

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

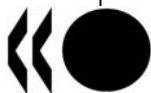
HEARING ON DIGITAL ECONOMY

-- Note by the Delegation of Norway --

This note is submitted by the delegation of Norway to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 15 February 2012.

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HEARING ON DIGITAL ECONOMY

REFUSAL TO SUPPLY IN RESIDENTIAL ADVERTISING ON INTERNET

-- Note by Norway¹ --

I. Introduction

1. Internet portals are highly efficient mediums for communication. A large and increasing share of services is offered through such electronic networks. One of these services is related to advertising and searching for residential properties for sale.

2. Advertising and searching for residential properties for sale on Internet portals has increased substantially the last decade in Norway, and can be seen as a separate product market.² This contribution will explain some issues of competition law that this market has risen. More specifically, the issues network effects, refusal to supply on non-discriminatory terms will be dealt with.

3. In Norway, all major Internet portals such as Finn.no, Tinde.no and Zett.no used to have a practice which permitted only estate agents (including lawyers licensed to practice as estate agents) to advertise residential properties for sale.³

4. Consequently, sellers of residential properties who wished to advertise on an Internet portal were forced to use an estate agent. The Norwegian Competition Authority (NCA) received several complaints against the Internet portals' refusal to supply and assessed whether the practice was an infringement of the antitrust rules in the Norwegian Competition Act.

5. The NCA is of the opinion that the Internet portals' refusal to supply leads to anti-competitive effects in services related to the purchase and sale of residential property. However, the Authority has not found basis in the antitrust rules of the Norwegian Competition Act to intervene against the portals' practice.

6. The NCA therefore proposed a regulation which will ensure open access to advertising residential properties for sale on the portals. Based on this proposal the Ministry of Government Administration and Reform in 2009 established a regulation that requires Internet portals to provide general access to residential property advertisements on non-discriminatory conditions. The regulation applies to all Internet portals who offer residential property advertisements in order to ensure a level playing field in the market. The regulation entered into force 1 January 2010.

¹ This contribution is based on a former contribution from Norway to OECD CC for the session in June 2009, [DAF/COMP/WD\(2009\)57](#).

² Case 2006/1738

³ For some of the portals the refusal to supply does not include second homes or residential properties abroad.

II. Access to advertising of residential properties for sale on Internet portals

The market for advertising and searching for residential properties

7. Advertising and searching for residential properties for sale on Internet portals is a two-sided market where platforms compete to attract searchers (buyers) and advertisers (sellers) on both sides of their platform.

8. In the Norwegian market, Finn is decidedly the largest Internet portal. The NCA's investigation in the merger of Media Norge in 2007 indicated that more than 90 percent of the residential properties sold through estate agents were advertised on Finn.⁴ Many of these properties are also advertised on Tinde and Zett. However, Finn has substantially more searchers on their portal

9. One-sided multi-homing is probably the best description of how searchers and advertisers interact via the portals, since most searchers single-home and most advertisers multi-home. This may explain why Finn as the largest portal has more searchers relatively to advertisers compared to the other portals.

10. The number of searchers or advertisers is important when agents choose to join a portal. The more searchers that visit a particular platform, the more attractive it is for advertisers to use the platform, and vice-versa. Network effects are therefore presumably strong on both sides of the portals.

11. The importance of network effects in platform competition depends on the degree of differentiation between the platforms. In markets with strong network effects and a low degree of differentiation between the platforms, barriers to entry are normally high. Under such market conditions, it will normally be difficult for new entrants to get both sides of the market on board and achieve the required critical mass to remain in the market. Such markets are therefore often highly concentrated.

12. Depending on the strength of the network effects and the degree of differentiation, platform competition can tip an industry to monopoly.⁴ Such an outcome does not, however, necessarily reduce social welfare. An assessment of the competitive effects must thus be done on a case-to-case basis.

13. The degree of differentiation between the Internet portals is in principle relatively low. However, each of the Internet portals is owned by different media corporations, and has therefore connections to different local- and regional newspapers. Some searchers will therefore prefer the Internet portal that has connection to their preferred newspaper. In addition, some estate agencies are minority shareholders in Finn, which presumably affects their preferences when choosing which portal to advertise on.

14. The probability of tipping in the market is reduced by the advertisers' multi-homing and some agents' heterogeneous preferences. However, the existence of strong network effects nevertheless results in a concentrated market and makes it difficult for new entrants to achieve the required critical mass to remain in the market. The importance of network effects therefore implies that it is unlikely that competition can lead to a less concentrated market in the future.

15. A concentrated industry with few Internet portals providing advertising and searching for residential properties for sale does not necessarily reduce social welfare. However, anti-competitive behavior such as refusal to supply may reduce social welfare. In well-functioning markets, competition normally restricts companies' possible anti-competitive behavior. In principle a well-functioning competition should discourage both existing portals and potential new entrants from limiting its supply of advertising space to estate agents only, given that this would be profitable for the platform. However, in

⁴ Case 2006/1738

markets with strong network effects, competition may not necessarily restrict anti-competitive behavior from the established players.

III. The NCA's antitrust cases

16. The antitrust rules in the Norwegian Competition Act of 2004 are harmonized with the EC competition rules. Section 11 of the Competition Act of 2004 corresponds to the prohibition against abuse of a dominant position in the TFEU Article 102 and the EEA Agreement Article 54. Likewise, Section 10 of the Competition Act corresponds to the prohibition against agreements between undertakings that restrict competition in the TFEU Article 101 and the EEA Agreement Article 53.

17. The NCA has reviewed the Internet portals' refusal to supply under both Sections 10 and 11 of the Competition Act. As described below, the Authority has not found a basis for intervening.

Section 11 – Abuse of dominant position

18. In 2005 the NCA assessed whether Finn's refusal to supply was in violation of Section 11.⁵ When defining the relevant product market, the NCA did not conclude on whether advertising on Internet portals constitute a separate product market, or if advertising in number-one newspapers is part of the same market. The reason being that irrespective of the market definition, Finn did not, at that time, have a dominant position in the market for advertising of residential properties.

19. The NCA also assessed whether Finn's refusal to supply could constitute an abuse of a dominant position. According to EC-practice under Article 102 a refusal to supply may only be an abuse of a dominant position if there is no actual or potential substitute to the refused product.⁶ On this basis, the NCA stated that advertising in newspapers was a potential substitute to Internet portals and Finn's refusal to supply therefore was not an abuse of a dominant position.

Section 10 – Agreements between undertakings that restrict competition

20. In 2007 the NCA assessed whether Finn's refusal to supply was a result of a horizontal or vertical agreement in violation of Section 10.⁷ The NCA concluded that it is not likely that there exist horizontal agreements in violation of Section 10, neither between the Internet portals nor between estate agents.

21. In addition, the NCA investigated the possibility of vertical agreements between the Internet portals and estate agents. Finn defended its practice claiming that their refusal to supply is a unilateral conduct based on commercial considerations only, and not on an agreement with estate agents. The company argued that adapting their product to the professional estate market improves the company's earnings, since almost all of the residential properties are sold through estate agents. Furthermore, Finn stated that the refusal to supply is important to protect the quality of their brand. Tinde and Zett provided similar arguments for their refusal to supply.

22. On this basis the NCA concluded that it is not likely that there exist vertical agreements between Internet portals and estate agents in violation of Section 10.

⁵ Decision A2005-33

⁶ Case C-7/97 Oscar Bronner v Mediaprint Zeitungs- and Zeitschriftenverlag

⁷ Decision A2007-7

IV. Regulation in order to promote competition

23. As explained above, the NCA has not found basis in Sections 10 or 11 to intervene against the Internet portals' refusal to supply. However, the NCA is of the opinion that this practice limits the available options for persons who do not wish to sell residential property through an estate agent, and reduces competition in the market for services related to the purchase and sale of residential property.

24. In addition to the prohibitions in Sections 10 and 11, the Norwegian Competition Act Section 14 provide legal basis for intervention by regulation against market conduct which restricts competition contrary to the purpose of the Competition Act. Section 14 states as follows:

“If necessary to promote competition in the markets, the King may by regulation intervene against terms of business, agreements or actions that restrict or are liable to restrict competition contrary to the purpose of the Act.”

25. Under the instructions of the Ministry of Government Administration and Reform, the NCA in 2008 assessed whether there is a basis for applying Section 14 in order to impose an end to the Internet portals' practice. Section 14 only applies if two main conditions are satisfied: a) A regulation is necessary to promote competition in the markets, and b) There is a business practice that restricts or is liable to restrict competition contrary to the purpose of the Competition Act (i.e. in this case the Internet portals' refusal to supply). The NCA found that these conditions were satisfied on the basis described below.

26. It follows from the preparatory works of the Competition Act that a regulation to promote competition is necessary only if certain conditions are satisfied. The preparatory works mention the following situations where a regulation may be relevant; the antitrust rules are not applicable, it is difficult to prove an infringement of the antitrust rules, and an individual decision would not be a sufficient means to prevent the anti-competitive behavior in the market.

27. The NCA has found that these situations apply to this case: a) Sections 10 or 11 have not been found applicable to intervene against the Internet portals' refusal to supply, b) The existence of anticompetitive agreements is difficult to prove, especially when considering that other plausible explanations of the Internet portals' practice exist, and c) An individual decision does not prevent that estate agents migrate their advertisements to portals on which the individual decision do not apply to, thus causing unstable market conditions.

28. The second condition, the restriction of competition, calls for a competition analysis, of which the main considerations are provided in the following.

29. When selling a residential property, the seller typically needs a number of different services related to the sale, e.g. estimation of value, marketing, organizing open house and round of bids, transfer of ownership insurance, contract and settlement. Many of these services can be bought separately from different types of suppliers in the market, but most estate agents offer these services mainly in bundled packages.

