

Written Submission

By

CSNA (Convenience Stores and Newsagents Association) to the Joint Oireachtas Committee on
Health

Regarding the

Pre-Legislative Scrutiny of the Public Health (Tobacco Products and Nicotine Inhaling Products) Bill
2019

At the outset of this submission, and to prevent any misunderstanding of the position that CSNA holds with respect to public health in general and to tobacco specifically, we wish to reiterate that CSNA is committed to assisting the Minister in the control and reduction of tobacco harm, and to the protection of public health.

We represent retailers that sell, amongst many other products, tobacco. It is our duty, as representatives, to bring forward the salient and important facts and points of view that will allow you, the Health Committee, to make recommendations on this Heads of Bill, recommendations that will, we hope, strengthen the proposed legislation.

We do not intend to waste the time of the Committee arguing against the introduction of the licencing system. What we ask the Committee to focus upon is ensuring that

1. Any licencing system providing for fees should reflect the cost of the service provided,
2. The service must be rendered to, or at the request of, the party paying the fees and
3. The change must be proportionate to the cost of the service rendered.

Any licence fees set should be based upon recovering only of those costs associated with

- The actual administration of the licencing regime
- The enforcement of the licences – this may include inspections
- The provision of licencing – related information directed to retail customers
- The provision of information to applicants and licensees to ensure their continued and future compliance.

CSNA cannot accept that the Minister should be permitted to set either a licence fee, or an administration fee without there being a proper methodology established to protect licensees from fees that we would consider to be a sales tax, designed to enrich the Exchequer rather than a fee designed to provide a service.

The Department of Health recently provided for a similar scheme for accepting notifications from sunbed operators and in Section 13.6 of the Sunbeds Act provided for “ such fee in respect of each premises referred to in subsection (5)(b) as may be prescribed from time to time for the purpose of establishment and maintenance of the Sunbed Business Notification List and to contribute to the expenses of carrying out of investigations under and the enforcement of this Act”.

The Statutory Instruments 52/2015 provided for a fee of €120 and was commenced in February 2015 by the Minister Leo Varadker TD.

As both the Department and Minister of Health are aware, the existing regime whereby retailers have registered with the HSE Tobacco Control Office has not led to any reports of non-compliance on a scale that would give cause for concern; on the contrary, in Dáil Debates, Committee hearings, Public Consultations and Official Reports, the evidence from Ministers, officials and commentators is that there is a very high degree of compliance, particularly amongst retailers with respect of the many tobacco control laws that the EHO’s monitor and, on rare occasion, prosecute. Compliance rates that are consistently in the 90% region must be acknowledged and, whilst not rewarded by the Department or legislature, at least not penalised unduly. We reject entirely any attempt by the Department to place a punishment tax on retailers providing a legitimate product to adults as prescribed and provided for in law.

Compliance and Enforcement

It is worthwhile to reflect upon the very significant levels of compliance that are currently achieved by registered retailers throughout the State. Various offences are created in the significant range of tobacco control legislation, indeed the categorising of them in connection with the Fixed Penalty Notice displays about 70% of potential offences but for CSNA members, the most important offence by far is the sale of tobacco to a minor (Section 45 of the 2002 Act). While there have been a small number of transgression of registration, signage or display, every retailer that we represent pays particular attention to their obligations to prevent youth access to tobacco products. We believe that the official statistics, provided by the EHS prove this to be the case. There are over 13,000 registered retailers. There were 61 convictions in the 6 year period 2014-2019 according to the EHS. There were no prosecutions in the following counties, Wicklow, Carlow, Galway, Mayo, Sligo, Leitrim, Waterford or Kerry. The full list is as follows

Louth	8
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Cavan	8
Cork	7
Dublin	6
Westmeath	6
Donegal	4
Meath	4
Monaghan	4
Laois	3
Offaly	2
Wexford	2
Longford	1
Clare	1
Tipperary	1
Roscommon	1
Kildare	1
Kilkenny	1
Limerick	1
Total	61

The average fine imposed by the District Court for those 61 convictions was €521, a total of €31,774 and a further €62,005 was imposed on those convicted to defray prosecution costs an average of €1,050 per conviction. The efficacy of the prosecution system, which is generally the course of last resort by the EHS can be attested to by the lack of “repeat offenders”; only one retailer, convicted previously for the offence of selling to a minor was returned to Court on a similar charge in the 6 years that EHS has published records of convictions.

This would most certainly point legislators in the directions of accepting the proposition that, while we all need to have the highest levels of vigilance to prevent youth access, it is not the current system of detection and prosecution that is at fault, the current system has a very real deterrent factor and does not require additional or more severe penalties to secure compliance.

