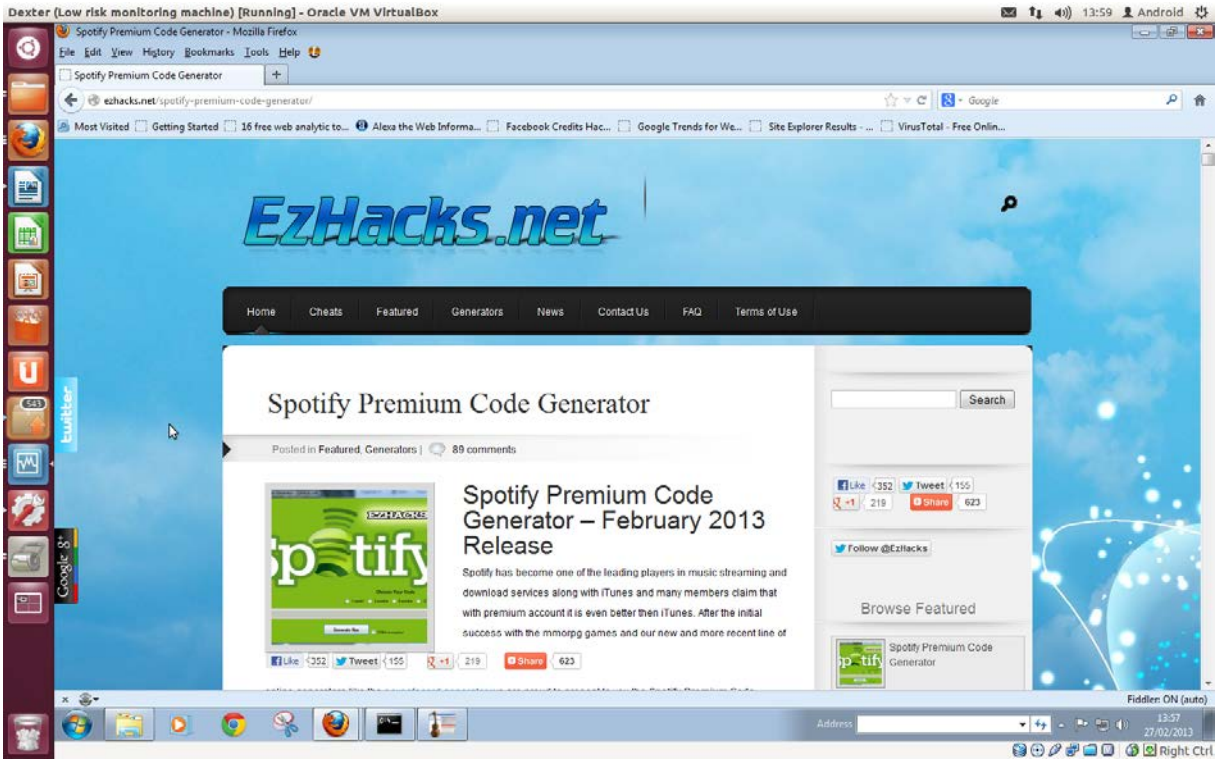
### **Sanctions Imposed**

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

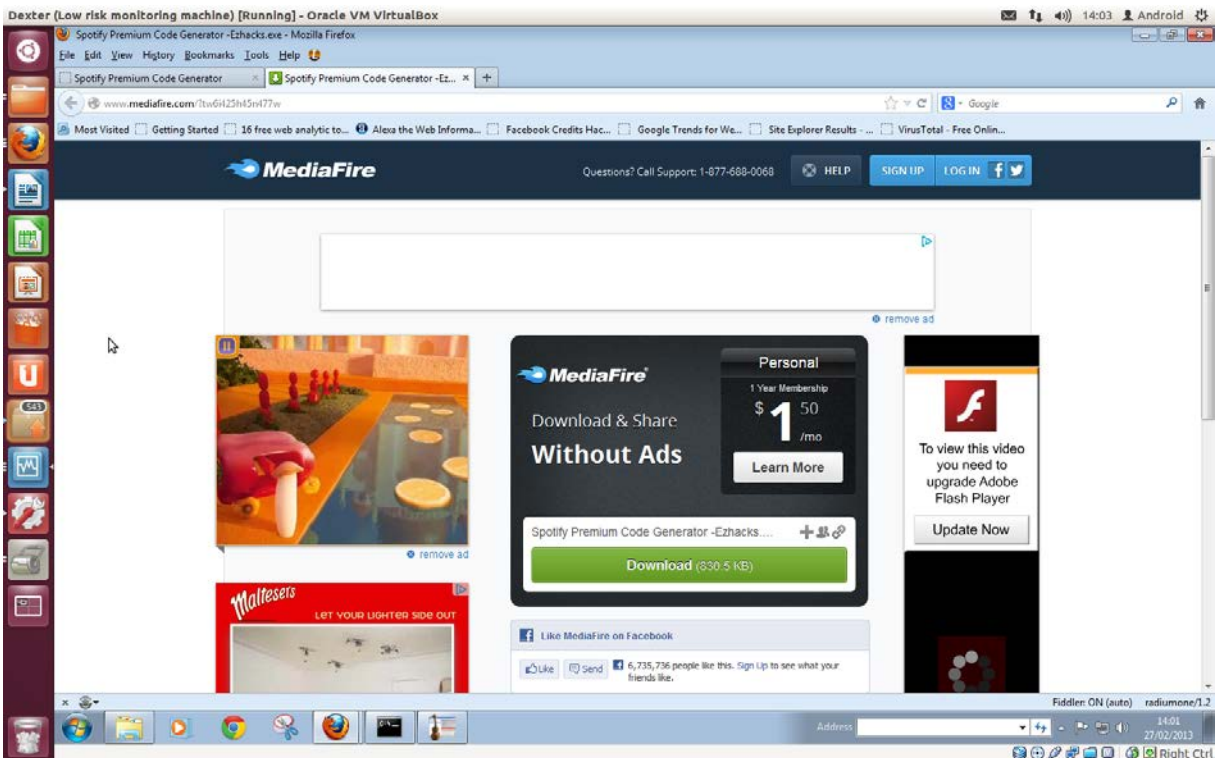
- a formal reprimand;
- a fine of £65,000; and
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Appendices

