

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

ROUNDTABLE ON VERTICAL RESTRAINTS FOR ON-LINE SALES

-- Note by Norway --

This note is submitted by Norway to the Competition Committee FOR DISCUSSION under Item VII at its forthcoming meeting to be held on 26-27 February 2013.

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ROUNDTABLE ON VERTICAL RESTRAINTS FOR ON-LINE SALES

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1. Norwegian experiences and challenges related to Internet platforms: Introduction

1. The emergence of web portals in Norway has taken place within a wide range of services. Internet portals can be specially adapted for the advertisement and searching for specific products and services. The web portal may be owned and run by a vertical integrated undertaking, or by an undertaking without activity in a downstream market.

2. In a note submitted to the OECD the 20th of May 2009^{*}, the Norwegian Competition Authority (NCA) accounted for the experiences related to two-sided markets and Internet portals for advertising and searching for residential properties for sale. The Norwegian experience concerning the establishment of a regulation that requires the Internet portals to provide access to residential property advertisement on non-discrimination conditions is one of the cases that will be presented in this paper.

3. One-sided and especially two-sided network externalities are prevalent features in online platform markets. 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 platforms, barriers to entry are normally high. Under such market conditions, it will normally be difficult for new entrants to achieve the required critical mass to remain in the market. Such markets are therefor often highly concentrated.

4. Depending on the strength of the network effects and the degree of differentiation, platform competition can tip an industry to monopoly.¹ 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.

5. The NCA is of the opinion that the market conduct by the Internet platforms can lead to anti-competitive effects related to different products and services which are traded via the platform. The NCA has reviewed a few cases concerning the online services market behaviour under the antitrust rules of the Norwegian Competition Act, but has so far not found reason for intervention. However, in 2010 the NCA introduced a regulation concerning access to online advertisement of residential property on non-discriminatory conditions.

6. Section 2 briefly describes three Norwegian cases related to Internet platforms in which the NCA has either investigated or made observations. Section 2.1 describes an Internet platform for the collection of purchased e-books initiated by the major publishers in Norwegian. Section 2.2 gives a brief presentation of the Norwegian experiences concerning the international platforms for online hotel booking. Section 2.3 describes the Norwegian regulation that requires Internet portals to provide general access to residential

* [DAF/COMP/WD\(2009\)57](#).

¹ The competition between VHS and Betamax is a good example of the importance of network effects and how an industry may tip to monopoly.

property advertisement on non-discriminatory conditions. Finally, section 3 provides a short summary and the expected follow-up.

2 Experiences related to Norwegian cases

7. The antitrust sections in the Norwegian Competition Act of 2004 are harmonized with EC competition law. Section 10 of the Competition Act corresponds to the prohibition of agreements restricting competition in the TFEU Article 101 and the EEA Agreement Article 53. Likewise, Section 11 of the Competition Act corresponds to the prohibition against abuse of a dominant position in the TFEU Article 102 and the EEA Agreement Article 54.

8. The NCA has investigated a few cases under both Sections 10 and 11. This regards the residential property platforms' refusal to provide general access to the platforms. The NCA did not, at that time, find reason for intervention.²

9. In the following we will present the experiences and development related to three other Norwegian cases.

2.1 Norwegian e-book platforms

10. Digitalisation has led to massive changes in the publication and sales of books, particularly through the development of the electronic book, or "e-book". The market for e-books in Norway is nascent and lags greatly behind major English speaking countries like the United States and the United Kingdom.

11. The development and distribution of e-books in Norway has mainly been driven by the publishers. In April 2011, the Norwegian book industry launched a joint project "Bokskya". This is an Internet platform that collects purchased e-books from affiliated bookstores. Several critical articles in Norwegian newspapers have described Bokskya as difficult to use, and with a poor selection of e-books. Also, the Norwegian book industry is characterized by vertical restraints. Big publishers control a major part of the distribution and bookstore chains. These circumstances, it has been argued, may prevent or delay the development of new products and platform solutions in the e-book market.

12. Norwegian publishers and booksellers have traditionally enjoyed subsidies and special arrangements, including an exemption from competition law. The exemption, called "the fixed price policy", involves pricing arrangements where retailers are obliged to sell books at the price set by the publisher. The vertical restriction limits price competition between bookstores in the fixed price period.

13. The Norwegian Government has recently invited comments from interested parties on the proposal for new legislation that makes the fixed price policy statutory. The purpose of the proposition is to contribute to a diversity of Norwegian literature as well as to maintain a nationwide network of physical bookstores. The discussion paper has not concluded whether e-books should be part of the proposed new legislation.

14. Sales of e-books in Norway have followed the existing value chain of printed books, rather than developing an e-book platform directly from the publisher. Today Norwegian e-books are part of the fixed price policy, but publishers can set different prices for paper and e-books. Unlike Norwegian paper books, the e-books have value added tax.