As a Committee delegated to provide Pre-Legislative scrutiny of the Heads of the Bill, CSNA asks you to consider the following.

Revenue collects license fees from many different commercial sources for alcohol, bookmaking, fuel, gaming and amusement. Revenue manages to process tens of thousands of licences annually and is ideally positioned to act on behalf of the State in the matter of tobacco/NIP licences. There is already a central clearing house (National Excise License Office) in Waterford specially designed for the specific task of issuing licenses. CSNA is in no way impressed with the suggestion in the proposed legislation that the HSE should be in charge of the licensing process. We cannot accept that the (so far entirely un-costed) process would provide taxpayers (and licence holders) value for money.

We urge the Committee to recommend that NGLO/Revenue to be appointed to collect and administer the licence fee.

The Committee wishes to read observations on specific Heads, but we would suggest that it also needs to inform itself of some of the effects that the proposed legislation may have. Retailers of tobacco products are in the unique position by virtue of the Finance Act 1995 that they will commit a criminal offence if they sell any packet of cigarettes at a rate higher than the recommended retail price. The effect of this is that whatever fee may be applied by the Minister/Oireachtas to the licencing of outlets, retailers will be prevented by law from increasing the price of the products that are creating the additional cost! That the State provides protection against a price increase for a known carcinogenic product is remarkable. What will happen is that the cost of the licence fee will be offset against other products, including food and household necessities.

The CSNA requests that retailers be permitted to sell above (but not below) the tobacco companies RRP and so asks the Committee to recommend.

We note the suggestion within the Heads that there would be one licence for sellers of tobacco products and NIP and a different one for sellers of NIP alone.

We would be very concerned that the pricing structure being devised by the Department to cover this criteria would be different or greater for one category than the other, given that the administrative process, the visitations, the checking for compliance for each of the tobacco products and NIP would not, in themselves, suggest a need for differential or additional costs. To travel to a store, regardless of whether it has a range of 50 or 200 individual products, or one or four displays, checking whether there is a “dual licence” or a “single licence” and ensuring that the sale is made in accordance with the laws would not suggest that there should be a varied fee structure.

If the Committee is inclined to accept the proposition that licence fees be set at different levels depending upon what products are sold, why would they not consider that the quantity of sales made, or the turnover of the business are legitimate categories for differential licence fees?

We must return to our central point, licences cannot be, nor should they be, taxes. They must be a payment for a service, the administration of that service, the monitoring and compliance of that service and any necessary communication around that service. It cannot be a profit centre for the Exchequer.

CSNA requests that the Committee agrees that there shall not be a different fee structure for different licences.

The majority of observations from CSNA relate to the licencing proposals, both for tobacco products and NIP, but we would also like to bring the attention of the Committee to other aspects of the Heads that are a concern to us.

In **Head 3**, reference is made to the Bill applying to online sales which would initiate a licencing of any company wishing to engage in online trading but given that tobacco cannot be sold online, this would only relate to NIP sales. The main problem with this is that the majority of online sales, both from EU and non-EU countries of NIP is not required to make excise declarations and many of the requirements of the TPD (Tobacco Products Directive) are ignored by online retailers and their customers. How is compliance and/or licencing going to be achieved for both EU and non-EU economic operators?

Head 7 – Transitional Provision

The provision of a restriction on the age that an employee must be before they are legally permitted to sell tobacco products or NIP must provide for a period of transition for existing (at the time of the Bills passing) staff that are under the age of 18 to achieve that age and therefore not to lose their existing job.

CSNA requests that the Committee to recommend that the Bill will contain a provision to permit the continued employment of existing staff under the age of 18 until they reach that age.

Head 9

In (14) the annual licence fee “of such amounts to be prescribed from time to time for the grant or renewal of each licence for each individual premises” is to be (subject to the permission of the Minister of Public Expenditure and Reform) disposed of in a manner determined by the Executive “- that is the Health Service Executive”.

That a licencing system for tobacco retailers should provide funding to the HSE without the purpose or direction of that funding being earmarked or ring fenced for compliance related matters is a great concern to us.

As mentioned previously, the notification fee for sunbed operators is set at a level to cover all administrative and compliance measures, it is **not** set at a level to provide an income or surplus to a manifestly wasteful entity.

In **Head 9, subhead (15)**, the non-refundable administration fee for the processing of applications needs to be removed and the cost of any administration be incorporated into the licence fee in the interests of efficiency. There is no indication what such an administration fee would be set at, how it would be set or even if it is reasonable to seek a separate payment for a process that will, at the same time, require a payment, incurring a duplication of costs and banking charges for both applicant and the State.

We ask that the Committee recommends the deletion of this subhead.