**Appendix A: Screenshot of the ezhacks.net website purporting to contain the “Spotify Premium Code Generator”:**

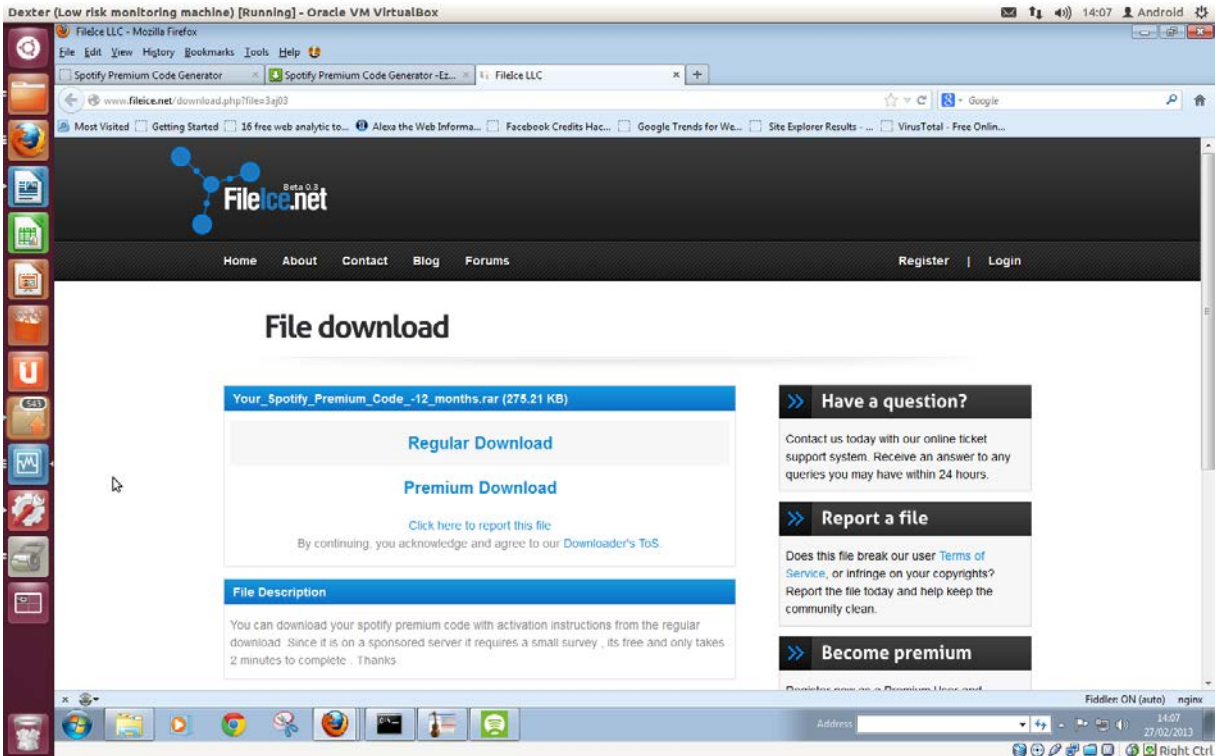


**Appendix B: Screenshot of the mediafire.com website purporting to contain the “Spotify Premium Code