² A2005-33, A2007-7

15. Further, Norway does not have a technical platform that supports innovative digital literature. There have been examples where Norwegian digital literature has been forced to be published in Denmark as there are no technical facilities in Norway to support these products. The increase in sales of e-books over the Internet is lower in Norway than in neighbouring countries, and price comparisons undertaken by the NCA shows that the price level of e-books in Norway is significantly higher than in Sweden.

16. The NCA has in written submissions to the Ministry of Culture pointed out that the fixed price agreement and the vertical integration between publishers and bookstores is perceived as an obstacle to competition and may hamper further development and digitalisation of the book market. Firstly, high prices on e-books contribute to the protection of printed books whereby publishers and booksellers avoid cannibalization, but at a significant disadvantage for the e-books market. Secondly, the consumers are not able to benefit from the savings associated with not having to print, physically distribute and sell the e-books.

2.2 *Online hotel booking*

17. National Competition Authorities in other countries have opened investigations into online hotel booking. In Norway, the conduct and distribution agreements of these booking services have been a concern both for the hotel industry and for the NCA.

18. So far, the NCA has arranged meetings with the Norwegian hotel chains to receive information on the nature of the hotel booking website services and price setting agreements, but has yet to open a formal investigation. The concerns have been linked to the undertaking Expedia and hotel booking services through its subsidiary Hotels.com. The issue has also been presented in the Norwegian media.

19. In September 2012, the Norwegian press reported that the major online platforms for hotel bookings had obtained an increased market share in Norway. It was also revealed that the hotels had to pay a commission to the web portals up to 30 per cent. The press also referred to a statement from one of the hotel groups claiming that the distribution agreements could represent an infringement of Norwegian competition law.

20. The hotels were committed to pay substantial commissions to the web platforms. Norwegian hotels claimed that the level of commission was too high, and that the web portals represent a costly intermediary. In addition, the hotel groups did not want to enter into an agreement that they feared could breach competition law. Recently, some of the major Norwegian hotel groups have cancelled their distribution contracts with Hotels.com. In total 320 hotels, covering more than half the Norwegian hotel market ended their contracts in 2012. The cancellations involve the contracts with Hotels.com. After the cancellations of the distribution agreements, the Norwegian hotels claim to have increased their sales campaigns on their own web sites. The main focus in the marketing activity has been to guarantee that the lowest hotel accommodation prices would be obtained from the hotels own web sites.

21. The distribution agreements contain a price parity clause. Price parity agreements mean that the consumer will face the same price from all distributors of hotel bookings. The NCA has not yet opened a formal investigation under the Norwegian Competition Act. One reason is, as explained above, that a substantial part of the Norwegian hotels have cancelled their distribution agreements, and are engaged in significant online marketing and booking services on their own websites. Since the question about price parity conditions is also part of the investigations in other jurisdictions, the NCA has decided to await further investigation at this time.

2.3 Establishment of regulation that requires Norwegian internet platforms to provide general access to residential property advertisement

22. Access to Internet platforms for residential property advertisement has been subject to regulation in Norway. The regulation was implemented the 1st of January 2010. Section 14 of the Norwegian Competition Act provides the legal basis for the regulation:

"If necessary to promote competition in the market, 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."

23. Section 14 can be applied when two main conditions are satisfied. The first condition is that a regulation is necessary (to promote competition in the market). The second condition is that there is a business practice that restricts or is liable to restrict competition contrary to the purpose of the Competition Act. In addition there also applies a non-statutory condition that the regulation must be proportionate. It follows from the preparatory works of the Competition Act that a regulation to promote competition is necessary when the antitrust rules are not applicable, it is difficult to prove an infringement, or an individual decision would not be a sufficient means to prevent the anti-competitive behaviour in the market.

24. On behalf of the Ministry of Government Administration, Reform and Church Affairs, the NCA investigated web platforms conduct regarding access to residential property advertisement. Only real estate agents were permitted to advertise residential property for sales. The NCA had earlier reviewed the Internet portals' refusal to supply under both Sections 10 and 11, but the NCA had not, at that time, found a basis for intervening.

25. The NCA also found that an individual decision would not be a sufficient means to prevent the anti-competitive behaviour in the market. The real estate agents are the main customers of advert and could be able to move their demand to a web platform that is not subject to individual intervention. Consequently, the regulation had to apply to all the online advertisement platforms.