Head 11 – Granting, refusal or renewal of a licence

In (2) if an applicant or licensee obtains a licence to retail tobacco/NIP and has provided the Executive with a full history of any conviction that they may have had and subsequent to that information being provided and the Executive grants the applicant a license, CSNA is suggesting that provided that there is no additional conviction in the period prior to the next renewal, that licence holder shall be permitted to have their licence renewed.

Our concern would be that a different official in the Executive may take a different view of the licence holders' previous convictions and refuse to grant the renewal of a licence.

We ask that the Committee make a recommendation preventing such an occurrence.

Some retailers have many outlets. These may have all been registered as a single entity but will now be licenced on an individual basis. It is important that the Executive are able to correctly note convictions for these economic operators to the correct address to which the conviction refers, rather than the head office.

We ask that the Committee make a recommendation preventing such an occurrence.

Head 13 (4)

Where the licensee has notified the Executive under head 14 that they cease to carry on the business of selling tobacco or NIP in the premises specified in the licence from the register of licence.

Consider two scenarios, one the closure of a shop or the other the takeover of a shop. In the first instance, there is no further need to visit the store, carry out monitoring and other compliance duties, so it is reasonable to repay to the (ex) licensee the value of the unexpired term. The second

scenario is there a new owner comes in and needs to register their interest and pays a licence fee for 12 months, a portion of which has already been paid for. This is equitable and fair, not a cost to the State and should be **recommended**.

With this matter, we would be of the belief that the Executive should provide for a pro-rata return of the licence fee, retaining the annual fee less the unexpired term, calculated on a strict monthly basis, and we ask that the Committee so recommends.

Part 3

Head 16

Prohibition on the sale of tobacco products from temporary or moveable premises.

In the consultation process (in January 2015), CSNA were concerned that registered retailers would be unable to continue to provide tobacco products at sporting or music events that they had contracts to provide services to. A number of our members provide shop facilities at racecourses and sportsgrounds. These are bona-fide retailers and should be permitted to continue to provide a full service, including the sale of tobacco products, to their adult customer base, particularly if the proposed ban on vending machines is implemented, causing a very real inconvenience for adult smokers attending a race meeting, a music festival or a sporting occasion. The only people that we believe should be permitted to sell tobacco are retailers, but this measure would significantly discommode their customers.

Head 18

While we welcome the proposed inclusion of certain named family relations into the list of permitted sellers of tobacco products, CSNA would like to make the following observations to the Committee.

This provision will cost tobacco retailers a substantial amount of money in additional payroll annually given the requirement to engage only those of 18 years or more. It will also, regrettably, seal off the long standing tradition of our sector in giving jobs to youngsters from 16 and 17 years of age, all of whom benefitted from the opportunity that work affords, not just in terms of financial reward but also learning the value of work, the importance of co-operation, the nature of the public and how to behave in different surrounds. Retailers will no longer employ minors in their stores.

We cannot give our wholehearted support to a policy that will cause a lot of difficulties in local communities and urge the Committee to consider reversing this prohibition.

Head 19

This would appear, at first sight, to be a straightforward substitution of one defence for another, i.e., the only defence available to the seller will be if they have requested an age card, passport or driving licence, however it imposes a much stricter liability on the licensee regardless of the levels of care that they have taken to prevent the sale.

In the 2002 legislation, “it shall be a defence for the person against whom such proceedings are brought to prove that (a) he or she made all reasonable efforts to satisfy himself or herself that the person to whom the alleged offence relates had at the time of the alleged commission of the offence attained the age of 18 years. We are concerned that although retailers may not be the actual seller, and although they provide a very clear and consistent policy on NOT supplying tobacco products to minors will, they will through the actions of their staff, be unable to mount a defence against a prosecution.

Retailers provided detailed training, demand rigid adherence to company policy on a variety of work-related matters, expect scrupulous honesty and require their employees to carry out their duties in a law-abiding fashion. They provide tills that ‘prompt’ requests for ID and customer verification, they make it a part of the employees contract that they adhere to upholding the company’s’ age verification procedure and yet, after all that, a small number of employees choose, for whatever reasons, to ignore this most basic of duties and sell tobacco to minors. Is it fair or reasonable that the defence that has always been available to a good employer who can demonstrate that they have a culture in the store of tobacco control should now be removed? There is a lot to be said for prosecuting the actual seller, the staff member (or owner if they were the seller), but not the automatic prosecution of the owner of the business. We would very much appreciate if the Committee recommend that the existing defence be retained and that the **Committee will also recommend that the seller always be prosecuted for the offence**; as it stands, the EHS invariably offer to drop the charges against the employee in return for the guilty plea by the owner of the premises.

