



Tribunal Sitting Number 124 / Case 2

Case Reference: 11099

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|-------------------------|------------------------------|
| Level 2 Provider | Upright Line S.A. |
| Type of Service | Purchase - other |
| 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 6 August 2012 and 18 March 2013, the Executive received 148 complaints from members of the public regarding a subscription competition service operated under the three brand names Ustra, Oxyra and Ergma by the Level 2 provider, Upright Line SA (the "**Service**"). Further, extensive monitoring of the Service conducted prior to the receipt of complaints highlighted a number of issues with the promotion of the Service. The Service operated on the premium rate shortcodes 64055 and 79910 and via Payforit, and cost £10 every three days.

Consumers were routed to the Service landing page by affiliate marketing. Some consumers stated that they had been misled into accessing the Service landing pages and as a result had inadvertently incurred premium rate charges. Monitoring of the Service by PhonepayPlus found that the Service was promoted by affiliate marketing that offered consumers "free" products or services, such as, live streaming of the London Olympics or Xbox gaming codes. However, the incentives offered did not materialise and consumers were instead led to the Service landing pages.

The Investigation

The Executive conducted this matter as a Track 2 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 26 March 2013. Within the breach letter the Executive raised the following breach of the Code:

- Rule 2.3.2 – Misleading

The Level 2 provider responded on 11 April 2013. On 18 April 2013, and after hearing informal representations from the Level 2 provider, the Tribunal reached a decision on the breach raised by the Executive.



SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Rule 2.3.2 Misleading

"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 as a result of misleading affiliate marketing which led consumers to the Service landing pages.

The Executive determined that the three different brand names that the Service operated under were part of the same service as the same content was offered for the same price on the same shortcodes. Further, there were no separate contracts with affiliate marketers for the separate brand names.

The Executive conducted monitoring of the Service (Oxyra) on 9 August 2012. The Executive searched for "stream live olympics online free" on Google and selected a link to a YouTube webpage (**Appendix A**). The link led to a YouTube page which invited users to (**Appendix B**):

"Please click the link in the description below to watch the full live stream online free :)"

The Executive selected the link and was led to a webpage and noted that the following description of the offered video content was provided (**Appendix C**):

"Watch London 2012 Olympics LIVE Streaming Online Free"

The Executive clicked on "Stream Now" and was presented with a webpage that asked users to complete a, "survey from our sponsors below to watch this video". The Executive clicked on the option, "Want to Win an iPhone 4S?" and was taken to a landing page for the Service (**Appendix D**). The Executive answered a question and was taken to a Payforit page for the Service (**Appendix E**).

The Executive also conducted monitoring on the Service (Ustre) on 9 August 2012. The Executive had a similar experience to the one described above. Specifically, it searched for, "Watch 2012 London Olympics live Streaming Online Free" on YouTube, which led it to affiliate marketing for the Service, which stated that a user would be able to access a free Olympic streaming service. The Executive was then led to Facebook and asked to grant permission for content to be "shared" on the user's Facebook wall. The Executive allowed the content to be "shared" and was taken to a page which directed users to press a button marked "play" to access the live streaming. The Executive clicked on "play" and was led to a page which stated:

"Please complete the easy requirements below. To Watch London 2012 Olympics live"

The Executive clicked on the option, "Win a brand new iPhone 4S! Choose Your Favorite Colour!" and was directed to a Service landing page (**Appendix F**). When a colour was selected, the user was directed to a second landing page asking a further question (**Appendix F**). Answering the question led to a Payforit screen for the Service (**Appendix F**).

The Executive observed from its monitoring on 9 August 2012 that consumers were led to



believe that if they completed a survey they would be provided with free streaming content of the 2012 London Olympic Games. The "survey" was in fact a series of steps to subscribe to the Service at a rate of £10 per three days. The Executive asserted that, whilst pricing for the Service was provided and there is a clear inducement to win an iPhone 4 or iPad 2, clearly it is misleading to state that a consumer can view the streaming video content for free when this is not the case.

The Executive also conducted monitoring of the Service (Ergma) on 25 January 2013 and had a similar experience to the two documented above, although on that occasion the Executive searched for an "Xbox code generator" and was led to the Fileice.com website (**Appendix G**). Affiliate marketing eventually led the user to Service landing pages.

The Executive noted that on affiliate marketing webpage, under the heading "File Description" it stated:

"Xbox Live Gold FREE for 12 Months! Save your money; Never pay again! (You must take 1-2 minutes to complete a FREE survey. This is how we keep it FREE for everyone! Hint whenever you see a "Skip," "No Thanks," Etc link..use it!)."

Consumers were later informed:

"Offer name: Chance to win an iPhone 5 or iPad 3! File unlocks after: Pin number confirmed."

The Executive observed from its monitoring on 25 January 2013 that consumers were led to believe from the first statement above that if they completed a short survey they would be provided with Xbox Live Gold for free for 12 months. The "survey" was in fact a series of steps to subscribe to the Service (Ergma) at a rate of £10 per three days and, while pricing for this Service was provided and there is a clear inducement to win an iPhone 5 or an iPad 3, consumers do not obtain the promised Xbox PIN that will provide them with Xbox Live Gold for free for 12 months.

The Executive submitted that the second statement above was also clearly misleading as the monitoring on 25 January 2013 demonstrated that the file was not made available to the Executive after entering the PIN onto the Level 2 provider's website. The Executive further asserted that this statement is particularly misleading as the action of entering the PIN actually causes consumers to be subscribed to the expensive premium rate Service, which charges consumers £10 for every three days. This equates to around £100 per month.

The Executive accordingly asserted that the above untrue statements starkly conflicted with the reality of being subscribed to a premium rate service and consumers subscribed to the premium rate Service in the false belief that they would obtain an access code to obtain Xbox Live Gold for free for 12 months.

The Executive submitted that users were misled or likely to have been misled by affiliate



marketers into accessing the Service's landing pages as a result of free offers that never materialised.

In addition, the Executive noted that there were examples of affiliate marketing encouraging users to "click through" its promoters' webpages quickly, thus encouraging users not to read the webpages properly (**Appendix H**).

In light of the above the Executive submitted that a breach of rule 2.3.2 of the Code had occurred.

2. The Level 2 provider denied the breach and/or that it was responsible for any breach of the Code. Generally, the Level 2 provider submitted that it was not directly responsible for any of the actions alleged by the Executive, which had been carried out by affiliate marketers. It submitted that it had not been party to providing the alternative services offered by the affiliates as an inducer or incentiviser to subscribe to the Service. It asserted that its Service was the actual subscription Service and nothing else. It suggested that the organisation which PhonepayPlus should be discussing the alleged breach with was the affiliate marketer.

The Level 2 provider stated that prior to subscription initiation, consumers had to make three affirmative actions in order to subscribe and at each stage, detailed information on pricing and costs were supplied. It said this had been tested by the Level 1 provider and by a third party independent auditor to verify the Service was provided in accordance with the rules of Payforit, for whichever version is current at the time (currently 4.1).

The Level 2 provider noted that 38 of the complainants stated that they had not used the Service, 29 complainants stated that they had received unsolicited texts despite the fact that the Service does not send any unsolicited messages or marketing messages and a total of 61 complainants stated that the Service had been used by a minor despite the fact that the rules clearly stated you must be 18 or older and have the permission from the line subscriber. There were seven complainants that said STOP did not work, but the Level 2 provider stated that the STOP command had worked at all times. However, the customers sent STOP to the wrong shortcode and were offered a goodwill refund. It also said that the reminder messages were compliant with the Payforit v3 and Payforit v4 scheme. The Level 2 provider stated that it was sorry about cases where consumers sent STOP to the wrong shortcode and asserted that it had worked with its provider to make STOP work on all shortcodes, despite it not being a regulatory requirement. The Level 2 provider stated that seven complaints appeared to be "empty" and should be discounted and removed as it did not have the ability to comment or provide an explanation.

The Level 2 provider asserted that, as demonstrated above, 128 of the complaints were invalid, due to the fact that the complaints are "untrue". It stated that it felt that such complaints should not be counted when determining whether the Service is compliant or not. It also said the opt-in process is managed through Payforit, hence charges cannot be unknown to the users.

The Level 2 provider submitted that the actual total amount of complaints was, therefore, about 20. These complaints are based on a subscription base of 29443 to Ergma, 25549 to Oxyra and 66371 to Ustre or a total of 121363 subscriptions made. It was submitted that 20 complaints out of 121363 did not indicate that the Service itself operated contrary to what its



customers expected and/or were promised.

Further, the Level 2 provider said that the Service (Oxyra) appeared to have had only seven complaints, the latest was dated 20 September 2012, nearly seven months ago. It said that, for the avoidance of doubt, the mentioned video streaming service "OL OLYMPICS [*sic*]" had no relation to the Ergma and Ustre brands and no complaints had ever been received about the mentioned service.

The Level 2 provider stated that when contacting complainants it had received "odd feedback" such as:

"Just had a word with the customer she was not interested in refund. Just wanted this number to be un-subscribed."

"Phoned customer twice, said they know nothing about any complaints."

"Brother started subscription on sister's phone. He is 14".

The Level 2 provider stated that such consumers did not appear to have actually raised a valid complaint regarding the Service.

In informal representations the representatives of the Level 2 provider stated that its Service was not free and that this was made clear to consumers. It reiterated that the promotions were not operated by the Level 2 provider itself and that PhonepayPlus should regulate affiliates directly. It commented that it could not see what affiliates do, "behind out backs". It did, however, accept that in the absence of direct regulation, the "buck stops" with the Level 2 provider. It also accepted that to offer something for "free" when it does not exist or is not accessible is misleading, although it asserted that PhonepayPlus could not be sure that the "free" offers were fictitious, as PhonepayPlus had not provided evidence that it had tested all the links contained in the affiliates' promotions for the Service. Further, it argued that its own Service was never described as "free". Therefore, consumers could not have been misled into entering the Service as the Payforit page set out the Service costs clearly. Notwithstanding this, it stated that it strictly regulated its affiliate marketing partners, it did not allow promotions which used the term "free" and that such promotions were against its terms and conditions. It stated that it had amended its terms and conditions after considering PhonepayPlus adjudications regarding misleading affiliate marketing and where an affiliate was found to have promoted the Service using non-compliant promotions, the Level 2 provider's relationship with that affiliate was terminated immediately and the offending promotions were removed. It stated it had between 15 and 25 contracts with affiliate marketing networks and the only route of access to the Service landing pages was via affiliate marketing. It added that some affiliate marketers would not work for it as it was "too legitimate" in its approach to what was, or was not, permitted when marketing the Service.

The Level 2 provider acknowledged that it did not check affiliate marketers' promotions for the Service prior to publication (although the affiliate networks conducted some checks). However, the Level 2 provider stated that it had an employee who searched the internet to check promotions post publication. It also monitored and analysed traffic to check that consumers were not "misguided". It stated that, due to privacy regulations, it could only check the page which users had come from (and not any further back).

It asserted that it had good customer service and provided very quick refunds, sometimes

before a consumer had been billed by their network. It added that it had a call centre based in an English-speaking country to ensure English-speaking consumers could be understood and assisted. It stated that the complaint levels were very low; for example for the Ustre brand, it asserted there had been seven complaints out of 30,000 subscriptions.

The Level 2 provider stated that it would have been helpful to have received the Executive's monitoring prior to receiving the breach letter, as it had not received many complaints. The Level 2 provider commented that if consumers had been misled into subscribing to the Service (which it did not accept was likely) it was surprised that it had not received more complaints. In addition, it stated that consumers were not forced to subscribe to the Service, and could use the "back" button if they did not want to subscribe to the Service.

In summary, the Level 2 provider asserted that it had taken all reasonable action to control its affiliate marketers and had not set out to deliberately mislead consumers. It noted that the Service itself was not under scrutiny and had been approved by the Level 1 provider and a large mobile Network operator. It added that where mistakes had been made, it had rectified them in a timely manner.

3. The Tribunal considered the submissions made by the Executive and the detailed written and oral submission made by the Level 2 provider. The Tribunal noted that the definition of a "service" under the Code includes the promotion of a service and that the Level 2 provider is responsible for the promotion of its service, even where that promotion is delegated or sub-contracted to a third party. The Tribunal noted that the only method of access to the Service landing pages was via promotions from affiliate marketers who had a contractual relationship with the Level 2 provider (or an affiliate network who had contracted with the Level 2 provider). The Tribunal found that consumers were directed to the Service landing pages as a result of being misled into believing that they would obtain a free item, such as Xbox Live downloads, or live streaming of Olympics content, which it concluded – on the balance of probabilities – was never available to the user. As a result of the concealed nature of the consumer journey to the Service landing page, the Tribunal concluded that the way the Service was promoted was inherently misleading. Consequently, consumers were misled or likely to have been misled in breach of rule 2.3.2 of the Code. Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

The Tribunal commented that it had only considered the promotion of the Service and made no assessment of whether the Service was compliant with the Code once a consumer had passed the Service's Payfort pages.

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 criterion:

- > The promotion was designed with the intention to mislead customers by not providing consumers with adequate knowledge of the Service or the costs associated with it (prior to the consumer arriving at the Payforit page).

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:

- PhonepayPlus Guidance puts all Level 2 providers on notice that affiliate marketing carries a greater risk than marketing which is under the direct day-to-day control of the provider. The Level 2 provider took no steps to mitigate the greater risk as it did not check affiliates' promotions pre-publication. Checks were only conducted post publication, and not on a comprehensive basis. As the only route of entry was through affiliate marketing, the Tribunal considered the lack of pre-publication checks to be very significant.
- There have been a number of adjudications highlighting the risks involved in engaging affiliate marketers to promote premium rate services.

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

- The Level 2 provider stated that it had made a number of refunds in a timely manner and terminated the Service.

The Tribunal noted that contrary to the representations made by the Level 2 provider, the breach was not caused by circumstances beyond its control as the Level 2 provider had a contractual relationship with the affiliate marketers and had chosen not to require sight of the marketing in advance of publication. The Tribunal noted that the Level 2 provider said it had sought compliance advice from PhonepayPlus but had not received a response. After reviewing the relevant correspondence, the Tribunal concluded that the advice sought did not concern the use of affiliate marketing and therefore the request was not relevant to this adjudication.

The Tribunal further noted that the Level 2 provider had failed to control, or take reasonable steps to control its affiliate marketers when this was the only, and not an ancillary, method of entry into the Service. The Tribunal deemed that the Level 2 provider had been reckless as to the way the Service was promoted and chosen to have no advance knowledge of the affiliate marketers' promotions. Further, the Level 2 provider had not provided any evidence of compliant affiliate marketing for the Service. The Tribunal considered the number of adjudications relating to affiliate marketing and concluded that confidence in premium rate services is likely to have been further damaged by an additional adjudication. In particular, the Tribunal noted that a tribunal in the adjudication against the Level 2 provider Amazecell (27 September 2013, case reference: 08341) commented that:

"[T]he use of affiliate marketers gives rise to a particularly high risk of non-compliant activity.



The Tribunal was concerned at the level of harm caused to consumers by this activity and reminds providers that, as stated in the Code and Guidance, they are responsible for the promotion of their premium rate numbers, including the actions of their affiliate marketers.”

The Level 2 provider’s revenue in relation to the Service was within the range of **Band 1 (£500,000+)**.

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

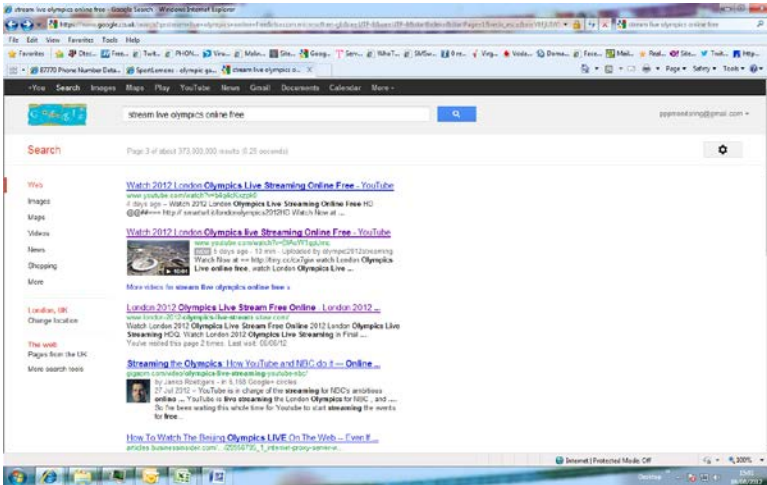
Sanctions Imposed

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

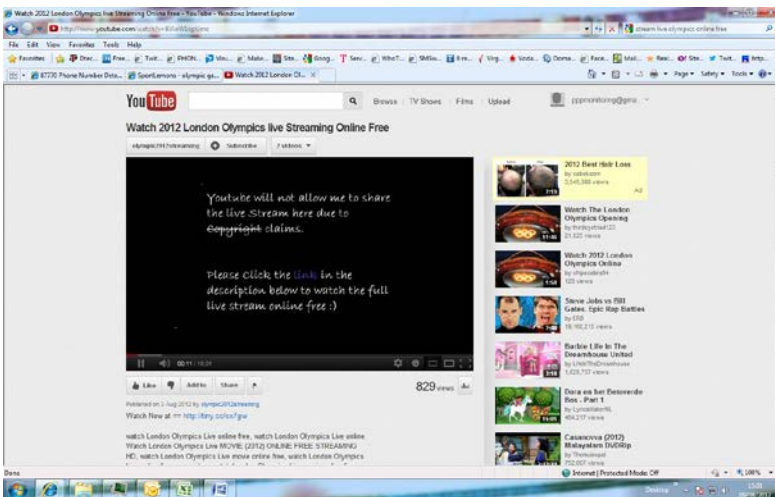
- A formal reprimand;
- A fine of £200,000; and
- A requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Appendices

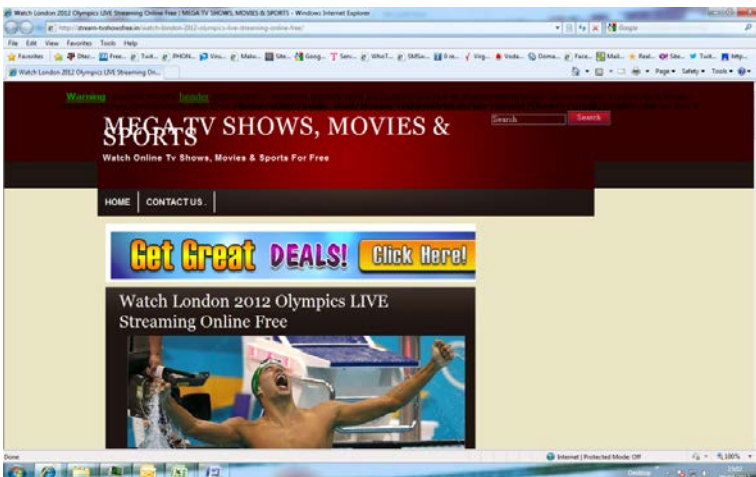
Appendix A: A screenshot of a Google search page:

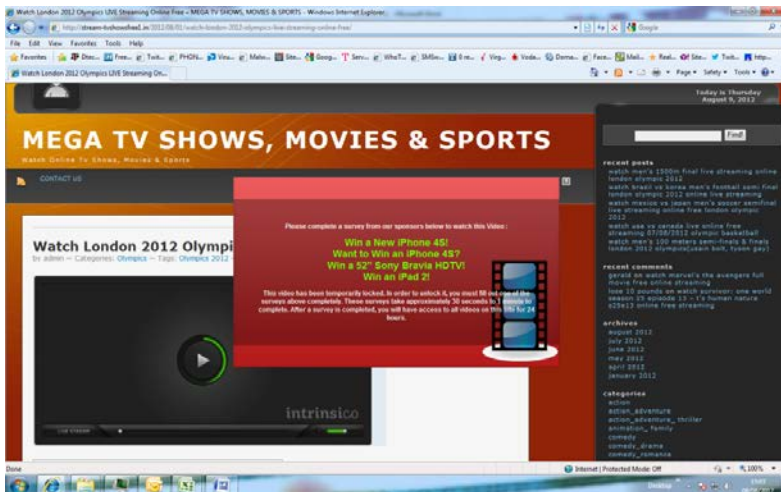
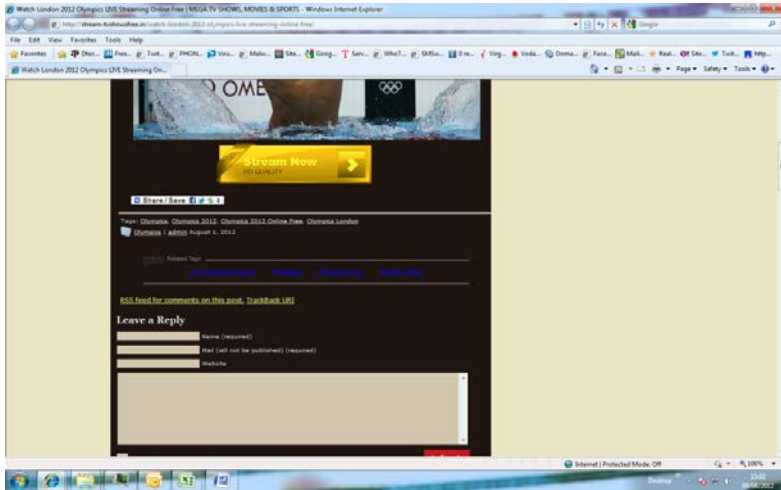


Appendix B: A screenshot of a YouTube page containing affiliate marketing:



Appendix C: Screenshots of affiliate marketing for the Service:

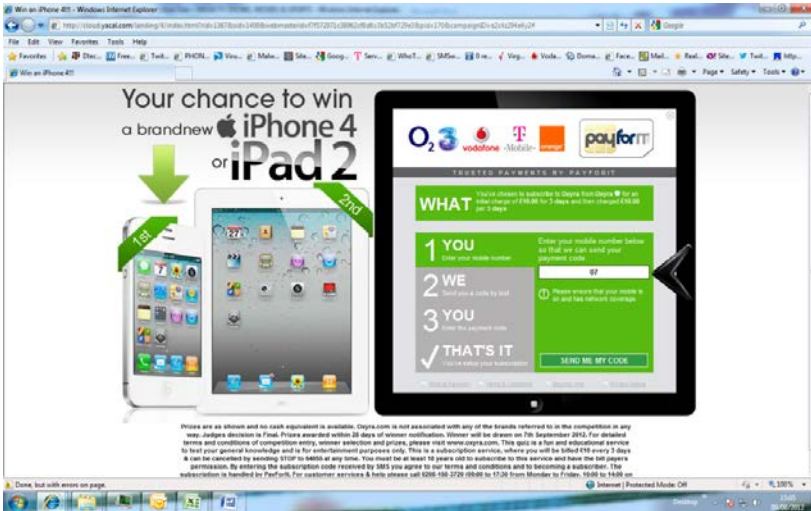




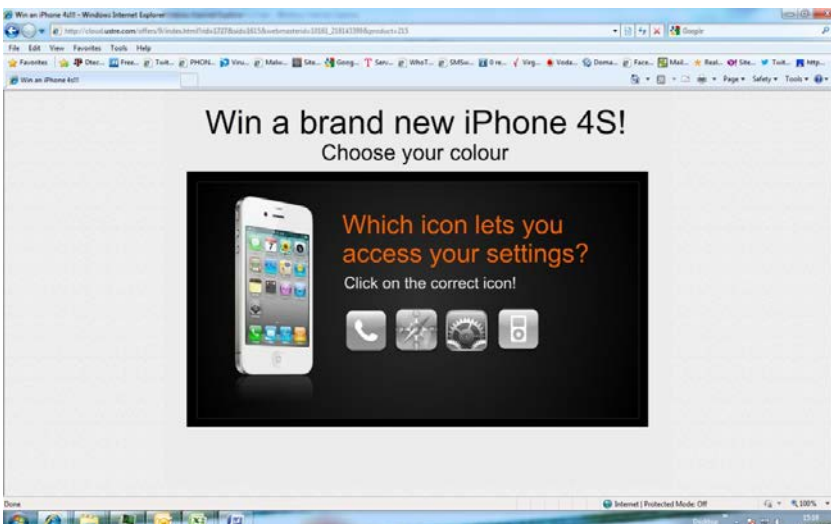
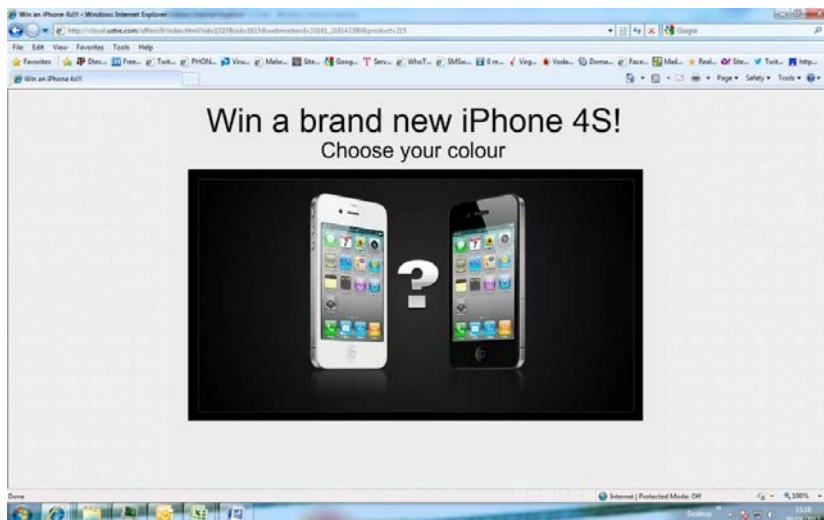
Appendix D: A screenshot of a Service landing page (Oxyra):



Appendix E: A screenshot of a Service landing page (Oxyra):

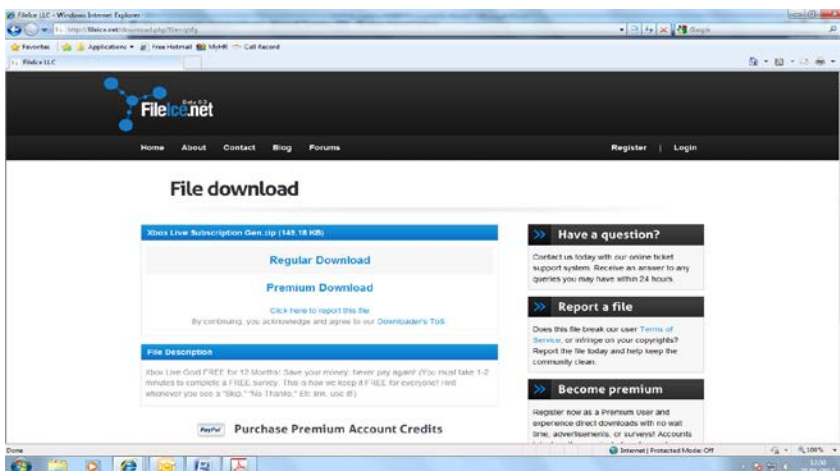


Appendix F: Screenshots of Service landing pages (Ustre):





Appendix G: A screenshot of affiliate marketing for the Service (Ergma) on Fileice.com:



Appendix H: A screenshot of affiliate marketing for the Service encouraging users to “click through” webpages:

