

**Public Consultation on Legislation in relation to the sale of tobacco products and non-medical nicotine delivery systems. (NMNDS)**

Response from CSNA (Convenience Stores and Newsagents Association). January 2015.

- CSNA objection to this process –

- 1- The response from CSNA to this Public Consultation should be considered to be a genuine series of reservations about the entire process.
- 2- We do not accept that the process is a realistic attempt by the Department of Health to consider all potential options relating to the sale of tobacco products and NMNDS.
- 3- This is due to given the fact that the very substantial constraints that are put in place by virtue of the policy objectives recommended without consultation by “Tobacco Free Ireland” limit the opportunity to consider solutions that would not require legislative changes.
- 4- In particular, the absence of any requirement given to the authors of “Tobacco Free Ireland”, the Tobacco Policy Review Group (TPRG) in the Terms of Reference<sup>1</sup> that were given to them to conduct a Regulatory Impact Assessment cannot be considered to have been anything other than a deliberate attempt to ignore the principals of Better Regulation<sup>2</sup>.
- 5- The Revised RIA guidelines<sup>3</sup> states that “consideration be given to the potential for the use of alternatives to regulation prior to recommending regulatory solutions”
- 6- Furthermore, the revised RIA guidelines clearly state<sup>3</sup>, “any reports or reviews produced by the group should then indicate how it took account of the Better Regulation principals in conducting its work”.
- 7- “Tobacco Free Ireland” made no reference to these principles (necessity, effectiveness, proportionality, transparency, accountability, and consistency), nor did it produce and include an RIA in its report, contrary to the programme for Government “supporting SME’s Section”.<sup>8</sup>
- 8- As such, CSNA considers that the report which was adopted in full by the Cabinet was fatally flawed.

A. – The Licencing Proposal –

- 1- The lack of any evidence in “Tobacco Free Ireland” that the current Tobacco Retailers Registration System required extinguishment and replacement by a licencing regime is a very real source of concern to CSNA.
- 2- There was no attempt by the TPRG to provide an argument to support their recommendation that retailers of tobacco products should be licenced to sell tobacco, nor was there any evidence to show that the existing system was not working as intended or was the subject off widespread non-compliance.

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<sup>1</sup> Dáil Debate 24<sup>th</sup> November 2011 pa no. 232 (Terms of Reference, T.P.R.G.)

<sup>2</sup> Department of the Taoiseach 2001

<sup>3</sup> Department of the Taoiseach 2009

- 3- On the contrary, the report accepted that compliance levels with registration is “very high” – in fact, according to the OTC reports on registration it is in the order of 99%.
- 4- The only other reference to the tobacco register is the statement “There is however, a financial cost in maintaining the register” (chapter 8, page 46)
- 5- To move from an existing registration system which is working exceptionally well and provides the Environmental Health Offices with a full and comprehensive list of all registered outlets in the country needs to have a much firmer rationale than an uncoded remark about a “cost in maintaining the register”.
- 6- The Consultation document alludes to an “anomaly whereby multiple retailers including supermarket chains make a single payment of €50, regardless of the number of retail outlets they have” (point number 29, page 7)
- 7- This “anomaly” is not in any way unusual nor was it unforeseen. It is a standard feature of registration in a number of jurisdictions across a range of products and services provided by both retailers and other providers of goods. With specific reference to tobacco retailers, it is exactly the same criteria as used (separately) by Scotland<sup>4</sup> and Northern Ireland<sup>5</sup> to identify and register tobacco retailers and was also the preferred mode of identification recommended to the New Zealand government by ASH New Zealand when that country was introducing registration of tobacco retailers.<sup>6</sup>
- 8- It must be said that CSNA does not consider this administrative matter to be sufficient reason to migrate all existing registered tobacco retailers away from the register and into an entirely different legal and legislative entity, a tobacco licencing scheme.
- 9- If there is some merit (which we do not consider there to be) of having each retail outlet individually registered then all that would be required would be an amendment to the relevant Acts (PHTA 2002 – 2009) to provide such.
- 10- The Tobacco register currently has 10,766 retailers registered in 13,223 outlets<sup>7</sup>, i.e. less than 19% of the total number of outlets registered onto the register are registered for more than one outlet. It would be disproportionate and unreasonable to use the fact that a minority of outlets paying €50 for multiple entries should force the extinguishing of the Register which is, as we have noted, working exceptionally well and in the manner for which it was designed.
- 11- In the Consultation Document (point number 30, page 7), the following statements are made

“The primary policy objectives of the licencing system are as follows:

- To replace the existing retail register for tobacco products.
- Further regulate who sells tobacco products and how and where they are sold to reflect the serious nature of these products in the context of protecting the public, particularly children, from the harm of smoking; and
- Restrict availability of and access to tobacco products.”