An additional problem arises from disciplinary actions that the owner of a business in which an employee has sold tobacco to a minor in a test purchase situation. On numerous occasions, despite the contracts of employment and the employee handbook giving “very clear and unambiguous terms that sales of age-restricted products to minors will lead to disciplinary action, up to and including dismissal, the WRC and Labour Courts have overturned such dismissals, awarding costs and ordering restitutions to sacked employees. The matter of sales to minors must be viewed by all arms of the State as a serious matter.

Part 4

Compliance

Head 22

CSNA welcomes the introduction of compliance notices and the opportunity it affords to remedy or rectify an omission or error, without the need to prosecute or impose a Fixed Notice Penalty, as long as the offences complained of are remedied. We do not consider that the offences specified in the subhead (13) should be the subject of fixed notice penalties (FNP) on the initial detection of the offence, given that the offences are primarily technical and administrative, rather than substantial.

We ask that the Committee seek to ensure that offences as set out in this section are only prosecuted or subject to penalties (including FNP) if there has not been an immediate rectification of the offence as noted in the compliance notice. This would allow a chance to 'mend their ways', rather than be penalised for what many would consider to be a minor infraction. The offences referred to are

- Non display of licence
- Not advising Executive of changes of particulars
- Incorrect signage
- Displaying a tobacco product
- Offences regarding packaging, presentation or features of plain packs

Head 23 – Prohibition Orders

These are obviously more serious offences, including not holding a licence, sales by under 18's, continuing to sell while suspended, permitting the sale of a tobacco product in a manner prohibited etc.

CSNA accepts that these offences are rarely committed, and when they are, could not be errors (unlike the offences referred to in the previous section). We understand and accept the need for authorised officer and the Executive to act appropriately in such matters.

Head 24 – Test Purchasing

CSNA has always viewed the prevention of access by minors of all tobacco products as being the most important aspect of our members societal duties.

CSNA has, for more than 15 years, provided our members with advice on preventing sales to minors. Our members have agreed to have their premises test purchased by agencies contracted by CSNA to

detect any staff willing to break the law. We are enthusiastic advocates of 'Show Me ID' and provide, on a micro and macro level a vast array of advice to all members of the association. We are therefore, we believe in a position of expertise with regard to prevention of sales of age-controlled products to minors and would like to make the following observation with regards to 2(b).

The protocols under which the Environmental Health Officers currently operate are not in anyway different from the Head in so far as, with limited resources, they need to operate with efficiency and will therefore draw up a list of registered tobacco retailers to visit based upon risk factors, informed by any requests or observations through the complaints hot-line. Premises in proximity to schools have always attracted the attention of EHO's, and it goes without saying that stores that have previously failed a test purchase (whether the store was prosecuted or not) will always be revisited within a short period of time to test purchase.

We would ask that the guidelines referred to in subhead (2) will be made available on the Department and/or HSE website, in the interest of transparency.

Head 25 – Non Compliance List

"Name and shame" lists are used as an addition to fines and penalties but there needs to be safeguard to prevent unfair practices or outcomes.

It is the responsibility of a retailer to be registered or licenced and to keep the register or licenser apprised of the status of the retailers. If they sell their shop and if they were unfortunate to have had a conviction noted on the 'name and shame' page, it is incumbent on the operator of the pages to remove that shop conviction details from the available records. It would be unjust to maintain details of a conviction for a shop that is under new ownership. We are also concerned that there is no timeframe or extinguishing the details of conviction and suggest that this is unfair.

We ask the Committee to recommend that there is a process to remove all details of conviction from a store that has been sold, and that the name and shame listing has an agreed timeframe for removal.

Head 26 – Fixed Notice Penalties

With regard to subhead 2(5), CSNA believes that the Bill should provide an indication to those deliberating what levels of fines are being considered by the Minister. We note that there are many references to Sun Bed legislative in the explanatory notes and would like to know whether the FNPs associated with offences for sunbeds will be similar in regulations attendant to this Bill.

Conclusion

To conclude, CSNA believes that this Bill will be improved if it adopts the recommendation that we have made in the course of this submission.

We believe we are adopting a balanced approach, seeking from the Committee an understanding and acceptance that retailers, as stakeholders, need to be treated fairly and not be punished for selling a legal product for which there is a demand for from our adult customers.

Although the Bill has not made any reference to proxy purchasing, we must ask the Committee to consider the need (as has been done throughout UK for both tobacco and NIP) to criminalise the purchase of tobacco products/NIP that are than provided to minors. Various health organisations have consistently referred to the need to prevent access of tobacco to minors, we are suggesting that many young people commence tobacco initiation and ultimately addiction through people providing cigarettes to them – Proxy purchasing is an offence in alcohol but not in tobacco.

CSNA would welcome the opportunity to present at any oral hearings into the Heads of Bill that the Committee may convene.

Vincent Jennings

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