APPROVED **[2025] IEHC 738**

THE HIGH COURT

JUDICIAL REVIEW

Record No.: 2025/344JR

BETWEEN:

CSNA COMPANY LIMITED BY GUARANTEE

Applicant

-and-

MINISTER FOR HEALTH, IRELAND and THE ATTORNEY GENERAL

Respondents

Judgment of Mr Justice Rory Mulcahy delivered on 18 December 2025

Introduction

1. These proceedings concern a challenge to the lawfulness of a statutory instrument, introduced by the first respondent ("**the Minister**"), which sets the fees for licences to sell tobacco and nicotine inhaling products.

2. Under the existing regime, any person who wishes to sell tobacco products is required to register to do so in accordance with section 37 of the Public Health (Tobacco) Act 2002, as amended. A once-off fee of €50 is payable in respect of such registration.

3. A new system for licensing the sale of tobacco and nicotine inhaling products has been introduced by the Public Health (Tobacco Products and Nicotine Inhaling Products) Act 2023 ("**the 2023 Act**"). Under the 2023 Act, any person wishing to sell tobacco or nicotine inhaling products is required to apply to the Health Service Executive (HSE) for a licence.

Section 18 of the 2023 Act confers power on the Minister to prescribe fees for the purposes of an application for a new licence, for renewal of a licence, and for a replacement licence. Those fees are recoverable by the HSE as a contract debt.

4. In exercise of that power, the Minister made the Public Health (Tobacco Products and Nicotine Inhaling Products) Act 2023 (Fees) Regulations 2024 ("**the 2024 Regulations**"). The following fees were prescribed:

- A fee of €1000 for an application for a licence to sell tobacco products;
- A fee of €800 for an application for a licence to sell nicotine inhaling products;
- A fee of €1800 for an application for a licence to sell both.

5. The same fees were fixed for applications to renew licences. The 2024 Regulations will come into operation on 2 February 2026. In these proceedings, the applicant ("**CSNA**") challenges the lawfulness of the 2024 Regulations on a number of grounds. CSNA's focus is on the 2024 Regulations insofar as they relate to tobacco products.

The applicant's case

6. In its Statement of Grounds, CSNA describes itself as a company that represents the interests of retailers and newsagents, independent shops and franchisees. It has approximately 1350 members, operating some 1500 stores.

7. CSNA issued proceedings on 13 March 2025 and obtained leave to apply for judicial review on 27 May 2025. Its Statement of Grounds comprises seven grounds of challenge, as follows:

i. *The First Respondent acted unlawfully and* ultra vires *the Act by disregarding the lawful purpose of section 18 when enacting the 2024 SI. The effect of the fees prescribed by the 2024 SI for licences and the renewal of licences is to impose an initial and recurring lump sum excise duty on retailers selling these products, regardless of the size of the retailer. The lawful purpose of the First Respondent's power to set licence fees pursuant to section 18 is to provide for the costs to the*

State and the HSE of administering and enforcing the licensing system in relation to the sale of products covered by the Act.

ii. *The First Respondent acted unlawfully and* ultra vires *the Act by disregarding the purpose of section 18 of the Act and then unreasonably and irrationally promulgating the 2024 SI which could never achieve that unlawful purpose. In particular, the First Respondent unlawfully intended to impose the equivalent of an additional tax or duty upon the sale of products covered by the Act to disincentivise their consumption, yet failed to acknowledge that the 2024 SI could make no difference to the retail price of the products concerned and, therefore, could not disincentivise their overall consumption.*

iii. *The First Respondent acted unreasonably and irrationally when setting the license and renewal fees in the 2024 SI. In doing so, the First Respondent set the fees in a manner that was arbitrary and capricious and without any evidential or methodological basis or connection to the licensing regime being established.*

iv. *The First Respondent acted unreasonably and irrationally by making an arbitrary distinction between the licence and renewal fee for the sale of tobacco products and nicotine inhaling products without any basis for that arbitrary distinction.*

v. *The First Respondent failed to take account of relevant considerations when setting the licence and renewal fees in the 2024 SI, by falling to acknowledge the fact that the Applicant's members are required to sell tobacco products at a fixed price determined by law.*

vi. *The First Respondent acted unlawfully and* ultra vires *the Act by enacting the 2024 SI, which will have a disproportionate economic impact on smaller retailers compared to larger retailers which amounts to an arbitrary and capricious distinction not authorised by the Act. The effect of the 2024 SI will cause consumers to attend larger retailers instead of smaller retailers and will likely cause the closure of retailers which is not a lawful purpose envisioned by the Act.*

vii. *The First Respondent acted unlawfully and* ultra vires *the Act by enacting the 2024 SI, which will have a disproportionate economic impact on the Applicant's members right to earn a livelihood and, in particular, in relation to smaller retailers who are less able to absorb the exorbitant increase in costs.*

8. CSNA's primary argument, therefore, is that it was not permissible for the Minister to fix fees other than for the purpose provided by the 2023 Act. It contends that this purpose was, in effect, to cover the State's costs in administering and enforcing the new licensing regime. CSNA also contends that the fees set were arbitrary and capricious and were fixed without any evidential or methodological basis.

