



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Statement of Reasons

Notifications lodged by
TVSN Channel Pty Ltd
in respect of

exclusive dealing conduct whereby TVSN acquires products from
suppliers on condition that the supplier limits its dealing with
other television shopping channels in relation to the same brand or
product category

Notification numbers: N10000521 & N10000541

16 July 2021

Commissioners: Keogh
Rickard
Brakey
Ridgeway

Summary

The Australian Competition and Consumer Commission (the **ACCC**) does not object to the exclusive dealing notifications lodged by TVSN Channel Pty Ltd (**TVSN**) on 18 May 2020 and 19 March 2021 based on the information available at this time.

TVSN is a television shopping channel. Under the notifications TVSN:

- acquires products from suppliers on condition that the supplier does not sell products under the same brand or in the same product category for feature or sale by another television shopping channel for a four month exclusivity period, and
- refuses to acquire products from suppliers if, within the preceding six months, the supplier has sold products under the same brand or in the same product category to another television shopping channel or such products have been featured on another television shopping channel.

(the **Notified Conduct**).

When businesses lodge a notification for exclusive dealing conduct, they receive protection from legal action for that conduct automatically on the day the notification is lodged with the ACCC. The protection continues unless or until the notification is revoked by the ACCC or withdrawn by the notifying party.

The ACCC can only revoke a notification if it is satisfied that the notified conduct:

- has the purpose, effect or likely effect of substantially lessening competition, and
- in all the circumstances, will not result in likely public benefit which would outweigh the likely public detriment.

TVSN submits that the Notified Conduct protects the investment it makes in identifying and sourcing products and developing campaigns for the promotion of products using the television shopping channel format.

The ACCC considers that the Notified Conduct is likely to lessen competition between television shopping channels, but this does not amount to a substantial lessening.

For more than 20 years TVSN was the only dedicated television shopping channel in Australia. In 2019, another television shopping channel, Australian Shopping Network Pty Ltd (**openshop**), launched.

TVSN has an incumbency advantage, established brand and reputation, a larger broadcast footprint than openshop and entrenched relationships with many of the suppliers of the goods and services most sought-after by television shopping customers. The ACCC considers that many suppliers, if forced to choose between TVSN and openshop, are likely to choose TVSN.

Therefore, with the Notified Conduct in place the pool of suppliers available to openshop, or another television shopping channel, is likely to be narrower and of more limited appeal, at least in the short term, than that available to TVSN.

In some circumstances, this may raise barriers to entry and expansion by competing television shopping channels and reduce the ability of other television shopping channels, including openshop, to compete with TVSN. This would, in turn, be likely to reduce the pressure on TVSN to compete for customers and/or suppliers by lowering its fees or prices

(including negotiating smaller margins on stock purchases) and/or increasing the quality of its services.

However, the ACCC notes that the limited duration of the exclusivity period provides opportunities for other television shopping channels to compete for suppliers who are, or wish to, supply TVSN.

The ACCC also notes that a substantial pool of alternative suppliers will remain available to other television shopping channels. There are a wide range of suppliers in each product category, only a few of which will be featured on TVSN at any time. The ACCC considers that there remains a range of suppliers available for other television shopping channels to approach and work with to develop offers suitable for presentation in the home television shopping format.

Having regard to the range of suppliers that will continue to be able to supply other television shopping channels at any point in time, the ACCC does not consider on the evidence currently available, that the Notified Conduct has the purpose, effect or likely effect of substantially lessening competition in any market.

The ACCC may revoke the notifications at any time if it forms the view that the Notified Conduct is likely to substantially lessen competition and the public benefits do not outweigh the public detriments.

To revoke the notification, the type of information the ACCC would consider includes the extent to which the Notified Conduct was reducing the competitive constraint that other television shopping channels provide on TVSN in competing for suppliers or customers.

Given the ACCC's conclusion that the evidence does not indicate the Notified Conduct has the purpose, effect or likely effect of substantially lessening competition, it is not necessary for the ACCC to form a view on whether the Notified Conduct is likely to result in a benefit to the public, and whether or not that benefit would outweigh any detriment to the public, including detriment resulting from any lessening of competition.

