

**Pre-Legislative Scrutiny – Public Health (Tobacco Products and Nicotine Inhaling Products) Bill 2019**  
**Submission to the Joint Oireachtas Committee on Health on behalf of Tobaccoland Ltd.**  
*27 November 2019*

## **Introduction**

This submission is made on behalf of Tobaccoland Ltd. (“**Tobaccoland**”) in order to highlight its serious concerns and strong opposition to certain provisions included in the proposed Public Health (Tobacco Products and Nicotine Inhaling Products) Bill 2019. If implemented, those provisions would severely damage, or result in the shutdown of, a number of Irish small and medium family-run businesses, including Tobaccoland, which operate tobacco vending machine businesses in licensed premises and registered clubs throughout Ireland. Tobaccoland is strongly opposed to the provisions of the proposed Bill set out below, which would amount to a totally disproportionate interference with its rights and those of similar businesses.

Tobaccoland requests the opportunity to appear before the Committee to present, in person, the views set out in this submission, and to recommend a proportionate alternative solution of restricting the hours of operation of tobacco vending machines, as detailed below, which we believe would address concerns around children potentially accessing products from tobacco vending machines, while also ensuring the continued survival of businesses such as Tobaccoland.

## **About Tobaccoland**

Tobaccoland is a family-owned business which is headquartered in Limerick. We own and service tobacco vending machines throughout the country. We have approximately 2,300 tobacco vending machines located in licensed premises, including licensed public houses and registered clubs. Tobaccoland has been in business for over 30 years and directly employs 42 people.

We have invested heavily in our machines and in our business, with over €1.5 million invested in the last 2 years alone. This has included investment to ensure compliance with the recently introduced tobacco Track & Trace regulations.<sup>1</sup> Tobaccoland led the tobacco vending machine industry in developing and adopting the token-based vending control system in all machines, to ensure that cigarettes are only available to adults.<sup>2</sup>

## **Overview of submission**

In this submission:

- We set out the specific provisions of the proposed Bill that we wish to highlight and are strongly opposed to, together with the reasons for those concerns and opposition.

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<sup>1</sup> European Commission, Systems for tobacco traceability and security features  
[https://ec.europa.eu/health/tobacco/tracking\\_tracing\\_system\\_en](https://ec.europa.eu/health/tobacco/tracking_tracing_system_en)

<sup>2</sup> As detailed below, Behaviour and Attitudes research (2015) indicates a compliance level of over 96% with current regulations in relation to sales from vending machines, including the prohibition of sales to persons under 18 years of age. A copy of this research report is included with this submission.

- We describe the current robust token-based control system, which Tobaccoland was instrumental in developing and implementing, which has been effective at ensuring that children cannot purchase cigarettes from vending machines located in licensed public houses and registered clubs.
- We question the adequacy and validity of the Regulatory Impact Analysis provided to the Committee along with the General Scheme of the Bill.
- We highlight the already high compliance rates of tobacco vending machine operators with current regulations, the current prohibition on consumer facing branding and advertising, and plain packaging requirements in respect of products sold from vending machines.
- We set out why we believe the introduction of a costly new retail registration system is not required, as registration systems already exist, and the focus should be on the enforcement of existing regulations.
- Finally, we recommend, as a proportionate alternative measure, the introduction of a restriction on the hours of operation of tobacco vending machines to between 9 p.m. and 6 a.m. (and 10 p.m. and 6 a.m. between May and September), which would mean that tobacco products could only be purchased from self-service tobacco vending machines at times when children are not permitted to be on licenced premises.

## **1. Specific provisions of the proposed Bill considered in this submission**

The specific provisions of the proposed Bill that we wish to highlight, and are strongly opposed to, are:

- Head 35(b) – which proposes to repeal Section 43(2) of the Public Health (Tobacco) Act 2002. The effect of this would be to prohibit the sale of tobacco products by means of self-service vending machines in licenced premises or registered clubs.
- Part 2 – which proposes to introduce a new licencing system for the retail sale of tobacco products.

For the reasons set out in this submission, we believe that these provisions would amount to a disproportionate interference with our rights, and that there are proportionate alternative measures (such as restricting the hours of operation of tobacco vending machines, as proposed in this submission) that would achieve the same policy objective.