9. The Statement of Grounds is verified by an affidavit of Mr Vincent Jennings, the CEO of CSNA. He describes the applicant and explains the retail market for tobacco products in Ireland, noting that 79.2% of the total retail price is made up of taxes (excise duties and VAT). He notes that because of the way excise duties on tobacco products are charged, retailers will not be able to increase prices to offset the cost of a licence, *i.e.* the cost cannot be passed on to the consumer, it must be borne by the retailer. He sets out the background to the introduction of the new licensing regime, and the applicant's attempts to engage with the first respondent. He avers that the applicant has "*no idea* how *the Minister for Health calculated the sums contained in the 2024 SI, or what methodology he used if any… It is hard to not draw the inference that these exorbitant figures were simply plucked out of the air and are inherently arbitrary.*"

10. The respondents filed a detailed Statement of Opposition in which they denied CSNA's claims. In relation to the plea that the Minister acted unreasonably in making the 2024 Regulations, or that he acted arbitrarily or capriciously or without any evidential or methodological basis in so doing, the Statement of Opposition expressly pleads that the Minister had regard to a number of factors, including the policy background to the 2023 Act. Those factors included (para. 55):

"*e.* *A policy which seeks to disincentivise retailers from selling tobacco products and nicotine inhaling products and thus, reduce the availability and possibly the amount of consumption of these products by the Irish population is consistent with*

policies adopted by the Government of Ireland over a period of several years and the State's international law obligations;

f. The fact that the aforesaid policies and/or the exercise of the statutory power conferred by section 18 of the 2023 Act were underpinned by evidence and/or studies from other jurisdictions, which reflect that charging a certain level of licence fee would disincentivise retailers from selling tobacco products and nicotine inhaling products, thus reducing the availability and/or consumption of such products."

11. The Statement of Opposition is verified by Ms Claire Gordon, Principal Officer of the Department of Health. Ms Gordon exhibits a number of policy documents, such as the Department of Health's '*Tobacco Free Ireland*' (October 2013). In addition, she exhibits what she describes as a "*briefing document*" to the Minister, dated 9 December 2024, which she avers she prepared together with her colleagues.

12. The briefing document set out the fees proposed to be charged. Under the heading '*Rationale for the proposed amounts – considerations and analysis*', it sets out comparators from other jurisdictions which have a licensing system: various Australian states, Ottawa in Canada, Oregon in the United States, and Finland. It notes the comparable figure for licensing alcohol, which is €500 for each category of alcohol (wine, beer, spirits and cider) up to a maximum of €1500 per annum.

13. It then identifies the possible impact of licensing on retail outlets, remarking that a licence fee "*may function as a disincentive to stock tobacco*", as happened in one Australian state where the numbers of entertainment venues holding licences reduced following an increase in the fee from Aus$12.90 to Aus$200, and the number of points of sale also reduced. This section of the briefing document continues:

"*There is strong evidence to show that the density of retail outlets selling tobacco products is associated with youth smoking and is a risk factor for relapse by smokers who have quit therefore a reduction in the number of outlets may reduce smoking prevalence*."

14. The document notes the existing position for retailers – the requirement to pay a registration fee – and then concludes with a section headed '*Analysis*':

> "*The proposed rates are set at the high end of comparable fees in other jurisdictions. This is because the policy objective in relation to tobacco products is to eliminate their use and the objective on nicotine inhaling products is to reduce youth and non-smoker use. As the evidence, cited above, shows that the density of retail outlets contributes to usage of tobacco products and their licence fee connect to reduce density, it is reasonable that the Minister should not set a fee that is at the lower end of the scale.*
>
> *A compatible licence product is alcohol. An annual off-licence for the standard combination of products (beer, wine, spirit and cider) is €1500. The health harms from alcohol are less severe than those for tobacco products, e.g. alcohol causes 2.4% of cancers here and approximately 1000 deaths per year, while tobacco causes 13% of all cancers here and an estimated 4,500 deaths per year.*
>
> *While the fees could be set far higher on health harm grounds, it is reasonable to take into account that this is the first time that retailers will have to pay an annual fee per outlet and it may therefore be more proportionate to begin with a lower fee in increase it in later years if desired.*"

15. The respondents did not identify any other relevant material provided to the Minister prior to his making the 2024 Regulations on 17 December 2024.