1. The notifications

- 1.1. TVSN Channel Pty Ltd (**TVSN**) operates a home shopping television channel which broadcasts throughout Australia.
- 1.2. On 18 May 2020 and 19 March 2021, TVSN lodged exclusive dealing notifications N10000521 and N10000541 respectively with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.3. Notification N10000521 involves TVSN acquiring, or offer to acquire, products or services from a supplier on condition that the supplier (or related body corporate) will not, without the written consent of TVSN, supply those products or services, or any other products or services (together, **products**) under the same brand or in the same product category for feature or sale by another a dedicated television shopping channel retailer (**DTSCR**) for a period up until:
 - four months after products purchased by TVSN from the supplier are received in Australia and available for sale by TVSN (having passed quality assurance procedures), and
 - four months after the completion of specific promotions, campaigns, events or television programs that TVSN intended would feature the products or use the services and that were notified by TVSN to the supplier.

(the **acquisition on condition notification**).

- 1.4. Notification N10000541 involves TVSN refusing to acquire products and services from a supplier (or related body corporate) (together, **the supplier**) for the reason that:
 - the supplier has supplied those products or services, or other products or services under the same brand or in the same product category (together, **the products**) to another DTSCR in the preceding six months, or
 - the supplier's products have been in the preceding six months, or are currently being, featured, listed, promoted or otherwise offered for sale on another DTSCR, or
 - the supplier has not agreed to supply the products in accordance with an exclusivity condition the subject of a notification, pursuant to section 93 of the *Competition and Consumer Act 2010*, that is currently in force

(the **refusal to acquire notification**).

- 1.5. For convenience, where relevant in this statement of reasons the acquisition on condition notification and the refusal to acquire notification are referred to collectively as the **Notified Conduct**.
- 1.6. DTSCRs, as defined by TVSN in the notifications, do not include other retailers which do not predominantly utilise the live presentation or live demonstration format to sell products on a dedicated television shopping channel, other broadcasters who may program live presentation or demonstration formats for the sale of consumer products but do not themselves retail those consumer products, or other marketing or distribution channels which the supplier might choose to use to market and/or sell their products including:

- the supplier’s own direct channels
 - other online retail outlet options
 - a bricks and mortar outlet, or
 - other televised options including any of the various choices for advertorial or infomercial advertisements, where the supplier is the retailer and receives the product sales and/or the “live” presentation or demonstration format is not used such as, but not limited to:
 - slots on Spree TV, Aspire TV or iShop TV (which do not use the “live” presentation/demonstration format)
 - segments broadcast within or during other programming such as Nine’s Today Extra, Channel Seven’s Morning Show and Daily Edition and Channel Ten’s Studio Ten, and
 - segments broadcast in-between programming or during advertorial breaks on the various television channels.
- 1.7. TVSN submitted that at the time of lodging the notifications, only one business, the Australian Shopping Network Pty Ltd (**ASN**), trading as and referred to as **openshop**, which also operates a home shopping television channel, properly fitted the description of a DTSCR and came within the scope of the Notified Conduct. The ACCC understands that this is still the case.
- 1.8. Legal protection for the Notified Conduct commenced on the day of the notifications were lodged and will continue until and unless the notification(s) are revoked by the ACCC or withdrawn.
- 1.9. Further information in relation to the notifications is available on the ACCC’s [public register](#).

Rationale for the Notified Conduct

- 1.10. TVSN submits that it seeks to differentiate itself within the live presentation television format which requires significant investment, including identifying and sourcing the products and developing the campaign for how that product can best be promoted to optimise the conversion of minutes of television air time into sales dollars. TVSN submits that this involves:
- the use of confidential TVSN know-how and proprietary information
 - TVSN taking the volume and financial risk on the ability to sell the stock it has purchased, and
 - forward planning in terms of programming, scheduling, production, promotion of future events and campaigns and the purchasing of stock (sometimes more than six months in advance).
- 1.11. TVSN submits it can only feature a limited number of the potential suppliers in any particular product category at a given point in time and does not wish to invest in purchasing products from suppliers selling to other direct format competitors. TVSN contends that the Notified Conduct protects the investment TVSN has made in its own brand and the expectation from customers that TVSN will offer them a unique

find within the live presentation format and programming content that is different from what can be seen on other DTSCRs.