## **2. Token-based control system for cigarette sales through vending machines**

Self-service tobacco vending machines are regulated by Section 43 of the Public Health (Tobacco) Act 2002 and the Public Health (Tobacco) (Self Service Vending Machines) Regulations 2009. Self-service vending machines are currently restricted to licensed premises and registered clubs, and must be operated with either a disc token or card obtained from a member of staff, or by a device controlled by a member of staff. Tobaccoland's vending machines are token operated. It is not possible to obtain tobacco from a self-serve vending

machine using coin or cash tender, which sets the current level of control and protection in respect of self-serve vending machines in Ireland apart from that in many other countries. Tobaccoland was instrumental in developing and implementing this token-based control system.

A person wishing to purchase cigarettes from a self-service vending machine must first approach a member of staff in the licensed premises or registered club and obtain a token or card from that member of staff, who is required to satisfy themselves that the person is 18 years or older. By virtue of the fact that machines must be in direct line of sight of a member of staff at all times, a further control exists to ensure that tokens purchased by an adult are not handed to a person under 18 years to obtain cigarettes from a vending machine.

**Summary:** A robust token-based system was developed and is currently in place in respect of vending machines, meaning that coins or cash cannot be directly used without a token to activate the machine, and thereby restricting access to adults, with age verification taking place by an appropriate staff member of the premises, before a person can purchase cigarettes from a vending machine.

### 3. Regulatory Impact Analysis

The Regulatory Impact Analysis (RIA) which accompanies the General Scheme of the Bill states, on page 39, that “*the proposal to ban self-service vending machines is for the protection of children and to contribute to the de-normalisation of tobacco use.*”

Tobaccoland believes that the measures in the proposed Bill are unnecessary, and a disproportionate means, to achieve that policy objective, and believe that alternative, proportionate, measures, such as those proposed in this submission, would achieve the same objective.

Tobaccoland believes that the development of an effective, balanced regulatory environment should, at a minimum, follow an intelligible process based on coherent policy objectives, effective regulation, enforcement and robust analysis. These are the objectives of Better Regulation, which is a recognised goal of good government, and is aimed at ensuring that regulatory legislation is fit for purpose. The aim of Better Regulation is to create regulation that is (1) necessary, (2) proportionate, (3) effective, (4) accountable, (5) consistent, and (6) transparent.<sup>3</sup> For the reasons set out in this submission, Tobaccoland believes that the proposed Bill does not meet these objectives.

The RIA presents impact analysis matrices which summarise the costs, benefits and impacts of various policy options, including a “do nothing” policy option. The costs and benefits are assessed by reference to the costs and benefits to the Exchequer. The impacts are assessed by reference to the impacts on public health.

Tobaccoland believes that the impact analysis presented at page 36 onwards of the RIA is seriously flawed for the following reasons:

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<sup>3</sup> See “Better Regulation”, Department of Business, Enterprise and Innovation (<https://dbei.gov.ie/en/What-We-Do/Business-Sectoral-Initiatives/Reducing-Administrative-Burdens/Better-Regulation/>); also, 2004 White Paper, “Regulating Better” (<https://assets.gov.ie/3477/281118144439-cf60aac3e3504e6f9f62f0ccda38f203.pdf>)

1. In assessing the “do nothing” policy option, the RIA fails to address the costs, benefits and impacts of better and more rigorous enforcement of existing legislation. Page 40 of the RIA sets out the extent of compliance test purchases of both vending machines and retail outlets by the Environmental Health Service. The HSE website reveals that, so far in 2019, there have been 17 convictions under the Public Health (Tobacco) Acts relating to licensed premises and hotels.<sup>4</sup> Comparing the number of convictions to the number of unsatisfactory test purchases in the RIA data (although Tobaccoland believes that data is seriously flawed) or the data in the independent audit referred to below, suggests there is significant scope for better enforcement of existing legislation. Tobaccoland believes that the option of additional legislation should only be considered where existing legislation is failing to meet its policy objectives with proper enforcement, and where there has been robust and thorough analysis of on its effectiveness.
2. The RIA fails entirely to consider the impact of loss of jobs (including loss of tax revenues and social insurance contributions on foot job losses), damage to economic activity (including loss of excise and VAT on cigarette sales), and damage to the viability of family-run businesses such as Tobaccoland and an Irish SME sector. These are real impacts that would directly affect the Exchequer, as well as the family owned and run businesses in the tobacco vending machine sector, which have not been considered in the RIA.