26. The sale of residential property will involve a number of services (e.g. value estimation, estate photography, marketing, contract drafting, etc.). Several of these services can be bought separately, but the real estate agents usually only offer these services as bundled packages. Due to the fact that only real estate agents had access to the Internet advertising portals and most sellers considered advertising on these portals to be essential to attract buyers, the customers (the residential estate sellers) were forced to buy the extensive bundles offered by the real estate agents. As a result of the bundling, the refusal to supply advertisement to other parties than real estate agents reduced competition, and limited the choice of services and innovation of new services related to the sales of residential property. In addition, the practice may have contributed to higher prices for services offered by estate agents. The higher transaction costs could lead to an inefficiently low number of real estate transactions.

27. General access to residential property advertisement on the web platforms may lead to increased competitive pressure on the real estate agents, both from private parties providing the services themselves and non-real estate agent enterprises unbundling the real estate services. Increased competition should result in more innovation and lower prices for the sellers of residential properties. General access would also increase consumer choice by giving the consumers the option of providing each of the services themselves, buying them from a non-real estate agent, or buying them from a real estate agent. On this basis, in 2009 the NCA proposed that the Ministry of Government Administration, Reform and Church Affairs should implement a regulation for general access to residential property advertisement on Norwegian Internet platforms.

28. The regulation for general access to Internet platforms was implemented the 1st of January 2010. Following the implementation, the NCA spent a considerable amount of resources to get the major Norwegian web advertising platform, Finn, to comply with the regulation. The main content of the access regulation states as follows:

"Undertakings that offer residential property advertisement on the Internet are required to provide general access to the service on non-discriminatory conditions."

29. As a result of the new regulation, questions have emerged on the interpretation and the implementation of the regulation.

30. The regulation has been the basis for innovations of new services in the market for the sale of residential property. Central to the development is that the regulation has paved the way for a new category of professional participants in the market, who are not a real estate agent. The new parties offer packages to private sellers including services concerning value estimation, estate photography, seller's duty to disclosure, sales prospect, advertisement, advice on open house and bidding round, etc.

31. The main question is related to the requirement to grant access on "non-discriminatory conditions". The NCA has received complaints from different parties who have tried to get access to the Finn website. The NCA has arranged meetings with representatives from Finn regarding the access conditions for the new professional participant. At the end of 2011 Finn proposed a solution for access conditions that involve all participants. These conditions are not completely non-discriminatory, but the NCA considers that differences in access condition between real estate agents and non-real estate agents have been objectively justified.

32. The access conditions for the non-real estate enterprises are as follows:

- they can use the same IT-publishing tool as estate agents
- they have the same opportunity to bundle advertisements with other sale relates services
- they have the same opportunity to use their own trademark
- they have the same start-up cost as the estate agents
- they have the same opportunity to obtain quantum rebates

33. The differences in the conditions are as follows:

- the advertisements from the new non-real estate participants will be published as personal advertisements and with additional information about key elements of the buying process.
- Finn will, unlike for real estate agents, carry out a quality control for advertisements from both private parties and non-real estate enterprises.
- the non-real estate enterprises cannot appear on the portal as intermediaries for the transfer
- due to differences in the administration costs, the real estate agents can get larger rebates

34. The NCA has spent a considerable amount of resources on following-up the new regulation. This is first and foremost due to the process with Finn to decide on access conditions that corresponds to the non-discriminatory condition in the regulation. Based on the experience so far, and as a result of technical developments and changes in market conditions, the Authority can expect to spend continuous resources on the interpretation of the regulation in the future.

35. The National Federation of House Owners in Norway (a nationwide organization for owners of private houses, apartments and holiday homes) has pointed out that selling residential property without assistance from an estate agent is difficult. Finn has reported that residential estates sold without a real estate agent only accounted for a small percentage of the total number of residential estates advertised for sale on Finn in 2011.

36. As previously mentioned, the regulation has been the basis for innovations of new services in the market for the sale of residential property. Central to the development is that the regulation has paved the way for a new category of professional participants in the market, who are not real estate agents. Such new professional undertakings offer services that make it easier for private parties to sell their residential property. Given that these new businesses have general access to the web portals on non-discriminatory terms, to the consumers are likely to enjoy a wider choice of services and increased the competition among estate agents. The market will decide which new services will evolve.

3 Summary and the expected follow-up

37. There is a substantial demand for e-books in Norway. So far, there are indications that this demand has not been satisfied. The NCA will continue to monitor the development in the market for e-books. According to the public information of the NCA the continuing disputes concerning online hotel booking also cover the question of price parity. The NCA has not taken a final position on the issue and is awaiting the results from the investigations carried out by other Authorities.

38. The NCA has spent a considerable amount of resources on the regulation of the access conditions to web platforms for residential property advertisement. It is still too early to conclude on the success of the new regulation. The NCA will carefully monitor the developments, both regarding necessary modifications to the current regulation and to achieve more general competence concerning regulation of online markets.