- 1.12. TVSN states that products under the same brand have been included because TVSN's engagement with customers relates to customers connecting with the brand, the brand's reliability and the brand story, not just the specific product being sold. TVSN contends that including products under the same brand also reduces the risk of TVSN's brand positioning suffering the negative consequences of another DTSCR providing a poor customer experience.
- 1.13. TVSN submits that the Notified Conduct allows it to mitigate the risk of:
 - brand and customer confusion (e.g. through different brand positioning, brands becoming associated with a particular DTSCR, and the possibility of the brand's/product's value proposition being diminished due to stock clearance by one DTSCR in light of a supplier's decision to switch) and to allow TVSN to meet customer expectations and provide fresh and exciting content, and
 - investments being appropriated by another DTSCR in relation to sourcing stock, promotion, content creation, IP and testing with consumers to maximise productivity.

2. The exclusive dealing notification process

- 2.1. In broad terms, exclusive dealing occurs when one person trading with another restricts the other's freedom to choose with whom, in what or where it deals. Exclusive dealing is common in many business arrangements.
- 2.2. Exclusive dealing can take a number of forms and may include:
 - the acquisition of goods or services on condition that the supplier will not supply, or will limit the supply of, goods or services to a competitor of the purchaser, or
 - refusing to acquire goods or services because the seller will not agree to any of these conditions.
- 2.3. In this case, TVSN is acquiring products from suppliers on condition they do not sell those products, or any other products under the same brand or in the same product category, for feature or sale by another DTSCR for a stipulated period; and refusing to acquire products from suppliers that have been sold to another DTSCR.
- 2.4. The *Competition and Consumer Act 2010* (the **Act**) allows a business to obtain protection from legal action for exclusive dealing conduct by lodging a notification describing the conduct (under section 93 of the Act) or by obtaining an authorisation for the conduct (under section 90 of the Act).
- 2.5. While a notification is in force, the business is able to engage in the exclusive dealing conduct as described in the notification without the risk of breaching the exclusive dealing provisions of the Act. The legal protection provided by an exclusive dealing notification commences automatically on the day a notification is validly lodged. The legal protection remains unless or until the notification is revoked or withdrawn.
- 2.6. Exclusive dealing is only a breach of the Act, and the notification can only be revoked, if the restriction meets the test set out in section 93(3) of the Act, i.e. that it

has the purpose, effect or likely effect of substantially lessening competition, and in all the circumstances, will not result in likely public benefit which would outweigh the likely public detriment.

3. Industry background

TVSN

- 3.1. TVSN is an Australian television home shopping network owned by Direct Group Pty Limited, an Australian-based home shopping company. TVSN broadcasts 24 hours, 7 days a week on free-to-air and subscription television in metropolitan and regional areas, with up to 13 hours of live broadcasting per day. These broadcasts are also available through internet streaming.
- 3.2. TVSN utilises live presentations and product demonstrations featuring its own presenters and auditioned brand representatives from suppliers or manufacturers.
- 3.3. TVSN buys the products it features on its broadcasts. That is, TVSN is the retailer of the products rather than a seller of advertising space or content to suppliers.
- 3.4. For more than 20 years, TVSN was the only dedicated home shopping channel in Australia.

openshop

- 3.5. ASN, trading as openshop, is a television home shopping network operating in Australia and is broadcast through the Seven Network (channel 75). openshop launched in Australia on 1 August 2019.
- 3.6. As noted, TVSN submits that currently, openshop is the only entity that meets the definition of DTSCR in the notifications and therefore comes within the scope of the exclusive dealing conduct (i.e. openshop is the only entity TVSN suppliers are restricted from also supplying products to).
- 3.7. ASN is a wholly owned subsidiary of Hyundai Home Shopping Network Corp (**HHSN**), a home shopping channel operator in South Korea that also operates in Vietnam and Thailand.
- 3.8. The openshop channel is broadcast 24 hours a day, seven days a week, initially with up to 12 hours of live broadcasting per week. openshop's broadcast footprint is smaller than that of TVSN's, as it does not broadcast in regional areas, other than regional Queensland, and it is not broadcast on subscription television. openshop states that it wishes to increase the amount of live filming it does, and its broadcast footprint, if its business grows.