#### **4. Protection of Children**

The RIA includes data drawn from the Enforcement Test Programme of the Environmental Health Service for the period 2014 to 2018. In an enforcement test purchase, a minor is asked to purchase cigarettes on behalf of the Environmental Health Service in order to test whether he or she will be prevented from doing so, in accordance with the law. On the basis of the test purchase data included in the RIA, the RIA concludes that *“over the last 5 years the proportion of successful purchases from self-service vending machines has consistently been much higher than the proportion of successful purchases over the counter.”*

Tobaccoland believes the data from the Environmental Health Service’s enforcement test purchase programme from 2014 to 2018 referred to, and the analysis of that data, in the RIA is seriously flawed.

The following table uses the figures from page 40 of the RIA, although Tobaccoland believes that data is flawed. The table shows the percentage of tobacco vending machines that were the subject of a test purchases in each relevant year by the Environmental Health Service, as well as the percentage of vending machines that resulted in an unsatisfactory result.

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<sup>4</sup> <https://www.hse.ie/eng/about/who/tobaccocontrol/enforcement/tobacco-convictions-2019.pdf>

Year	No. of Environmental Health Service test purchases	Satisfactory result	Unsatisfactory result	Total number of vending machines (approx.)	% of tobacco vending machines tested	% of tobacco vending machines with unsatisfactory result
2014	64	37	27	8000	0.80%	0.34%
2015	24	17	7	8000	0.30%	0.09%
2016	48	34	14	8000	0.60%	0.18%
2017	92	75	17	8000	1.15%	0.21%
2018	162	113	49	8000	2.03%	0.61%

Tobaccoland believes the data referred to, and the analysis of that data, in the RIA is seriously flawed for the following reasons:

1. There is considerable variability in the data and the numbers of test purchases are very small, resulting in data that is not representative.
2. Based on the proportion of vending machines to retail outlets in the country, approximately 38% of the total test purchases should have been in respect of vending machines. Further, a larger sample size is required to ensure accurate data.
3. There is no clear indication of whether the data is nationally representative, why particular outlets were targeted, or whether the testing was random or targeted as a result of information received by the Environmental Health Service. The profile of the test purchases is not given.

Tobaccoland has made available to the Committee an independently conducted audit of tobacco vending machines in Ireland by Behaviours & Attitudes, which evidences a very high level of compliance – of over 96% – with existing regulations.<sup>5</sup> This audit tested 1,525 locations with a self-service tobacco vending machine and reported just 53 instances (approximately 3.4%) where a purchase from a vending machine may potentially contravene existing regulations. The audit confirmed a very high level of compliance with existing control measures, confirming that, in the vast majority of cases, a token was required to be purchased from staff, or the machine was located behind the bar, or (in a small number of instances) staff were required to operate the machine. We believe the Behaviour & Attitudes audit is a more robust analysis of self-serve vending machines in Ireland than the data included in the RIA, and that the Behaviour & Attitudes audit more accurately represents compliance levels with current regulations.

It is also important to note that self-service tobacco vending machines are only permitted in licensed premises and registered clubs, which are themselves subject to control measures and enforcement under the liquor licensing laws. Those control measures include a prohibition on children under 15 being on a licensed premises after 9 p.m. (or 10 p.m. between the months of May and September) and restrictions on persons aged 15 to 17 being on licensed premises

<sup>5</sup> Independent Audit of Vending Machines in Ireland, Behaviour & Attitudes (December 2015).

after those time without being accompanied by a parent or guardian, or for the purposes of a private function at which a substantial meal is served to persons attending the function.<sup>6</sup>

Tobaccoland believes that existing control measures are effective at ensuring that cigarettes are not potentially accessible to children through self-service vending machines, and that any evidence of non-compliance does not justify the introduction of the disproportionate measures in the proposed Bill.

Tobaccoland believes that a proportionate alternative measure, which would achieve the same policy objective as the measures in the proposed Bill, would be the introduction of a restriction on the hours of operation of tobacco vending machines to between 9 p.m. and 6 a.m. (and 10 p.m. and 6 a.m. between May and September). This would mean that it would only be possible to purchase tobacco products from tobacco vending machines at times when children are not permitted to be on the licences premises. This would be achieved by fitting every tobacco vending machine with an internal timer (which would only be accessible by the vending machine owner), which would switch on and off at the relevant times.

**Summary:** There are very high compliance rate (over 96%) with existing tobacco vending machine control measures, as evidenced by the independent audit which Tobaccoland has made available to the Committee. Tobaccoland believes the data referred to, and the analysis of that data, in the RIA is seriously flawed.

## 5. Advertising

Page 41 of the RIA states that the prohibition of self-service vending machines is “*also proposed in order to meet Ireland’s obligation under Article 13 of the FCTC which requires each Party to the treaty to undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship.*” The RIA quotes Article 13, that the very presence of vending machines constitutes advertising. However, it is important to note that it is prohibited for tobacco vending machines to carry any consumer-facing cigarette branding or advertising.

The advertising of tobacco products to consumers is prohibited in Ireland. Also, with effect from September 2018, cigarettes can only be sold in prescribed plain packaging, with no branding whatsoever. Further, the locations of tobacco vending machines within licensed premises and registered clubs are specifically selected to ensure compliance with relevant regulatory controls (e.g. line of sight of a member of staff at all times) – not to advertise the availability of tobacco products.

**Summary:** Tobacco vending machines are prohibited from carrying consumer facing cigarette branding or advertising, and tobacco products sold from vending machines are required to be in plain packaging. The location of tobacco vending machines is to ensure compliance with current regulatory controls, not to advertise the availability of tobacco products.

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<sup>6</sup> Section 34 of the Intoxicating Liquor Act 1988 (as amended)

## 6. Retail Licensing System

Part 2 of the General Scheme of the Bill proposes to introduce a new licensing system in respect of the retail sale of tobacco (and nicotine inhaling) products, to replace the existing register of tobacco retailers.

Head 8 will require any person engaged in the retail sale of tobacco (or nicotine inhaling) products from a premises to hold a valid license for the sale of those products from the specific premises.

Tobaccoland believes that it is unnecessary, given existing registration requirements, for a burdensome, costly and unnecessary new licensing scheme to be introduced, and believes that the current register of tobacco retailers should be maintained and enforced.

It is important to note that, in addition to the current register of tobacco retailers, the tobacco Track & Trace regulations introduced in May 2019 also require all economic operators involved in the sale or movement of tobacco products (including Tobaccoland and other tobacco vending machine owners) to register, and be issued with economic operator, facility, ID codes, through the relevant ID issuer. These ID codes can be deactivated in duly justified cases.

**Summary:** The existing register for tobacco retailers should be maintained and enforced instead of creating a burdensome, costly and unnecessary new licensing system. Furthermore, the recently introduced tobacco Track & Trace requirements also require all retailers (and owners of tobacco vending machines) to be registered and to be issued with relevant ID codes.

### Recommendations:

1. Tobaccoland believes that the proposed ban on self-service tobacco vending machines is disproportionate and unnecessary, and should be removed from the proposed Bill. A robust token system already exists to ensure that age verification takes place.
2. A proportionate alternative measure that would achieve the same policy objective, and would address concerns in relation to children accessing tobacco products from tobacco vending machines, would be the introduction of a restriction on the hours of operation of tobacco vending machines to between 9 p.m. and 6 a.m. (and 10 p.m. and 6 a.m. between May September). This would mean that machines are only switched at times when children are not permitted on licenced premises.
3. The existing register of tobacco retailers should be maintained and enforced instead of creating a burdensome, costly and unnecessary new licensing system, particularly in circumstances where, in addition the current register of tobacco retailers, all retailers and owners of tobacco vending machines must also be registered, and be issued with ID codes, under the recently introduced tobacco Track & Trace regulations.

Tobaccoland requests the opportunity to appear before the Joint Committee on Health to make submissions in person and to address any questions or concerns from Committee members.

**James Walsh**  
**Director**  
**Tobaccoland Ltd.**