30. Marketing of a residential property for sale is mainly done through advertising in newspapers and on Internet portals. Even though these two channels can be seen as complementary products, access to advertising on the Internet portals has become an almost inevitable channel to reach most of the potential buyers. The inevitability of the Internet portal suggests that it is a distinct product market. In the merger of

Media Norge in 2007 the NCA stated for the first time that advertising of residential properties for sale on Internet portals constituted a separate product market.⁸

31. Due to the Internet portals' practice with refusal to supply to others than estate agents, sellers of residential properties who wish to advertise on Internet portals are forced to use an estate agent. About 95 percent of all of residential property sales in Norway is done through estate agents. This may indicate that some sellers find it difficult to sell their residential property without having access to advertising on Internet portals.

32. Thus, access to Internet portals represents an important quality factor for suppliers of services related to the purchase and sale of residential property. The refusal to supply therefore constitute a considerable barrier to entry for participants who is not an estate agent, but wants to enter the market for services related to the purchase and sale of residential property. Internet portals thus function as gatekeepers that efficiently limit the degree of competition to which the estate agents are exposed to for other service providers to sellers of property.

33. This result in a limited choice of services offered to sellers of residential property and less innovation of new services in the market. For many customers the consequence is that they are forced to buy more extensive packages of services from estate agents than they in principle demand.

34. In addition to limitation of consumers' available options and reduced innovation, the Internet portals' practice may contribute to higher prices for services offered by estate agents. A better variety of services would increase buyer power and may lead to lower prices.

35. On this basis the NCA found that the Internet portals' practice reduces competition in the market for services related to the purchase and sale of residential property. This reduction leads to higher transaction costs related to purchase and sale of residential property, which reduces the number of residential property transactions and may hinder transactions which are socially efficient.

36. Access to advertising on the Internet portals without having to go through an estate agent may lead to estate agents meeting increased competition, both from other professional actors and individuals who wish to sell residential property themselves. Increased competition should result in more options and lower prices for sellers of residential property.

37. More options and lower prices will reduce transaction costs related to purchase and sale of residential property, and may promote transactions that are social efficient. This benefits both buyers and sellers of residential property.

38. On this basis the Ministry of Government Administration and Reform in 2009 established a regulation that requires Internet portals to provide general access to residential property advertisements. The regulation applies to all Internet portals who offer residential property advertisements in order to ensure a level playing field in the market.

V. Implementing the rule of access on non-discriminatory terms

39. Section 1 of the regulation states as follows:

“Enterprises that offer residential property advertisements on Internet are obliged to give access to the advertisement service to anyone on non-discriminatory conditions.”

⁸ Case 2006/1738

40. After the regulation entered into force 1 January 2010, the NCA has dealt with several enforcement issues, most of which have been related to the understanding of the regulation's obligation to supply the Internet service on non-discriminatory conditions. The obligation is understood to apply to any aspect of the conditions on which the service is provided. This includes technical terms, outline of advertisement, price and rebates.

41. Private persons were given access to the portals from the first day the regulation entered into force. The portals established a new interface through which private persons can advertise a property. The portals chose to charge a price several hundred percent higher than the average price charged from estate agents. The largest portal charges private persons approximately EUR 600 (NOK 5000) for one advertisement.

42. The portals argued that quantum rebates would constitute an objective justification for treating customers differently. The first year of the regulation about 2000 private persons advertised on the largest portal. This equals two percent of the total number of residential properties being sold in Norway in one year.

43. From the point of view of the NCA, the number of private persons buying an advertisement the first year is as expected. It also shows that the relatively high advertising price does not prevent residential property sellers from choosing the new offer from the portals. The purpose of the regulation to provide access to the portals without having to go through estate agents is thus achieved. The NCA has not found basis in the regulation for finding the price level for private persons being an infringement of the regulation.

44. As indicated above, about 95 percent of all of residential property sales in Norway is done through estate agents. The rest of the transactions have traditionally taken place with the aid of a lawyer or estate agent performing a limited service covering contract and settlement. With an obligation on the Internet portals to supply other service providers than estate agents, a new type of suppliers of services to sellers of real estate was given a window of opportunity.

45. The new entrants in the estate agent market were initially not given access to the largest of the portals. After dialogue between the NCA and the portal, access was given. However, the portal claimed that it was only obliged to give the new entrants access on the same terms as private persons. The portal claimed that differences between the quality of the service provided by estate agents and the new entrants gave grounds for objective justification to deny equal access conditions as given the estate agents.

46. The NCA's view is that the obligation not to discriminate means that the new entrants should be given access to the same type of interface as used by estate agents in order to be able to make automatic advertisement feeding systems. Furthermore, they should be able to obtain similar volume rebates, as no any objective justifications could be found.

47. After dialogue between the NCA and the portal, the portal agreed to give the new entrants access on such terms. The portal pointed out the fact that since the law of estate agents does not apply to the new entrants, the portal should be allowed to establish routines for checking the information content in the advertisements provided by them, in order to avoid negative customer experiences – and protect the brand of the portal. Such routines incur additional costs that the portal should be allowed to add to the price. The NCA has not objected to this view, leaving the new entrants with access conditions somewhat worse than estate agents, but better than private persons. The NCA cannot find grounds for pursuing this practice as a potential infringement of the regulation.