Previous notifications

- 3.9. TVSN has previously lodged two other notifications which have subsequently been withdrawn, meaning the legal protection provided by those notifications is no longer in place.
- 3.10. Notification N10000509, lodged on 30 October 2019, and withdrawn on 27 May 2020, involved TVSN engaging suppliers of specific consumer products for sale through TVSN on the condition that those suppliers, distributors or manufacturers not market, promote or sell products on a Competitor Shopping Channel (**CSC**). TVSN defined a CSC as another television shopping channel or direct selling medium involving video

footage or live streaming in the presentation or promotion of goods, and which utilises the presentation and/or demonstration of goods as an integral part of the marketing and sales process.

- 3.11. The definition of CSCs was not as specific in N10000509 as the definition of DTSCRs in the current notifications. Some parties expressed concern that the definition of a CSC could capture broadcast mediums other than dedicated television home shopping channels, such as infomercial segments in lifestyle programs on commercial television networks.
- 3.12. In withdrawing N10000509, TVSN advised it was doing so in recognition of feedback from interested parties that reflected a need to clarify the notified conduct to avoid misinterpretation of its intended scope. The current acquisition of condition notification (N10000521) was lodged when N10000509 was withdrawn.
- 3.13. Notification N10000523, lodged on 18 May 2020 along with the current acquisition on condition notification, and withdrawn on 29 March 2021, involved TVSN refusing to acquire products and services from a supplier, or having the ability to terminate the supplier agreement, for the reason that the supplier (or related body corporate) had supplied or proposed to supply, or had not agreed not to supply, products or services to another DTSCR.
- 3.14. N10000523 was similar to the current refusal to acquire notification except that TVSN could refuse to acquire products and services from a supplier if that supplier had supplied any products or services to another DTSCR at any time. That is, it was not limited to circumstances where the supplier had supplied another DTSCR with products under the same brand or in the same product category and there was no time limit on how long TVSN could refuse to deal with the supplier for.
- 3.15. TVSN withdrew N10000523 when it lodged the current refusal to acquire notification (N10000541).

4. Consultation

- 4.1. The ACCC conducted a public consultation process regarding the notifications.
- 4.2. The ACCC sought submissions from a range of interested parties. Public submissions were received from openshop and Australian Functional Ingredients Pty Ltd, a former supplier to TVSN. A further public submission was received from an entity whose identity was redacted at their request.
- 4.3. The ACCC also interviewed a number of suppliers. Each supplier requested that they speak to the ACCC on a confidential basis.
- 4.4. The ACCC also had regard to information provided by TVSN, and submissions and information received from interested parties, in relation to the previous notifications described at paragraphs 3.9 to 3.15, as relevant.
- 4.5. All public submissions received by the ACCC in relation to the notifications and public versions of TVSN's responses to submissions and the ACCC's information requests are available on the ACCC's [public register](#).
- 4.6. Submissions, and the views expressed by suppliers through the ACCC's market inquires, are summarised as relevant in the ACCC's assessment of the Notified Conduct below.

5. ACCC assessment

- 5.1. The ACCC assesses an exclusive dealing notification by applying the test in section 93(3) of the Act. The test requires that in order for the ACCC to revoke a notification, it must be satisfied that the notified conduct:
- has the purpose, effect or likely effect of substantially lessening competition, and
 - in all the circumstances, will not result in likely public benefit which would outweigh the likely public detriment.

Future with or without the Notified Conduct

- 5.2. To assist in its assessment of the Notified Conduct, the ACCC compares both the effect on competition and the public benefits and detriments likely to arise in the future with the Notified Conduct against the likely future without the Notified Conduct.
- 5.3. The ACCC considers that in the future without the Notified Conduct, TVSN is not likely to:
- include in its contracts or agreements entered into with suppliers a requirement that the supplier did not, unless the supplier had TVSN's consent, supply products under the same brand or in the same product category, for feature or sale by another DTSCR for a four-month exclusivity period, or
 - refuse to acquire products from a supplier because the supplier had supplied products under the same brand or in the same product category to, or these products had been featured on, another DTSCR in the preceding six months.

Areas of competition

- 5.4. The ACCC defines the areas of competition likely to be affected by the Notified Conduct to assess whether the Notified Conduct would have the purpose, effect or likely effect of substantially lessening competition in a market.
- 5.5. TVSN submits that the products it retails are manifestly sold in the context of the broader retail market, rather than a market for retailing through DTSCRs only, because TVSN is constrained in determining price and quality by the easy availability of identical products or close substitutes from numerous competing retail outlets (including other forms of home shopping via catalogue and internet, and consumers 'at the margin' who would substitute with 'bricks and mortar' retailers).
- 5.6. openshop submits that one of the relevant markets is a market comprising a subset of suppliers for whom other retail channels is not an effective substitute to selling to a DTSCR (whom openshop characterises as **captive suppliers**). This is because the sales by those suppliers to DTSCRs represent a very substantial proportion and, in some cases, all of their total sales through all channels.
- 5.7. The ACCC has adopted a purposive approach to identifying the relevant areas of competition. In this respect, the scope of the conduct itself suggests a narrower market definition than submitted by TVSN (essentially, the retail market for consumer goods in Australia). It would be unlikely to be commercially viable for TVSN to prevent suppliers from also supplying other DTSCRs unless TVSN had some degree of market power such that a significant portion of TVSN suppliers are restricted from supplying other DTSCRs.

- 5.8. In this respect, even if, as TVSN has submitted, ‘there are plenty of products/suppliers available to compete for within categories of goods suitable for sale and promotion by home shopping channels’, some suppliers will be more profitable to DTSCRs than others. Forcing suppliers to choose between TVSN and openshop is unlikely to be an attractive commercial strategy for TVSN unless it is confident that many of the most commercially attractive suppliers in this category of suppliers will choose it.
- 5.9. The ACCC has therefore considered the impact of the Notified Conduct on competition between DTSCRs for suppliers and customers. The ACCC does not consider it necessary to precisely define the boundaries of these areas of competition because if the Notified Conduct is unlikely to substantially lessen competition in narrowly defined areas of competition then it is also unlikely to do so in more broadly defined areas of competition.

Purpose, effect or likely effect of substantially lessening competition

- 5.10. For the reasons set out below and based on the information available to it, the ACCC is not at this time satisfied that the Notified Conduct has the purpose, effect or likely effect of substantially lessening competition in the narrowly defined areas of competition discussed above. Consequently, the ACCC considers the Notified Conduct is also unlikely to substantially lessen competition in any more broadly defined market.
- 5.11. However, the ACCC may form a different view in future if there is evidence indicating that the Notified Conduct contributes to a substantial weakening of the ability for other DTSCRs to source products and services from suppliers to sell through the home shopping channel format.

Effect on competition

- 5.12. TVSN submits that the Notified Conduct will not result in a substantial lessening of competition in any relevant market because TVSN lacks the ability to foreclose another DTSCR. Exclusivity will not enable TVSN to lock up ‘must have’ suppliers or a sufficient number of suppliers such that it can prevent competing DTSCRs from reaching and maintaining minimum efficient scale. TVSN submits that it is continually sourcing new suppliers and has a long history of developing previously unknown brands. Unlike other markets where it may be plausible that there are ‘must have’ products that a retailer or broadcaster may need, there is an almost unlimited range of suppliers that competing DTSCRs could source from around the world.
- 5.13. Rather, TVSN submits that the Notified Conduct is pro-competitive because it incentivises TVSN to invest in products, differentiate itself from other DTSCRs, protect its brand position and operate efficiently.
- 5.14. TVSN submits that the limited exclusivity period allows:
- the commitment from suppliers to cover some of the lead times involved in the required forward purchasing and planning for promotions, campaigns, events and television programs, and
 - a short period of time for the readjustment of inventories or sale of stock following the acquired stock being available for sale by TVSN, and TVSN’s promotion and presentation of the products to consumers - a presentation which may have to occur without the benefit of the supplier’s guest.

- 5.15. openshop submits that TVSN's response to the first direct competition which it has faced is not to compete on the merits but, rather, to use its buyer power to prevent or hinder the development of that direct competition.
- 5.16. openshop submits that most suppliers that supply brands substantially through DTSCRs, and certainly any with previous experience supplying to DTSCRs in Australia, have an existing or previous relationship with TVSN.
- 5.17. openshop submits that the Notified Conduct significantly weakens the competition between openshop and TVSN to acquire products from suppliers and raises barriers to entry by entrenching TVSN's existing buyer power with suppliers. openshop contends that most suppliers will choose to supply TVSN instead of openshop given its significant incumbency advantages and the risk to suppliers of losing access to a significant present or future revenue stream. openshop states that as a new entrant in August 2019, its ability to access new suppliers has been significantly impeded by TVSN existing buyer power which TVSN has used to prevent or hinder its suppliers from switching to openshop.
- 5.18. openshop submits that TVSN can reserve for itself the 'best' brands across categories (i.e., those well-known, high quality brands), leaving openshop the opportunity to engage only with those suppliers that TVSN does not want to deal with.
- 5.19. In response TVSN submits that the pool of suppliers, products or brands that are or could be well-suited to sales and promotion via the DTSCR format in Australia are not limited to those already proven to be commercially successful by TVSN taking the risk and investing its time, effort and resources.

ACCC assessment

- 5.20. Under the Notified Conduct, suppliers are not able to supply both TVSN and another DTSCR with products under the same brand or in the same product category at the same time. Suppliers will be able to switch between TVSN and other DTSCRs. However:
 - in the case of switching from TVSN, they will have to wait four months following the completion of any promotions agreed between TVSN and the supplier, and
 - in the case of switching to TVSN, they will have to wait until six months after the other DTSCR features a relevant product.
- 5.21. Therefore any supplier currently featuring on TVSN will, if they chose to sell products to openshop, be foreclosing opportunities to sell products under the same brand or in the same product category to TVSN for around 12 months – they will face a four-month wait after leaving TVSN before they can sell to openshop and then a six-month wait after selling to openshop before they can return to TVSN.
- 5.22. Any supplier not currently featuring on TVSN will, if they are selling or choose to sell products to openshop, be foreclosing opportunities to sell products under the same brand or in the same product category to TVSN for a minimum of around seven or eight months.
- 5.23. Suppliers are able to supply products under one brand or product category to either TVSN or openshop at the same time as supplying products under a different brand and product category to the other.

- 5.24. The ACCC notes that TVSN was, for more than 20 years before openshop commenced operations in Australia, the only dedicated DTSCR in Australia. It has an incumbency advantage, established brand and reputation, a larger broadcast footprint than openshop and entrenched relationships with many of the most desirable suppliers.
- 5.25. Accordingly, the ACCC considers that many suppliers would, if forced to choose between TVSN and openshop (or another DTSCR), choose TVSN. This was supported by the ACCC's market inquiries undertaken with suppliers who indicated that:
- they would value the opportunity, or at least the choice, to be able to supply other television shopping channels while continuing to supply TVSN, particularly openshop, for the opportunity to reach a larger audience, diversify their sales channels and potentially build relationships that could assist in expanding into overseas markets, and
 - if forced to choose between supplying TVSN exclusively or being able to supply other television shopping channels but not TVSN, they would (at least in the short term) be likely to continue to supply TVSN. This is because there would be a high cost of losing their potentially significant revenue streams through TVSN, and there is a significant risk that they are not able to replace this revenue by supplying other television shopping channels, at least in the short term.
- 5.26. The degree of risk that suppliers perceived in deciding whether to effectively 'switch' from TVSN to openshop appears to depend on several key factors, including: the size of their business, the proportion of their total sales derived through TVSN, how crucial the television shopping medium is as a distribution channel for their product(s), and the likelihood that they will be able to replace these sales elsewhere.
- 5.27. This means the pool of suppliers who would preference openshop will likely primarily consist of those suppliers who either:
- do not wish to appear on TVSN during the period that the Notified Conduct will prevent them doing so
 - do not think they will be able to appear on TVSN (TVSN is not interested in working with them), or
 - openshop is able to offer more favourable terms to, such as increased levels of promotions, more airtime or less direct competition in the form of similar products also being featured on the same DTSCR, such that notwithstanding its smaller broadcast footprint it may be more profitable for the supplier to supply openshop.
- 5.28. Therefore, the ACCC considers that with the Notified Conduct in place the pool of suppliers available to openshop or another DTSCR, at least in the short term, is likely to be narrower and of less appeal than that available to TVSN. Many of those suppliers whose products are best suited to the television home shopping medium are likely to be unavailable to other DTSCRs, including many of the top/most profitable suppliers in this category.
- 5.29. For this reason, the ACCC considers that in some circumstances the Notified Conduct may raise barriers to entry and expansion and reduce the ability of other DTSCRs, including openshop, to compete with TVSN. This would, in turn, be likely to

reduce the pressure on TVSN to compete for customers and/or suppliers by lowering its fees or prices (including negotiating smaller margins on stock purchases) and/or increasing the quality of its services.

- 5.30. However, the ACCC notes that a substantial pool of suppliers will remain available to openshop and/or another DTSCR.
- 5.31. Home shopping channels tend to specialise in selling certain categories of products such as fitness, beauty, kitchen and food, electronics, homewares, jewellery, travel, and garden and leisure, with a particular focus on products that have a 'brand story' amenable to the feature segment format of television shopping channels.
- 5.32. There are a wide range of suppliers in each of these products categories, only a few of which, in each category, will be featured on TVSN at any time. While some will be more amenable to the home television shopping format than others, the ACCC considers that there remains a range of suppliers available for other DTSCRs to approach and work with to develop offers suitable for presentation in the home television shopping format.
- 5.33. Further, in respect of those suppliers selling to TVSN, the foreclosure of opportunities for openshop or another DTSCR to sell their products relates only to products in the same brand or product category. While for many suppliers this will cover a significant proportion of the products they sell, and in some cases all the products they sell, suppliers with a broader range of brands and/or product categories are able to supply these different ranges to different DTSCRs at the same time.
- 5.34. The ACCC also notes that the limited duration of the exclusivity period provides opportunities for openshop, or another DTSCR, to compete for suppliers who are, or wish to, supply TVSN. Further, some of these suppliers will see benefit in switching between DTSCRs to expose their products to different audiences notwithstanding that switching means that they are prohibited from supplying TVSN with products in the same brand or product category for six months after they have supplied another DTSCR.
- 5.35. The ACCC also notes that openshop's submissions raising concerns about the notifications were lodged about the current acquisition on condition notification and an earlier refusal to acquire notification (as described at paragraphs 3.13. to 3.15) which was subsequently withdrawn. The conduct the subject of that notification allowed TVSN to refuse to deal, for all time, with any supplier if that supplier, or a related body corporate of the supplier, ever had, or proposed to, supply any product, under any brand or product category, to another DTSCR.
- 5.36. Rather than take up the ACCC's invitation to provide an additional submission directed specifically at the current refusal to acquire notification, openshop stated that its previous submissions should still be taken into account in the ACCC's assessment of the Notified Conduct. openshop also submitted that its decision not to provide a further submission should not be taken as accepting any of TVSN's assertions in relation to the current refusal to acquire notification.
- 5.37. In conclusion, the ACCC considers that the Notified Conduct will lessen competition between DTSCRs by reducing the number, and quality, of the pool of suppliers available to openshop or another DTSCR. However, having regard to the range of suppliers that will continue to be able to supply other DTSCRs at any point in time, the ACCC does not consider on the evidence currently available that the Notified Conduct is likely to substantially lessen competition between DTSCRs for suppliers or customers.

Does the Notified Conduct have the purpose of substantially lessening competition?

- 5.38. A corporation will have the purpose of substantially lessening competition if that is its actual purpose for engaging in the conduct.¹ This will be ascertained from direct and indirect evidence as to the actual intentions and purposes of the corporation. The Act provides that the relevant purpose must be a substantial purpose but not necessarily the sole purpose.
- 5.39. TVSN's stated purpose in lodging the notifications is to:
- protect the investment TVSN has made in its own brand and the expectation from customers that TVSN will offer them a unique find within the live presentation format and programming content that is different from what can be seen on other DTSCRs, and
 - reduce the risk of TVSN's brand positioning suffering the negative consequences of another DTSCR providing a poor customer experience or positioning a brand or product and its features and attributes in a way that conflicts or tarnishes the relationship between TVSN and its customers.
 - mitigate the risk of investments being appropriated by another DTSCR in relation to sourcing stock, promotion, content creation, intellectual property and testing with consumers.
- 5.40. The ACCC considers that the current notifications, which are limited in scope both with respect to the duration of the exclusivity period and the brands and products covered, are not inconsistent with TVSN's stated purpose.
- 5.41. The ACCC considers, on the information available to it, that the conduct the subject of the current notifications does not have a purpose of substantially lessening competition in any market.