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<sup>4</sup> New Laws on the sale and purchase of Tobacco, Retailer Regulations Scottish Government, Tobacco Control Team

<sup>5</sup> Tobacco Retailers Act (Northern Ireland) 2014

<sup>6</sup> Ash.org.newzealand “why ASH supports a register”, 2012

<sup>7</sup> National Tobacco Control Office, December 2014

- 12- Point number 31 states “Under the licensing system, all retailers wishing to sell tobacco products must apply for a licence. Licences will apply to premises in fixed locations. A retailer who owns or controls more than one retail premises must obtain separate licences for each premises. A prescribed annual fee for each premises will apply.
- 13- The Consultation Document states that “In Ireland, licences are required for a range of businesses and activities, including the sale of alcohol, gaming, gambling, and bookmaking activities”.
- 14- CSNA would submit that all of these licenses are Revenue Excise licences, operated by Revenue through the centralised NELO.
- 15- It has not been suggested anywhere in the Consultation Document, nor in the “Tobacco Free Ireland” report that it is proposed to introduce a licensing system administered by Revenue.
- 16- Regardless of which administrative arm of the State is involved in a new licensing system, the real affect for retailers will be a combined financial and administrative burden.
- 17- Both government partners, Fine Gael and Labour committed in their Joint Programme for Government to reduce red tape and regulatory burdens<sup>8</sup>. CSNA would submit that the Department of Health / Tobacco Policy Review group proposals to initiate a licensing system is contrary to this principle.
- 18- A sum of €5 million was placed into the income column of the Department of Health estimate for Budget 2014 in October 2013<sup>9</sup>. This figure was to cover “increase in licensing fee for tobacco retailers”.
- 19- CSNA has attempted, on several occasions, and through a number of different channels, since October 2013 to elicit the working figures that accompanied these €5 million “income from retailers” figure. In advance of this Consultation process, we had sought information from the Minister, the Department of Health, the Department of Public Expenditure and Reform, the office of the Taoiseach and through various Parliament Questions and approached by a number of Deputies. We were advised by the Tobacco Policy unit who control this Consultation process that they were not willing to give us any information regarding this €5 million licence fee income as it was, “not relevant” to the Consultation. We have sought this information under Freedom of Information but it has not been provided to the Association in time to introduce arguments or viewpoints in this income source.
- 20- CSNA are most unhappy that there has been no opportunity offered by either of the Ministers for Health to engage with our Association, which represents over 1,200 individual members in 1,500 stores throughout the Republic.
- 21- CSNA does not consider that licensing is an absolute requirement for the sale of tobacco products. We consider that there is an element of “punishment” tax being applied to the introduction (or consideration of the introduction) of a tobacco retailer licence, renewable annually.
- 22- There is a total absence of any discussion, between the Department of Health and the representative of retailers, vendors, publicans, hoteliers, restaurants and nightclub operators.
- 23- A decision has been made that will have a material effect upon these businesses, the vast majority of whom are compliant with all aspects of the various Public Health Tobacco Acts.<sup>10</sup>

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<sup>8</sup> STATEMENT OF COMMON PURPOSE, Programme for Government 2011-2016, Department of Taoiseach, 2011

<sup>9</sup> Department of Health Estimates 2014 p.36 of part 2 (Expenditure Allocations 2014-2016)

<sup>10</sup> See various Annual Reports OTC and HSE for total compliance statistics

- 24- This lack of engagement with stakeholders is contrary to Better Regulation<sup>11</sup>, contrary to Cabinet Guidelines<sup>12</sup> with respect to conducting Regulatory Impact Assessments and will lead to an uncosted expense for Irish businesses.
- 25- This disconnect between tobacco retailers and Department officials is in no way ameliorated through this consultation process as all real options are not “up for discussion”, it is to be blunt, a “box-ticking” exercise.
- 26- Regardless of the suggestion from the Department of Health that matters regarding the actual amount of the fee were “not relevant” to this c\* process, the CSNA would like to place on record a number of observations.
- 27- Using existing registration statistics, obtained from the National Tobacco Register December 2014, the “breakdown of retailers premises is as follows (the description of trade are self-select by the owner/operator.)

Licensed Premises	6,311
Convenience Stores	2,320
Garage Forecourts	1,154
Supermarkets	914
Newsagents	811
Hotels	672
Independent business	607
Registered Clubs / Nightclubs	166
Restaurants	88
Mobile Premises	65
Food Stalls	9
Duty Free Shop	8
Vessels	5
Others	93
<b>Total</b>	<b>13,223</b>

- 28- It is not unreasonable to accept that the majority of these premises, entitled by PHTA 2002-2009 to register as tobacco retailers have a Revenue Excise Licence for the sale of alcohol. This would include licenced premises, hotels, supermarkets, garage forecourts, clubs/nightclubs and convenience stores. There is a strict liability attached to the retailing of alcohol that is part and parcel of the Revenue Licence.<sup>13</sup>
- 29- There is nowhere in the Consultation Document or in “Tobacco Free Ireland” a suggestion that those existing retailers of tobacco that are also the holders of Excise Licences for the sale of intoxicating liquor (both on and off the premises) will not be permitted to apply for a licence to retail tobacco. Many of the liquor licensees have confirmed their character and the appropriateness of their premises for the sale of alcohol via the courts and as such, it would appear they would be acceptable licensees for the retail of tobacco.
- 30- Given that a policy decision has been made following a specific recommendation by the TPRG to prohibit the sale of tobacco through self-service vending machines, and given that these machines are not permitted to be used in “ordinary” retail establishments, i.e. supermarkets, convenience stores, newsagents, etc. it must be concluded that if a publican, hotel or club wishes to continue to sell tobacco as part of their business that they will be

<sup>11</sup> Better Regulation, Department of the Taoiseach 2004

<sup>12</sup> Cabinet Handbook, Conducting RIA p.27-28, 36 and 61-65

<sup>13</sup> Intoxicating Liquor Act 2000

permitted to apply for a licence to do so, subject to the condition applicable to outlets retailing in “ordinary” stores – a closed container with the products not visible to the customer. The Tobacco Register does not have statistics on the number of vending machines in operation in the country but it is generally accepted that the figure is between 6,500–7,000.

- 31- For CSNA and its members, this is a very significant matter. If it is the intention of the Department of Health to exclude or discourage the holders of intoxicating liquor licences such as pubs, clubs and hotels from applying for tobacco licences, the most obvious methods would be to make the annual cost of a licence so high it would act as a disincentive to businesses that may not consider tobacco as a core or essential part of their business.
- 32- If this were to be the case, it would mean that only those businesses for whom the provision of tobacco to their customers was a necessity would apply for a licence. The striking of a fee would not be the actual cost of providing a service, but the cost of maintaining a smaller cohort of licensees. This is coming close to the application of unfair or unreasonable terms for equivalent transactions, if the effect is a substantial reduction of competition.
- 33- When the Australian Government were considering licences for retailers of tobacco, much thought<sup>14</sup> was given to ensuring that the relevant licence fees were proportionate and could not be considered to be a barrier to trade or a tax. An annual tobacco licence fee varies between territories Aus. \$253 in SA<sup>15</sup>, Aus. \$224 in WA<sup>16</sup> \$306 in TAS<sup>17</sup> and no fee is applied in either Queensland<sup>18</sup> or Victoria.<sup>19</sup>
- 34- There is no suggestion that the Federal Government of Australia receives less or more compliance from retailers in Victoria or Queensland mainly because they are not required to pay a licence fee, they are all required to register as retailers and must ensure that all laws, State and Federal with regard to tobacco retailing are observed.
- 35- In the 38 states in the United States where retailers are required to hold retail licences, the variation between the individual states are substantial. Some states require an annual fee. Other states permit local authorities to administer retail licences.

- Annual Tobacco Retail Licence Fees Throughout U.S.A. –

	<u>US \$</u>
New York	300
Maine	100-150
Connecticut	50
New Jersey	50
Pennsylvania	25
Rhode Island	25
Vermont	10
New Hampshire	0
Minnesota	300
Indiana	200
Maryland	200

<sup>14</sup> Allen Consulting Group “Licencing of tobacco retailers and wholesalers, desirability and best practise arrangements”

<sup>15</sup> Sahealth.sa

<sup>16</sup> Health. WA

<sup>17</sup> Tobacco in Australia – The Cancer Council Victoria

<sup>18</sup> Health.qld

<sup>19</sup> Tobacco in Australia – The Cancer Council Victoria

Texas	180
Nevada	150
California	100
Michigan	100
Tennessee	100
Wisconsin	100

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36- there is no requirement in Northern Ireland, Scotland, England or Wales for tobacco retailers to apply for a licence, despite the fact that since 2005, the United Kingdom has consistently<sup>21</sup> be accorded the title of “best tobacco control” jurisdiction, with Ireland having the honour of being considered (out of 34 European Countries) to have the second best suite of tobacco control measures.

37- Any licensing bureaucracy will have significant set up costs. The office of Tobacco Control, in their Annual reports 2010<sup>22</sup> showed an income of €510,750 from the €50 registration fees 2009/2010 and expenditure / operating costs of €752, 014. The maintenance of the retail register is now being carried out as a function of the HSE following the dissolution of the OTC in 2011. A further €89, 350 has been taken in by the HSE from additional retailer income.<sup>23</sup>

In the absence of any evidence to the contrary, we must assume that the Department of Health had factored into their income of €5 million from the increase in tobacco retail income to have accounted for such an outlay. This would mean that retailers would be contributing €6 million.

38- The retail register was set up in 2009 at a cost of over €750,000. When allowing for additional spending costs, it is not unreasonable to suggest that any new administration involving the setting up of a new licencing system will require an initial outlay of over €1 million.

If the Department presumed that all existing retailers would contribute towards this gross income of €6 million, then each licence would have a fee of €500 attached, assuming that there were 12,000 applicants.

39- However, as previously alluded to, the prohibition on vending machines potentially reduces the total cohort of retailers to a figure not exceeding 6,500, a figure that would require an average licence fee of almost €1,000 to achieve the nett figure of €5 million noted as “income” from the retailer licence fee. There was no contra-fee for expenditure noted in the Budget estimates for set-up costs therefore it is reasonable to assume that the €5 million figure is nett of all set up costs (estimated €1 million).

40- We must suggest that such a level of licence fee is not proportionate to any other licence fee levied on retailers in Ireland and would be considered by CSNA members to be unjust and punitive taxation.

<sup>20</sup> source myUSAcorporation retail-cigarette-tobacco licence.html

<sup>21</sup> Europeancancerleagues.org

<sup>22</sup> [Retail Register Income and Expenditure, page 42](#)

<sup>23</sup> National Tobacco Control Office, December 2014

## B – Licensing System for the Sale of NMNDS –

- Non-medical nicotine delivery systems, primarily e-cigarettes are sold in a substantial number of CSNA members outlets.
- 1- We fully accept that there is a need to regulate e-cigarettes and related products and consider that such regulation should be carried out throughout the member states. Such regulation should focus upon quality standards and safe delivery of nicotine.
- 2- We consider that all importers and distribution of NMNDS should be required to register with the member state in which they intend to place their products and commit to adhere to agreed safety protocols, drawn up by the EU.
- 3- We are concerned that a Licensing system for NMNDS, operated, we presume, by the Department of Health may be an expensive barrier for many of our members and would urge the Department to enter into discussion with retail representative groups as to how these products, which have significant potential in harm reduction, can be safely placed upon the market.
- 4- Whilst there will be some retailers that will specialise in selling NMNDS products, the majority of tobacco retailers in retail outlets would be unwilling to pay a substantial licence fee to sell a product that is very much peripheral to their core sales.

## C – Prohibition of the sale of tobacco from self-service vending machines –

- 1- There are no CSNA members permitted to sell tobacco through self-service vending machines.<sup>24</sup>
- 2- We will limit our observations to the facts as we believe them to be.
- 3- Approximately 8% - 10% of all tobacco products sold legally in the Republic of Ireland are through vending machines.
- 4- There has been one conviction since 2009 by a Court for the sale via a vending machine of a tobacco product to a minor.<sup>25</sup>
- 5- Australia is considered by many tobacco control advocates to be one of the world's best exponents of integrated tobacco control laws. Vending machines are permitted in Australia.<sup>26</sup>
- 6- Self-service vending machines, operated by a remote control device (similar to a TV. control) to "switch on" the machine from behind the bar/counter of a licenced liquor outlet are used in Australia, as are token operated self-service machines, both of which automatically "turn off" after each purchase / use.
- 7- CSNA would be concerned that if there was a prohibition on self-service vending machines (particularly in some clubs and public houses) that there may be an increase in availability of contraband tobacco.
- 8- Whilst this is a matter for vendors, publicans and hoteliers primarily, we must register our dismay at the lack of consultation by the TPRG with any of these businesses that will be affected by such a move.
- 9- We must also suggest that the usage (as justification) of surveys from 2011 and previous years of limited sampling to justify such a prohibition does the Department no merit; if there

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<sup>24</sup> PHTA 2002-2004

<sup>25</sup> HSE response to PQ 172, 6<sup>th</sup> November 2013

<sup>26</sup> Tobacco in Australia – The Cancer Council Victoria

was/is such a level of non-compliance, why did the HSE environmental Health Officers not make it their business to conduct a series of test purchases and initiate proceedings against repeat offenders?

- 10- Vendors are all small businesses, none of them are owned by multinational chains or tobacco companies. They were permitted, under the 2009 Regulation<sup>27</sup>, to continue to trade in licenced premises once they retrofitted their coin-operated self-service machines. This level of retrofitting was carried out at very considerable expense at a time when the Irish economy was experiencing very real difficulties. We would be aware of a number of small business owners who incurred very significant borrowings to finance such retrofitting.
- 11- We are not convinced that tobacco control actually needs to be carried out at the expense of hard working small businessmen who have complied with all previous regulatory and legislative requirements.

#### D – Prohibition of the sale of tobacco from Temporary or Mobile units/Containers –

- 1- CSNA does not accept that bona-fide retailers should be prevented from selling tobacco products from temporary or mobile units.
- 2- In the Consultation Document, reference is made to a recommendation from the Joint Oireachtas Committee that the sale of tobacco products at fairs and markets be prohibited; it is most important to advise the Department that this recommendation followed observations made to the Committee that illicit and illegal trading of contraband and smuggled cigarettes was being carried out at such venues. There was never an issue with registered tobacco retailers selling legitimate tobacco products.
- 3- The CSNA have among its membership a small number of shopkeepers who are registered to sell tobacco in their stores. They also hold the concession to sell a variety of products at racecourses and festivals in their locality.
- 4- These retailers are registered to sell tobacco products at these events and their registration is with the HSE (previously OTC). We would consider that the service they provide to race-goers and those attending festivals is very different to the criminal elements selling smuggled product and should not be seen as a “problem”.
- 5- CSNA finds it difficult to accept that the Department is willing to discommode adult attendees at a variety of events.
- 6- CSNA accepts that “persons dressed in a tobacco company’s livery travelling around bars, nightclubs and events selling that company’s products from mobile containers/units” is unacceptable practice and considers such action as prohibited marketing services.
- 7- We would seek to distinguish between the activities of a bona-fide retailer and those of a tobacco company or their agents and would request a re-assessment of the criteria for prohibition.
- 8- CSNA believes that there needs to be a balancing of proportionality applied to what types of activities and venues can and may be permitted to have a concession selling (amongst other products) tobacco. We would consider that businesses carrying out legitimate sales of products should, if they so choose, be permitted to sell tobacco products subject to all other provisions of PHTA 2002-2013.

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<sup>27</sup> S.I. no 42 of 2009



E – Prohibition of the sale of tobacco Products at events/locations primarily intended for person under 18 years of age –

- 1- CSNA has no difficulty with accepting this provision, once it is understood, and any legislation providing for such a prohibition will ensure such an understanding, that the prohibition is limited to the period during which the majority of attendees are likely to be under 18 years old.
- 2- Many of the events attended in the majority by those under 18 years of age are held in locations that are licenced premises (hotels, theatres, exhibition centres). It should be possible to ensure that any prohibition on sales of tobacco products was in existence only for the period of time that the event was taking place, and was not a blanket or total prohibition on sales of tobacco products.

F – Prohibition of the sale of tobacco Products by persons under 18 years of age –

- 1- CSNA accept this rec, not only for the reason outlined in the Consultation Document but also because it brings into line the laws on the sale of alcohol and tobacco in this regard.
- 2- CSNA would like to ensure that the law relates to the sale of tobacco products, and that young persons working in a retail environment will be permitted, as part of their normal duties, to stock machines with tobacco product and access tobacco product from storerooms, etc.
- 3- There are similar distinction in retail outlets licenced to sell alcohol and in licenced premises where staff under the age of 18 years are allowed to stock shelves with alcohol and deliver drinks previously paid for to customers.

G – Prohibition of the sale of NMNDS **by** and **to** persons under 18 years of age –

- 1- CSNA has no difficulty with this prohibition.
- 2- Similar to our observation in Section F, it would be important that the prohibition is limited to the sale of the products, not attendant work-related duties handling or displaying such products.

H – Minimum suspension periods for retailers convicted of certain offences under tobacco control legislation –

- 1- The Department of Health introduced the various Public Health Tobacco Acts and are in the process of introducing a Bill relating to standardised packaging. In each of these pieces of legislation, various offences are created that enable the authorised officer to initiate Court proceedings. It is the discretion of the judge, having heard all evidence presented, to apply fines and penalties and to sanction the payment of prosecution costs.
- 2- Reference is made in the Consultation Document (point 58) which states “This undermines the intent of the legislation which is to ensure that sanctions are effective”, with regard to “evidence that almost half of the suspension imposed are for a period of one day, and is a

minority if cases, no suspension period is imposed, despite the mandatory nature of Section 5a)”

- 3- The Consultation Document neglects to mention that in addition to suspension being applied, fines were also imposed and in the vast majority of cases, costs were also awarded to the HSE in respect of costs incurred by them in bringing the prosecution. These fines range from €100 to over €2,000 and costs average €500.
- 4- If, in a “minority of cases”, no suspension period was imposed, it is a matter of law and should have been dealt with by way of appeal.
- 5- Before providing CSNA viewpoint on the question of whether there should be a minimum suspension period, it is important to note that this matter was the subject of debate in the Oireachtas<sup>28, 29</sup> in 2009 when the legislation providing for judicial discretion was put into the Public Health Tobacco Bill 2009. The Government, acting on the advice of the Department and the Attorney General accepted the need to allow for judicial discretion on the grounds that suspension / closure orders which were significantly out of line with similar offences under the Intoxicating liquor Act would “most certainly” be the subject of legal challenge. This was the view of Minister for State Áine Brady as stated in Committee stage to both the Dáil and Seanad when the Bill was being considered.
- 6- CSNA would like to contradict the stated view of the Department in the Consultation Document that the sanctions, as currently being applied in the Courts are not “effective”.
- 7- The Department has access to all convictions recorded under various offences against PHTA. To make a case for a lack of effectiveness, it would have to be shown conclusively that tobacco retailers were ignoring the law and were willing to break the law given the perceived ineffectiveness of sanction.
- 8- The best way of proving such a hypothesis is to ascertain how many of those retailers convicted of offences against the various sections of PHTA have been before the Courts on subsequent occasion. To our knowledge, none of those convicted for what we would consider to be the most “important” transgression, i.e. sale of tobacco to a minor has been before the Courts on a similar charge. We believe that this fact is proof that existing sanctions do work.
- 9- As a prohibited body, we are less concerned with other PHTA offences such as smoking in a workplace and breaches of legislation regarding “smoking areas” as we are with ensuring that our members are fully aware of their duties and responsibilities with regard to preventing the sale of a tobacco product to a minor.
- 10- Whilst we have additional obligations regarding signage and displaying our identification number on our closed containers, these matters are, we would suggest, “minor” breaches of the law when compared with the sale of tobacco to a minor, which we accept to be a very serious matter.
- 11- When considering the appropriate fines, penalties and suspension period that should be applied to a person convicted under Section 45 (Sale of Tobacco to a Minor), judges will consider all aspects of the evidence presented to them prior to sentencing. They will have been involved in many cases requiring their accumulated wisdom and knowledge of the law.
- 12- As a society we should be able to trust their expertise and their judgement in determining the application of quantum for cases brought before them. We do not believe that providing a minimum (and unspecified in the Consultation Document) period that does not give discretion to a judge is warranted.

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<sup>28</sup> Debates Oireachtas 10<sup>th</sup> July, Dáil

<sup>29</sup> Debates Oireachtas 15<sup>th</sup> July, Seanad

13- According to the most recent review of convictions under<sup>30</sup> the PHTA, there were convictions recorded in prosecution for offences in 7 separate sections

Public Health Tobacco Acts		Convictions
Section 46	Display of Signs	2
Section 47	Smoking in a prohibited Place	32
Section 43.4(a)	Registration number on Container	1
Section 43.4(c)	Display of Signs (no sales to under 18's)	2
Section 33	Prohibition of advertising	2
Section 45	Sales to minors	16
Section 37.14	Unregistered person selling tobacco	5

14- As CSNA does not believe that there should be any change in the existing legislation regarding minimum suspension periods, we do not distinguish between different offences. We would once again remind the Department of the need to maintain proportionality with regard to the nature of the offence and the level of appropriate sanction. The original 2002 and 2004 Acts made a conviction for non-display of a sign or non-display of a registration number on a closed container liable to a 90 day suspension order, wholly disproportionate to the “crime” and one that would have the effect of bringing the law into disrepute as well as causing ruination to businesses.

15- There are some offences in PHTA that are applied to persons that are not registered retailers; customers (smoking in a prohibited place) or staff of retail outlets (selling to a minor). For those persons, if the registered retailer is not also convicted for the same offence, a situation could arise that a mandatory suspension under 5(a) could be imposed regardless of the absence of a conviction of the retailer.

16- Furthermore, the proposed prohibition of sales of tobacco products via a self-service vending machine may lead to a number of registered retailers electing to cease selling cigarettes. In such a case, it would not be possible to impose a sanction of suspension from a register that they are no longer registered upon.

17- At the moment, the HSE operate a national inspection programme to ensure compliance with all sections of the legislation. There is very little interaction between retailer representative groups and the HSE Tobacco Control (EHS). CSNA are of the view that as representatives of stakeholders, both the Department of Health and HSE should encourage dialogue with retail representatives, in line with recommendation from the World Health Organisation (WHO) with regard to Tobacco Control matters.

18- Both the Department of Justice<sup>31</sup> and the Scottish Department of Health<sup>32</sup> have published guidelines and protocols for their Test Purchase Schemes. Whilst we are aware of the existence of the protocols used by the HSE in conducting the test purchase scheme, we have never been provided with a copy of it, nor do retailers have an agreement in place on how Environmental Health Officer will conduct the National Inspection programme.

19- CSNA would also like to place on record that there is a very high level of compliance by retailer with regard to their obligation under the PHTA. Rather than focussing upon the small number of businesses that run afoul of the law, it is important to state that the levels of compliance are very high.

<sup>30</sup> EH Review 2013, Environmental Health Service

<sup>31</sup> [Intoxicating Liquor Test Purchase Scheme](#)

<sup>32</sup> Scottish Government “A practical guide to Test Purchasing in Scotland”, October 2007

20- In the most recent survey conducted by the HSE (EH Review 2013) there were a total of 37,510 inspection relating to PHTA, leads to an overall compliance rate of 90.87%. The vast majority of non-compliance (3,425) were for technical offences. There were a total of 55 convictions, 16 of these were for Section 45 (sale to minors). The total number of convictions was 0.15% of the number of possible infractions; it is important to note that retailer of tobacco products are responsible businesses and are treated in the overwhelming majority of cases with courtesy and professionalism by the Environmental Health Officer carrying out their statutory duties.

#### i – Fixed Penalty Notices for Certain offences –

- 1- As stated in the consultation paper (point 61), fixed penalty regimes under other legislation are in use in Ireland for many years.
- 2- Whilst they all enjoy the common term “Fixed Penalty Notice”, there is no universality in the level(s) of penalties imposed, whether there are any additional sanctions that are applied in addition to the FIXED PENALTY NOTICE and the degree of proofs required by the issuing authorised officers.
- 3- Although one of the fixed penalty notices referred to in the c paper relates to legislation sponsored by the Department of Health regarding sunbeds, a commencement order specifying the amount of penalty applying to offences has not been made as of yet.
- 4- Fixed Penalty Notice for some offences committed by motorists under the Road Traffic Act for speeding are, once paid within a certain period of time, €80, but offences under Consumer protection are in the order of €300.
- 5- Irish Rail operates a Fixed Penalty Notice for all routes for those caught travelling without a valid ticket. This penalty is €100 plus the unpaid fare, payment of which within 21 days will avoid a prosecution.
- 6- The National Transport Authority<sup>33</sup> also has a range of Fixed Charge Notices for offences by Public Service Vehicle operators ranging from €40 to €250, with payment having to be made within 28 days from the date of the notice, or, if paid within 56 days, an additional 50% is added to the original charge notice. The notices are issued by a Compliance Officer authorised by the NTA.
- 7- If the Department are to introduce Fixed Penalty Notice, we would consider that there should be a “weighting” applied to allow different levels of penalty be set for different offences.
- 8- In many jurisdictions, the payment of a Fixed Penalty Notice ensures that the matter is disposed of without a recorded conviction. As it stands, offences under the PHTA 2002-2013 involve a mandatory suspension of the registration. The Consultation Document does not make any reference to whether such a suspension would be imposed, given that at this juncture, it is only a Court can determine the period for suspension.
- 9- It would be very important that this matter is addressed as we believe such an additional penalty (suspension) should not be imposed by an authorised officer.
- 10- Environmental Health Officers, acting on behalf of HSE Environmental Health Service carry out a very large number (currently in excess of 37,000) of inspections each year to monitor compliance on smoking ban, point of sale legislation, display notices and test purchasing. Last year (2013), there were 3,425 instances of non-compliance, all but 55 of which were not considered to be so serious as to initiate a prosecution.

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<sup>33</sup> National Transport Authority – Fixed Charge Offences - SPSV

11- We would not believe that there should be a significant increase in the number of Fixed Penalty Notice that would follow an initial finding of non-compliance and that an “improvement order” or “caution” should always be given to a first offender rather than immediately applying a Fixed Penalty Notice, particularly where the offence (or other offences) have not been the subject of prior notification or warning. This would be reasonable and proportionate, in line with the existing compliance programme.

(ii) publication of Information in Respect of any person on whom a fine, other penalty or conviction is imposed by a Court or Pursuant to a FIXED PENALTY NOTICE (name and Shame)

- 1- The HSE has commenced publishing<sup>34</sup> on a website the details of convictions for PHTA offences, subject to certain DATA protection constraints. These details list the name, address and trading name of the convicted trader as well as details of the offence, the level of fines and costs imposed and the period of suspension in accordance with Section 5a PHTA.
- 2- As such, the question being asked relates to whether it is appropriate to involve a list of those traders given a Fixed Penalty Notice.
- 3- As referred within the Consultation Document (point 63) this style of publication is already carried out by both the FSAI and the NCA.
- 4- There are significant differences between the actual operations of both the FSAI and the NCA with respect to a number of ways that their websites are operated.
- 5- The names and addresses of traders provided with various improvement orders etc. by FSAI are removed after a given period once the improvement has been made. Names remaining on the website are only those that have either not “purged” their offence or are no longer in business.
- 6- The National Consumer Agency places the names of traders that have been convicted or have had uncontested Fixed Penalty Notice given to them onto their website but do not remove these names; theoretically they are there in perpetuity, even after the store has been sold and new owners (still trading under the same symbol group / franchise) are in place.
- 7- The disposal of an offence by way of a Fixed Penalty Notice is most certainly potentially less burdensome and more efficient for both the agency authorised to enforce compliance and the trader. We would accept that Fixed Penalty Notice is an activity carried out on behalf of the state and cannot argue against the publication of the details but must put these caveats into our observation.
- 8- In the first instance, it should be agreed that the names and details of the recipient is accurately displayed on the website, not a generic T/A Spar Mallow or Londis Kildare as such description can (and do) apply to other traders both existing and those re that may purchase the business at any time subsequent to a Fixed Penalty Notice being applied.
- 9- Secondly, there should be a specified time period that the Fixed Penalty Notice is displayed, after that, it is removed.
- 10- Thirdly, at the moment, the recording of convictions on the HSE website specifies the section of the PHTA for what a conviction was obtained but does not state what the type of offence committed to such a section, e.g. Section 37 ( non-registration), Section 47 (smoking in a

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<sup>34</sup> HSE Compliance and Enforcement Q1 – Q3 Tobacco Convictions 2014

prohibited place) Section 45 (sale of tobacco to a minor). CSNA believes that publishing only the section number of the legislation without clarifying the nature of the offence is unnecessarily untransparent.

- 11- There is a significant difference, in the public eye, to an establishment convicted of the offence of sales to a minor with one convicted of the absence of a registration number on a closed container – not all offences should be considered worthy of “shaming”.
- 12- If Fixed Penalty Notice are to be placed on the HSE website, then we would ask that both the court and Fixed Penalty Notice details record the type of offence.

- The offence of selling tobacco to a minor is not one of strict liability; Section 45(2) of the PHTA 2002 provide that “ it shall be a defence for a defendant to prove that he or she made all reasonable efforts to satisfy himself or herself that the purchaser has attained the age of 18 years”

The “reasonable efforts” referred to are personal to the actual seller. In the event that a sale to a minor of a tobacco product has taken place, the action of the seller (or sales assistant) are separate and different from those of the employer.

If a test purchase takes place and a tobacco product is bought by a minor volunteer, this action (the sale by the assistant) is an offence and subject to prosecution.

As there is a defence to the action of the assistant by the employer, it cannot automatically be assumed that the registered tobacco retailer is also guilty of any offence.

This is a clear difference between sales of alcohol to minors, for which there is no defence by a licensee other than one where a Garda age card I.D. was accepted but subsequently proven to be fake.

It would appear that such distinction between the action of an assistant (for which there is no defence) and the actions (training, in-store documentation, contracts of employment, till-prompts, etc.) of the employer / registered tobacco retailer are matters that require considerable investigation in advance of any decision to prosecute or, if it is the intention of the Minister to introduce Fixed Penalty Notices for section 45 offences, prior to applying a Fixed Penalty Notices to an employer.

It is our belief that section 45 Fixed Penalty Notices could be given to sales assistants (who currently are very infrequently convicted for sales made), even when there is a decision made by the Environmental Health Officer not to proceed to a prosecution of the owner on the basis that it was clear that the actions of the employer met the legal obligation to take all reasonable efforts to prevent a sale.

In such a scenario, it would be most important that the conviction / Fixed Penalty Notices applied to the sales assistant did not lead to a suspension from the register for the innocent retailer.

CSNA urges the Department to introduce an amendment to the PHTA to make proxy purchasing “or fishing” an offence. We are aware that many minors are refused direct access to cigarettes by our retail members but these minors then persuade or coerce people over the age of 18 years to buy them for them. In the Act enabling registration in Scotland and also in Northern Ireland, an offence of buying tobacco with the intention of supplying it to a minor was created.

This (banning proxy purchasing) is another recommendation from the Joint committee of the Oireachtas previously cited in the consultation document.

In conclusion, we once again must re-iterate our belief that the adoption by the Cabinet of the entire “Tobacco Free Ireland” report as official Government Policy is flawed.

- There was no requirement placed within the Terms of Reference that set up the Tobacco Policy Review Group to conduct a Regulatory Impact Assessment.
- As there was no requirement to conduct an RIA, the 12 person TPRG did not engage with relevant stakeholders within the tobacco retailing community to gather information and views on matters regarding alternative to legislation and the workings of existing Regulation and Legislation.
- It is, in our view, contrary to Better Regulation Guidelines to introduce matters as policy without considering the effect of such policy on businesses.
- The lack of any back up data to demonstrate a need to move from a registration to licencing system is lamentable. Costs to business to rise.

As an addendum, but in the interests of ensuring that the Department of Health can assist the project of de-normalising tobacco, we are providing you with the most recent (2013) list of shares and Bonds owned by the Irish Government\* in tobacco companies.<sup>35</sup>

At present rate these have a value of €17 million. We are quite confident that in the National Pension Reserve Fund were instructed to immediately sell their shares and provide the value of this unethical investment to the Department to assist in a range of cessation services it would be money well spent.

			Value €
BAT	75,766	shares	2..9m
Lorillard	8,439	shares	0.3m
Phillip Morris	50,961	shares	3.2m
Reynolds	7,868	shares	0.3m
Bat Holdings	1.48m	Bonds	1.6m
Bat Finance	1.70m	Bonds	1.8m
Imperial Finance	2.77m	Bonds	3.23m
Phillip Morris	3.71m	Bonds	3.65m
			€16.98m

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<sup>35</sup> National Pension Reserve Fund Annual Report 2013