Generator”:**

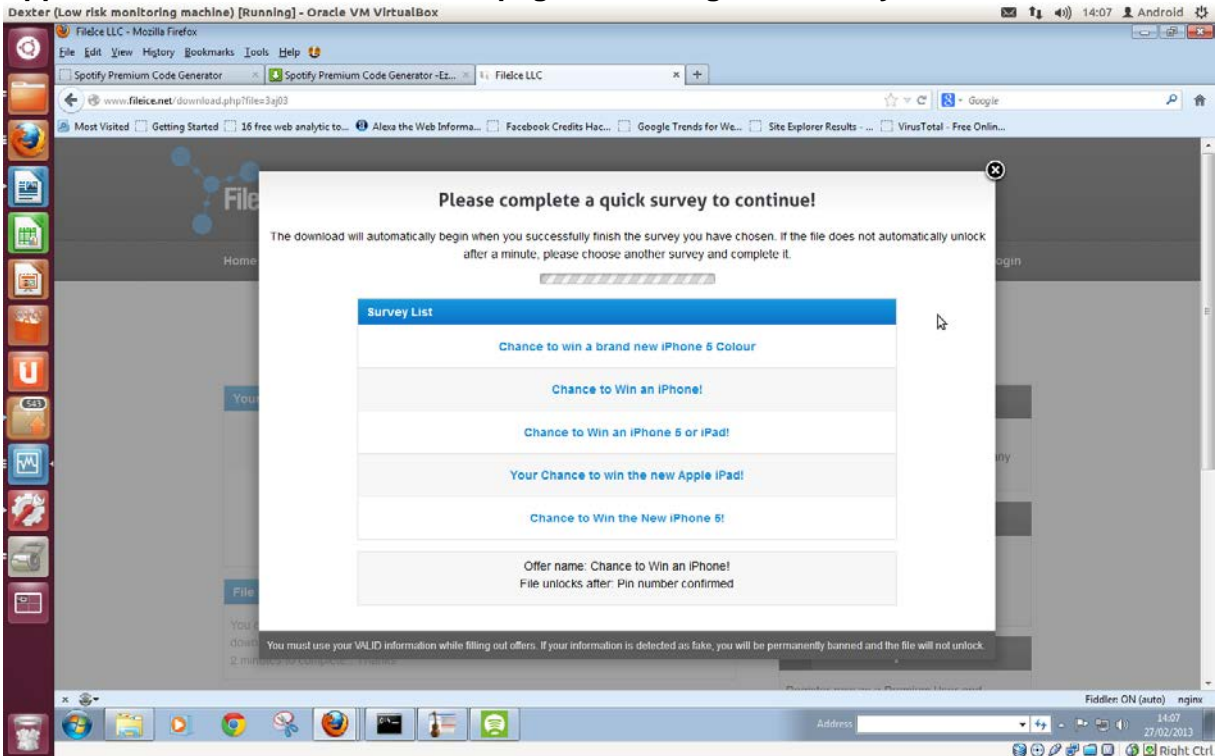




Appendix C: Screenshot of the fileice.net website purporting to contain the “Spotify Premium Code”:



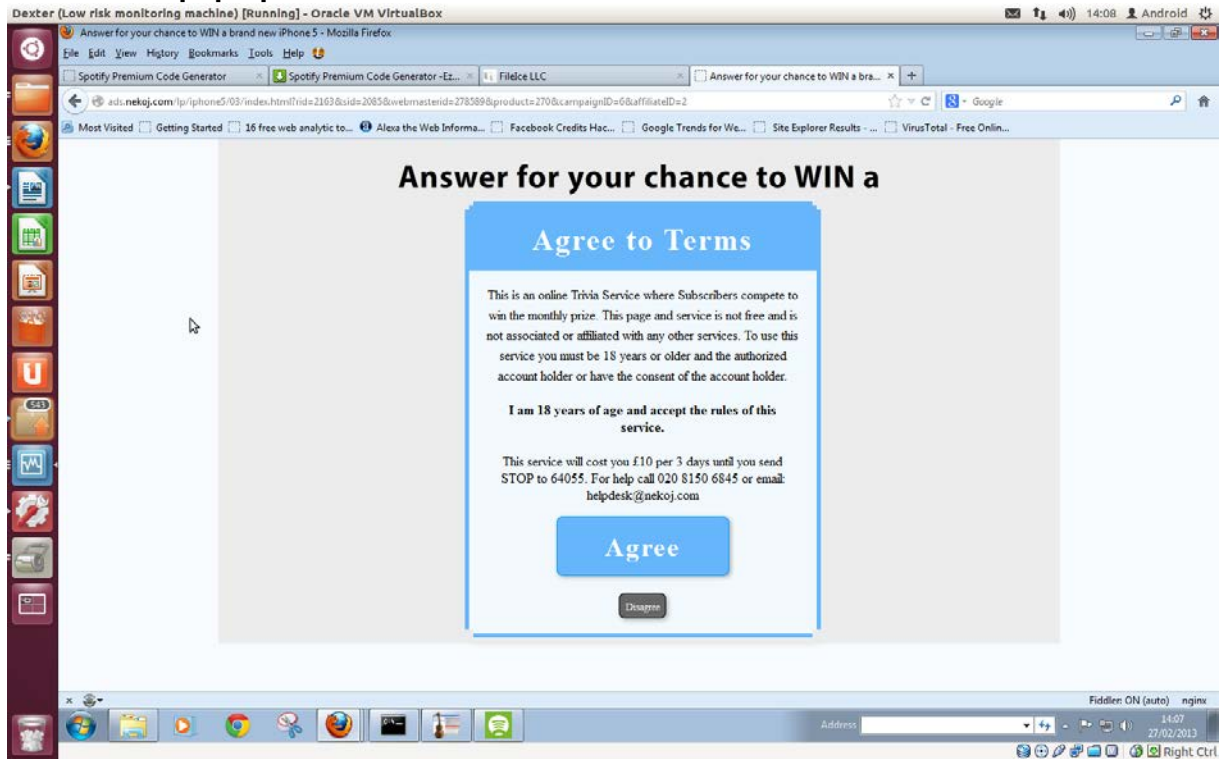
Appendix D: Screenshot of the webpage containing the “Survey”:



# Code Compliance Panel Tribunal Decision



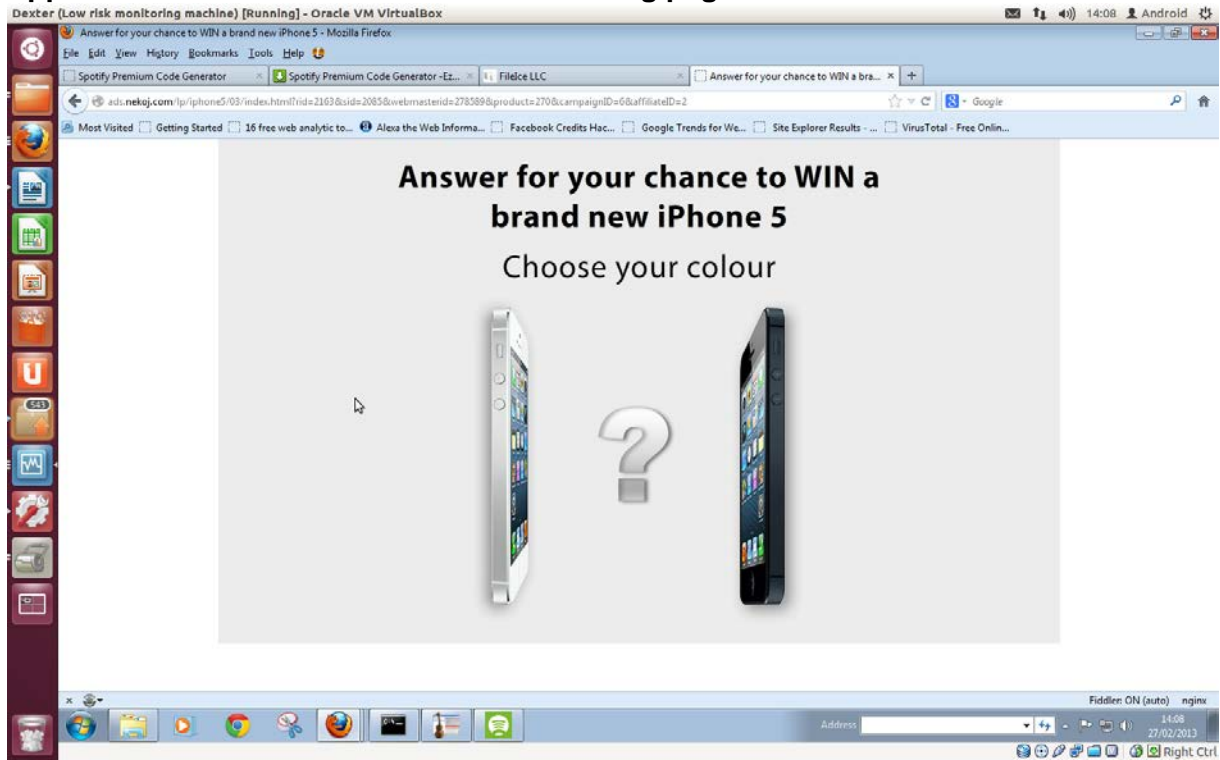
## Appendix E: Screenshots of the Service landing page containing the “terms and conditions” pop-ups:



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Appendix F: Screenshot of the Service landing page:



Appendix G: Screenshot of the Service mobile webpage containing the first trivia question:

