

11 March 2022

To Mr Alex Reed
Senior Analyst, Mergers, Exemptions and Digital
Australian Competition & Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601
alex.reed@accc.gov.au

Copy sharon.dearno@accc.gov.au
gavin.jones@accc.gov.au
exemptions@accc.gov.au

Dear Alex

7-Eleven Australia Pty Limited and 7-Eleven Stores Pty Limited — Notification of resale price maintenance under section 93 of the Competition and Consumer Act 2010 (Cth)

We refer to the resale price maintenance notification lodged by 7-Eleven Australia Pty Limited and 7-Eleven Stores Pty Limited (together, **7-Eleven**) on 28 January 2022 and your email dated 24 February 2022 requesting further information from 7-Eleven.

We are instructed to provide the following responses, which are set out below each of the questions in your email.

1 We note that a range of 7-Eleven eCommerce initiatives are described in the notification. Please define “eCommerce platform” for the purposes of the Notification.

For the purposes of the Notification, an “eCommerce platform” is a technology through which customers can purchase 7-Eleven products at a price that cannot be manually reduced by a store operator.

The eCommerce initiatives described in section 4 of the Notification each involve an “eCommerce platform” through which customer transactions would be processed.

Critically, the “eCommerce platforms” the subject of the Notification are only those which are affected by a functional limitation that prevents store operators altering the price of products because of the way that technology interacts with 7-Eleven’s core enterprise resourcing planning (**ERP**) system.

Where 7-Eleven rolls out an eCommerce platform which does not have such a functional limitation, 7-Eleven will allow store operators to manually override the price set by 7-Eleven to reduce the price of a product being purchased by a customer.

For example, 7-Eleven has [Confidential] operates using technology that allows a store operator to individually reduce the price of a product sold to a customer. Consequently, when 7-Eleven [Confidential], 7-Eleven will allow store operators to individually discount products [Confidential].

2 Explain the extent to which, pursuant to the Notification, 7-Eleven intends to deploy or adapt existing eCommerce initiatives (for example, the eCommerce platform used by 7-Eleven's USA counterpart) versus develop new solutions.

7-Eleven currently does not intend to deploy or adapt any existing eCommerce initiatives.

Each of the initiatives referred to in the Notification will be developed as new solutions as part of 7-Eleven's digital strategy. The exception is where 7-Eleven partners with an existing third-party marketplace, such as Uber Eats, in which case this would involve deploying that third-party marketplace's existing technology for processing transactions rather than developing a new solution.

[Confidential] However, transactions from Micro Market stores will still be processed through 7-Eleven's core ERP system, meaning that the eCommerce platform will still be subject to the functional limitation described in the response to question 1 above.

3 Explain the extent to which 7-Eleven would implement its digital strategy in Australia if it was unable to engage in the Notified Conduct.

- (a) Where 7-Eleven considers that eCommerce initiatives could not proceed or would be limited, explain why including details of specific limitations or burdens.
- (b) Where 7-Eleven considers that eCommerce initiatives could proceed, explain the form they would likely take and provide reasons why.

Please provide a response in relation to at least each of the eCommerce initiatives described in 7-Eleven's notification, not just Pay & Go.

7-Eleven considers that each of the eCommerce initiatives described in the Notification could not proceed if it were unable to engage in the Notified Conduct, including Pay & Go, Digital Screen food ordering, 'Micro Market' stores, the proprietary eCommerce platform, third-party marketplaces (other than those not affected by the functional limitation described in the response to question 1, [Confidential]), and any future eCommerce platforms affected by the functional limitation described in the response to question 1.

In each case, the specific limitation preventing 7-Eleven from proceeding with the eCommerce platform is that 7-Eleven's core ERP system cannot integrate with the eCommerce platform in a way that would allow store operators to manually override the price set by 7-Eleven for that product. This is because 7-Eleven's core ERP system cannot accommodate more than two different price points per product in each state (for example, one for regional stores and one for CBD stores).

We note that section 5.2 of the Notification contemplates some of 7-Eleven's eCommerce initiatives may not be affected by any perceived technological limitation. By way of clarification, this paragraph noted that 7-Eleven could technically allow for store operators to discount if, every time a store operator wanted to process a transaction at a discounted price, this was communicated to 7-Eleven,

which would then alter the price set of the product on the core ERP system (before changing it back to the original price after that store operator had processed the transaction). While the price on the ERP system is set at the reduced price requested by the store operator who wishes to discount, no other store operators can also request that 7-Eleven reduce the price of that product. In addition, 7-Eleven's ERP system may take up to 14 days to implement each change to the price of a product. This potential workaround is clearly not feasible given the substantial administrative burdens on 7-Eleven would outweigh any benefit of implementing the eCommerce platform.

4 Regarding the discounting figure provided at section 11.1 of the Notification about the approximate percentage of all sales by 7-Eleven's store operators that are of products priced below the maximum recommended resale price set by 7-Eleven, please provide the following information:

- (a) The methodology used to calculate this figure, or, if simpler, the underlying data.
- (b) A frequency distribution table for the number of (1) corporate-owned and (2) franchised stores by discounting levels, or data presented in another way that would enable the ACCC to understand patterns in behaviour in respect of pricing. For example, does the figure indicate a small number of stores discounting frequently or is the incidence of discounting relatively consistent across stores. Please provide this information for each six-month period from 1 January 2020 to 31 December 2021.
- (a) The discounting figure provided was obtained by dividing the quantity of transactions involving a price override by a store operator **[Confidential]** by the total quantity of transactions **[Confidential]**. This led to an approximate discounting rate of **[Confidential]**.
- (b) The reporting system that 7-Eleven used to extract the discounting figure provided in the Notification and described in (a) above has been disabled. 7-Eleven can no longer provide the discounting figure by number of sales; instead, it can only provide data on the proportion of transactions by *value of sales* that were subject to a price override for both franchised stores and corporate owned stores in the 2020 and 2021 calendar years.

The data by month for 2020 (separated into totals for franchised vs corporate owned stores) is annexed at **Confidential Annexure A**.

The data by month for 2021 (separated into totals for franchised vs corporate owned stores) is annexed at **Confidential Annexure B**.

The relevant figures for each six-month period from 1 January 2020 to 31 December 2021 (separated into totals for franchised vs corporate owned stores) are set out in **Confidential Table 4.1** below.

The data by month for 2020 for each individual store is annexed at **Confidential Annexure C**.

The data by month for 2021 for each individual store is annexed at **Confidential Annexure D**.

The minimum and maximum annual discounting rates among franchised and corporate stores are set out in **Confidential Table 4.2** below.

Confidential Table 4.1 – Discount rate (by value of sales) for 1 January 2020 to 31 December 2021

		Franchised	Corporate owned	Total
1 January to 30 June 2020	Total sales	[Confidential]	[Confidential]	[Confidential]
	Total price override			
	Total discount rate			
1 July to 31 December 2020	Total sales			
	Total price override			
	Total discount rate			
1 January to 30 June 2021	Total sales			
	Total price override			
	Total discount rate			
1 July to 31 December 2021	Total sales			
	Total price override			
	Total discount rate			

Confidential Table 4.2 – Maximum and minimum annual discount rate (by value of sales) among corporate and franchised stores

		Min annual discount rate ¹	Max annual discount rate ²
2020	Franchised	[Confidential]	
	Corporate		
2021	Franchised		
	Corporate		

- 5** The last paragraph of section 11.2 of the notification states that 7-Eleven may need to specify a minimum retail price to store operators for products sold through a third-party’s marketplace app to cover commissions and other miscellaneous charges charged by the third party. Please explain why such commissions could not be recovered in another way. For example, directly passing on the cost to the store operator or stipulating the mark up (as a percentage or figure) the store operator must apply to the product rather than a minimum price.

7-Eleven considers that passing on the costs of third-party marketplace commissions and charges to store operators would directly impact their revenue and profit figures. Store operators could not recoup the costs by increasing prices to customers because 7-Eleven specifies a maximum recommended resale price of products. The adverse impact on revenue and profit would be more significant for store operators who generate more sales through third-party marketplaces, creating an incentive to reduce sales from eCommerce platforms which is contrary to the rationale of 7-Eleven’s digital strategy.

7-Eleven interprets the second alternative posed by the ACCC as 7-Eleven stipulating a mark-up that store operators must apply to products sold in-store, because it is impossible (as explained above) for store operators to set, by way of manual override, a different price to that which is set by 7-Eleven for products sold through eCommerce platforms the subject of the Notification.

7-Eleven considers that stipulating a mark-up that store operators must apply is worse for customers, who would then face higher prices across the board (i.e., regardless of whether they purchase products in-store or via an eCommerce platform) and who would not have the ability to purchase certain products in-store at a discounted price. In addition, preventing store operators from discounting the product sold in-store would adversely impact their profit and revenue figures, because they would be unable to sell certain stock (e.g., products with a limited shelf-life or that have been discontinued). This would become “bad merchandise”, the cost of which they are required to bear under the 7-Eleven franchise agreement.

- 6** Section 11.3 of the notification states that eCommerce transactions are a small proportion of 7-Eleven sales. As noted above, the ACCC is also considering the impact the Notified Conduct may have on store operators’ pricing decisions for products sold through channels other than

¹ Excluding stores for which there was not data for every month in 2020.

² Excluding stores for which there was not data for every month in 2020.

eCommerce platforms (for example, physical checkout in-store). The ACCC notes that there may be a significant staffing and administrative burden in offering products for sale through physical checkout in store at a price that is different to that stipulated by 7-Eleven for eCommerce transactions – for example, it may be necessary to display two prices for the product in store, one for physical check out sales and another for eCommerce sales. Please provide 7-Eleven’s view about the likely impact of the Notified Conduct on prices set for products sold via physical checkout in store.

7-Eleven considers there will be no impact of the Notified Conduct on prices set for products sold via physical checkout in store.

Discounting products

If the ACCC authorised the Notified Conduct, store operators will still be able to discount products sold via physical checkout in store. Store operators are currently primarily incentivised to discount products in the following two circumstances:

- (a) when a product is nearing its expiration date; or
- (b) when a product is discontinued.

These incentives will not change.

As an example, when a store operator discounts stock which is yet to be sold but close to its expiration date, the store operator offers the discount by manually changing the displayed price of the product (e.g., by placing a new price sticker on the product or placing the product in a specific section or basket with clear signage indicating that it is discounted). The purpose of the discount is to encourage customers to purchase the product so that it does not become “bad merchandise”, the cost of which store operators are required to bear under the 7-Eleven franchise agreement. Each time a customer purchases the discounted product, the store operator manually overrides the price at the physical checkout.

The Notified Conduct does not prevent customers from purchasing discounted stock in store via the physical checkout and does not affect the ability or incentive of store operators to offer such discounts. The only alteration that the Notified Conduct will bring about is that, when labelling products as discounted, store operators will have to make clear that the discount is only available when the

customer purchases the product via the physical checkout (and not when the customer purchases the product via an eCommerce platform).

This is not a meaningful increase in the administrative burden on store operators offering an in-store discount. Accordingly, 7-Eleven considers there will be no change to the tendency of store operators to offer in-store discounts if it engages in the Notified Conduct.

Promotions

7-Eleven engaging in the Notified Conduct will also not affect the setting of promotions by 7-Eleven. Promotions are customer offers such as special price point, multi-buys or unique loyalty offers and are distinct from the setting of discounts by store operators as described above.

Unlike other convenience retail franchise networks in which individual store operators determine the promotions available in store, the decision to offer a promotion for a product in a 7-Eleven branded store is made by 7-Eleven at the national level. Promotions are then advertised to customers and implemented in-store at a national, state or cluster level. Offering promotions is an important way for 7-Eleven to offer value to its customers and is central to its business model. Accordingly, 7-Eleven intends to only implement eCommerce platforms which will be able to accommodate promotional initiatives set by 7-Eleven at the national level.

If 7-Eleven were to engage in the Notified Conduct, it would continue offering such promotions for products available for sale in store and would also have the ability to offer even more value for customers by offering promotions on products purchased via an eCommerce platform.

- 7 Regarding section 11.4 of the Notification, explain the types of solutions to technological limitations or administrative burdens that 7-Eleven may be able to develop to avoid the need to engage in the Notified Conduct. Please also explain any incentive for 7-Eleven to develop and implement such solutions if 7-Eleven is able to engage in the Notified Conduct.**

The need to engage in the Notified Conduct arises from technological limitations in 7-Eleven's core ERP system, which cannot accommodate more than two price points per product in each state.

This limitation would prevent store operators from manually overriding the price set by 7-Eleven for a product sold through a certain eCommerce platform.

Accordingly, the only solution that 7-Eleven may be able to develop to avoid the need to engage in the Notified Conduct is a full replacement of its core ERP system. **[Confidential]**

- 8 Provide any key 7-Eleven Board documents or other internal documents over the period 1 January 2019 to 31 December 2021 considering:**

- (a) **The Notified Conduct.**
- (b) **Implementing 7-Eleven's digital strategy or eCommerce initiatives without the Notified Conduct.**
- (c) **Store-level discounting.**

We have not identified any key 7-Eleven Board documents considering these matters in the time available to respond to this notice. We are continuing to review other internal documents to identify if

there is any material (in addition to the documents already provided to the Commission) that would assist the Commission in assessing the Notification.

Claim for confidentiality

The information in this letter labelled **[Confidential]** and in red text and the Annexures are confidential to 7-Eleven and/or 7-Eleven's franchisees.

If the confidential information were to become publicly available, 7-Eleven and 7-Eleven's franchisees would likely suffer commercial detriment and, in relation to some of the information, be exposed to proceedings for breach of their contractual and equitable obligations of confidentiality.

7-Eleven requests, pursuant to section 89(5) of the Act, that the confidential information described above be excluded from the Commission's public register.

Further, 7-Eleven considers that the confidential information described above relates to the Commission's core statutory function of administering and enforcing the Act.

Accordingly, 7-Eleven considers that the information comprises "*protected information*" as defined by section 155AAA(21)(a) of the Act.

Please contact us if the ACCC would like any further information.

Thank you for your assistance.

Yours sincerely



Simon Cooke | Partner
King & Wood Mallesons

Level 27, 447 Collins Street
Melbourne VIC 3000

T 

M 

E 