Conclusions regarding substantial lessening of competition

- 5.42. The ACCC considers that the Notified Conduct will lessen competition between DTSCRs by reducing the number, and quality, of the pool of suppliers available to openshop or another DTSCR. However, having regard to the range of suppliers that will continue to be able to supply other DTSCRs at any point in time, the ACCC does not consider on the evidence currently available the Notified Conduct has the purpose or likely effect of substantially lessening competition in any relevant market.
- 5.43. The ACCC is concerned to ensure the Notified Conduct does not substantially undermine the ability of openshop, or another DTSRC, to source suppliers or offer products and services to customers. If evidence should come to light that the Notified Conduct is substantially affecting the ability of other DTSCRs to compete on their merits, the ACCC is able to revoke the notification.
- 5.44. To revoke the notification, the type of information the ACCC would consider includes the extent to which the Notified Conduct was reducing the competitive constraint that other television shopping channels provide on TVSN in competing for suppliers or customers.

¹ *Universal Music Pty Ltd v Australian Competition and Consumer Commission* (2003) 201 ALR 636, at 693.

Public benefits and detriments

- 5.45. The ACCC has assessed the Notified Conduct by applying the test in section 93(3) of the Act, which requires that in order for the ACCC to revoke a notification, it must be satisfied that the notified conduct has the purpose, effect or likely effect of substantially lessening competition, **and** will not result in likely public benefit which would outweigh the likely public detriment.
- 5.46. As the ACCC does not consider that the Notified Conduct has the purpose, effect or likely effect of substantially lessening competition, the test to revoke the notification is not met at this time.
- 5.47. Given this assessment, it is not necessary for the ACCC to form a concluded view on whether the conduct is likely to result in a benefit to the public, and whether or not that benefit would outweigh any detriment to the public including detriment resulting from any lessening of competition. However, given the submissions provided and concerns raised, the ACCC has set out below preliminary comments about the likely public benefits and public detriments of the Notified Conduct.
- 5.48. TVSN submits that the Notified Conduct will mitigate the risk of its investments being appropriated by another DTSCR. The ACCC considers that the Notified Conduct may maintain incentives for TVSN to invest in developing and promoting products by providing TVSN with better returns on these products.
- 5.49. However, the ACCC considers that protecting the position of a particular competitor in a market does not equate to a likely public benefit. This is particularly the case if the means of doing so is likely to reduce the ability of other market participants (in this case DTSCRs) to compete with the party engaging in the conduct (TVSN).
- 5.50. The ACCC considers that some free-riding by other DTSCRs and suppliers on TVSN's investments in products could potentially occur, but that TVSN has not identified particular issues unique to its investments in product development and promotion that would jeopardise those investments. Therefore, the ACCC considers that any public benefit resulting from the Notified Conduct would likely be limited.
- 5.51. In relation to public detriment, as noted at paragraph 5.29, the ACCC considers that the Notified Conduct may raise barriers to entry and expansion and reduce the ability of other DTSCRs to compete with TVSN. This, in turn, would be likely to reduce the pressure on TVSN to compete for customers and/or suppliers by lowering its fees or prices and/or increasing the quality of its services. The ACCC considers this reduction in competition to be a public detriment.

6. Conclusion

- 6.1. Based on the available information, the ACCC considers the Notified Conduct is unlikely to have the purpose, effect or likely effect of substantially lessening competition.
- 6.2. The ACCC therefore does not object to the notifications at this time and the immunity for exclusive dealing provided by the notifications is allowed to stand at this time.
- 6.3. However, the ACCC may revoke the notifications at any time if it forms the view that the Notified Conduct is likely to substantially lessen competition and the public benefits do not outweigh the public detriments. To revoke the notification, the type of information the ACCC would consider includes the extent to which the Notified

Conduct was reducing the competitive constraint that other television shopping channels provide on TVSN in competing for suppliers or customers.