

Our ref: PJAR\MEFR\1000-080-624  
Your ref: N10000523  
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4 December 2020

[REDACTED]

Miriam Kolacz  
Senior Analyst  
Adjudication Division  
Australian Competition & Consumer Commission  
Level 17 Casselden  
2 Lonsdale Street, Melbourne 3000



Dear Miriam

**Exclusive dealing notification N10000523 lodged by TVSN Channel Pty Ltd**

As you know, we act for Australian Shopping Network Pty Ltd (ASN, trading as **openshop**) in relation to two exclusive dealing notifications lodged by TVSN Channel Pty Ltd (**TVSN**) with the Australian Competition and Consumer Commission (**ACCC**) on 18 May 2020 – N10000521 and N10000523.

We refer to TVSN's submission dated 23 October 2020 recently published on the ACCC's website (**Further Submission**) with respect to its refusal to acquire notification (N10000523) (**Refusal Notification**).

TVSN's notified refusal to acquire conduct is described in section 3.1 of the Refusal Notification as follows:

"The notified conduct relates to the following:

TVSN can refuse to acquire products and services from a supplier, or has the ability to terminate the supplier agreement, for the reason that the supplier (or related body corporate) has supplied or proposes to supply, or has not agreed not to supply, products or services to another DTSCR."

As set out in openshop's submission of 21 October 2020, the notified refusal to acquire conduct has the following key features (among other things):<sup>1</sup>

- TVSN can, indefinitely, refuse and threaten to refuse to acquire all products from a supplier for the sole reason that the supplier has, at any time in the past, supplied any product to openshop. There are no other requirements or conditions that need to be met before TVSN can refuse to acquire from a supplier in these circumstances. In particular, there is no requirement that TVSN must also consider there to be a risk of brand confusion or a diminished ability for TVSN to maximise the profitability and sale of the supplier's products due to the way the product was promoted or sold on the other DTSCR.

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<sup>1</sup> See openshop's submission to the ACCC dated 21 October 2020, paragraph 3.4.

- TVSN can, indefinitely, refuse and threaten to refuse to acquire all products from a supplier for the sole reason that the supplier proposes to supply, at any time in the future, any product to openshop. There are no other requirements or conditions that need to be met before TVSN can refuse to acquire from a supplier in these circumstances. In particular, there is no requirement that TVSN must also consider there to be a risk of investments being expropriated and/or brand confusion in relation to the TVSN brand or the supplier's brand.

In the Further Submission, TVSN claims that:

"The notification was not intended to prevent suppliers switching from Hyundai-Openshop to TVSN or to suggest that historical supply to Hyundai-Openshop alone would prevent TVSN acquiring that supplier's products." (emphasis added)

...

"TVSN simply wants the commercial freedom not to be forced to buy or continue to buy from a supplier, including where that supplier:

- is proposing to move to another DTSCR (as opposed to other retail platforms) and there is a risk of investments being expropriated and/or brand confusion in relation to the TVSN brand or the supplier's brand; or
- has supplied to another DTSCR and there remains a risk of brand confusion or a diminished ability for TVSN to maximise the profitability and sale of the supplier's products due to the way the product was promoted or sold on the other DTSCR." (emphasis added)

The description of TVSN's notified refusal to acquire conduct in the Refusal Notification is clearly and unambiguously broader than the way in which TVSN describes the intended scope of the notified conduct in the Further Submission.

While TVSN may provide additional information to clarify the intended scope of the notified conduct, there is no statutory mechanism for TVSN to amend the scope of the conduct originally notified.

The ACCC therefore must assess the notified refusal to acquire conduct as described in section 3.1 of the Refusal Notification.

For the reasons described in openshop's submission to the ACCC dated 21 October 2020, openshop submits that the ACCC can be satisfied that:

- the refusal to acquire conduct described in the notification has the purpose and/or has the likely effect of substantially lessening competition in contravention of section 47 of the *Competition and Consumer Act 2010* (Cth) (**CCA**); and
- in all the circumstances, the refusal to acquire conduct described in the notification has not resulted and is not likely to result in a benefit to the public. Alternatively, any asserted benefits to the public do not outweigh the detriment to the public that has resulted or is likely to result from the notified conduct.

Accordingly, openshop submits that the ACCC should notify TVSN under subsection 93(3) of the CCA that the refusal to acquire notification is not approved.

If the ACCC has any questions in relation to this letter, please contact Peter Armitage on [REDACTED] or Melissa Fraser on [REDACTED]



**Ashurst**