

Mr Gavin Jones
Director - Adjudication Branch
Australian Competition and Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

20 January 2020

Copy: *Steven Lee - Steven.Lee@accc.gov.au*

Dear Mr Jones

Exclusive dealing notification N1000509 lodged by TVSN Channel Pty Ltd – interested party consultation

Overview

1. We are instructed by Seven West Media (**Seven**). Seven appreciates the opportunity to provide comments on the exclusive dealing notification lodged by TVSN with the ACCC. Seven has an agreement with Australian Shopping Network-owned oneshop channel for the broadcast of that channel. The channel has been broadcast since July 2019.
2. In Seven's submission, there are several potential anti-competitive effects from the proposed conduct, which are not offset by public benefits. Specifically, the exclusive dealing notification will:
 - (a) make it more difficult for a new entrant shopping channel such as oneshop.com.au to compete because of the range and scope of suppliers that will be exclusively linked to TVSN. It is notable that the exclusive dealing notification has only been lodged since competition from oneshop commenced; and
 - (b) foreclose the opportunity for programmes such as Seven's The Morning Show to promote products contrary to the interests of the supplier of those products who would be seeking to maximise sales.
3. Given the success of TVSN without the conduct, it is not clear what the need for the notification is. Further, some of the matters identified as public benefits do not seem to be particularly strong or properly described as a public benefit.
4. More specific comments are detailed below.

Conduct Identified

5. The identified conduct is unclear in its scope. Specifically, it is not clear from either the description of the conduct contained in cl 3.1 of the notification or the clarification which was provided on 10 January 2020 whether the conduct is confined to conduct on "Competitor Shopping Channels" or includes television programmes where there is a direct selling opportunity which includes video footage or live streaming. In other words, it is not clear whether or not this actually captures what is done on programmes such as Seven's The Morning Show.
6. It seems from the letter from Moulis Legal dated 10 January 2020 that a question as to the scope of the conduct was raised by the ACCC, but the way in which the response is framed means the scope is still not clear. It is inappropriate to provide an exemption for any conduct if the scope of the conduct is not clear.

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7. If the conduct is confined to dedicated shopping channel only, it would not affect Seven's The Morning Show programming, however, that would still leave competition concerns about the effect on the shopping channel of openshop.com.au. It should be clear on the face of any notification, what conduct is and is not covered by the notification.
8. Further, the conduct is not confined to a particular list of suppliers, but rather to any suppliers with whom TVSN deals. Paragraph 6 of the notification has over 30 categories of products listed and those categories are enormously broad. In addition, that paragraph states that TVSN promotes 6,000 - 15,000 products. Two issues arise from that:
 - (a) the affected products are large in number. If there are certain types of products or particular brands that are more likely to use this form of promotion, that may accentuate the competition concerns; and
 - (b) it is simply not possible for any party to know whether or not a particular supplier is connected to TVSN and a competitor could well incur non-trivial costs in identifying this information. A notification process should not be used to, in effect, increase a competitor's costs.

Supplier v TVSN Investment


9. One of the key issues that TVSN identifies is the protection of its investment in training, dispatch of goods and the like (see paragraph 7 of the Notification). These seem to be matters which, in whole or in part, may involve supplier investment as well as TVSN investment. To the extent that they are supplier investment, then it is not a legitimate public benefit for TVSN to claim.

Benefits realised without the conduct

10. The benefits identified are matters which TVSN elsewhere identifies as already being features of its channel and product offering. If these have all been achieved without a requirement for this conduct, then it is difficult to see the need for the notification.
11. Further, the fact that the conduct is being introduced at a time when TVSN is facing competition from a new entrant, strongly suggest that TVSN is concerned about competition and seeking to adversely affect the business case of the competitor start up.

Yours sincerely


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