Expert evidence

16. In addition to the evidence of Mr Jennings and Ms Gordon, both the applicant and the respondents adduced expert evidence. The experts produced a joint report highlighting the matters on which they agreed and on which they disagreed. The experts were cross-examined on their affidavits. However, for reasons which will be explained below, their evidence is of only marginal relevance to the matters which have to be determined in these proceedings and therefore requires to be addressed only briefly. As the joint report and cross-examination revealed, there was, in any event, very little disagreement between them, save

in relation to their views of the mostly likely response to the introduction of the increased (from the once-off cost of registration) licensing fees.

17. The expert witness called on behalf of CSNA was Professor Anthony Foley, an emeritus associate professor at Dublin City University. Professor Foley has previously acted as economic advisor to various hospitality trade associations, including the Drinks Industry Group Ireland. A certain amount of his work throughout his career focussed on the pricing and consumption of alcohol, the decline in public houses in Ireland and hospitality generally. Little, if any of his work related to the use of tobacco or nicotine inhaling products, or the economic traits of those sectors of the economy. Professor Foley was asked to draft a report for the purpose of these proceedings which commented on the economic impact of the proposed fees to be imposed on retailers like CSNA's members in respect of tobacco and nicotine inhaling products.

18. In Professor Foley's report, he arrives at four separate conclusions regarding the likely effects of the licencing regime. First, he states the simple proposition that the increase in licence fees for retailers will result in increased costs. Second, he notes that, due to the way in which tobacco sales are regulated in Ireland, the increased cost of licencing will not be transferrable by way of an increase in price of tobacco products to customers. Third, he identifies that that existing profit margins for tobacco and nicotine inhaling products is already low, especially when compared to other items typically sold by retailers. This reflects evidence contained in the affidavit of Mr Jennings. Finally, he opines that the only effect the new licencing fees will have, as a matter of certainty, is to put greater economic pressure on retail outlets.

19. Concluding Professor Foley's findings, the report notes that the new licencing regime, taken on its own, would not be transformative in terms of having a specific dramatic negative impact on the sector. Taken, however, with other increased costs and, what he describes as, an already struggling sector, the new regime will reduce the income from, and the attraction of, operating small retail businesses.

20. The expert witness called on behalf of the respondent was Mr Patrick Massey, a director of Compecon, an economic consulting firm which specialises in the economics of competition and regulation. He has previously acted as an expert witness in proceedings

before the Irish courts, and in various mergers domestically and internationally. He lectured at Trinity College Dublin and Maynooth University on topics relating to the economics of competition and regulation. As with Professor Foley, the scope of Mr Massey's previous work was not specific to the economics of the tobacco industry.

21. Mr Massey was asked to prepare a report in which he evaluated the approach taken by Professor Foley in his report, with particular emphasis on the section which dealt with the potential economic impact the new licencing regime would have on small retailers, as well as the report's overall conclusions.

22. In his report, Mr Massey agrees that the imposition of the new licencing fees will result in increased costs for retailers, which may lead to some enterprises concluding that it no longer makes commercial sense to continue selling those products. He notes the position of Professor Foley that a licence for the sale of tobacco products will reduce the profit of a business by €1000, but states that this can be counteracted by devoting the space made available (by not stocking tobacco products) to alternative products, that may attract higher profit margins. He does not accept the assertion in Professor Foley's report that there has been a reduction in the profit margins of non-specialist retailers. His report states that the current data available suggests an upward trend of those retailers' profit margins between 2019 and 2022.

23. Regarding a suggestion by Professor Foley that the sale of tobacco and nicotine inhaling products generated footfall which attracts customers who then purchase other products in retailers' premises, Mr Massey states that this is not backed by any independent source other than a statement in a tobacco industry publication. Mr Massey cites several sources suggesting that the contention that tobacco sales increase footfall is exaggerated at best. In response to Professor Foley (and CSNA's) argument that the new licensing fees do not take account of the size of a retailer, Mr Massey observes that the same approach is taken to alcohol licence fees, which have been in existence for some time.

24. Finally, Mr Massey concludes that the imposition of the new licencing fees could not be considered as a substantial additional cost to a retailer, and disagrees with Professor Foley that retailers cannot set off the licencing fees by way of an increase to other products available in those premises. He further states that the claim in Professor Foley's report that

the proposed licence fees will result in shop closures and/or price increases for non-tobacco items is based on flawed economic theory.

25. The two expert witnesses also co-authored a joint report of their findings in which they identified four potential outcomes of the new licencing regime and their opinion on the likelihood of each. Regarding the first potential outcome, that retailers will simply absorb the licence cost, Professor Foley considers that if this is so, this will reduce the profitability of retailers and eventually lead to store closures. Mr Massey believes that retailers will simply offset the cost of the licences by reducing costs and/or increasing revenue through increased sales of other products. Professor Foley believes that there is limited potential for so doing.

26. Of the second potential outcome, that retailers will increase the price of non-tobacco related products, Professor Foley says that the increase in those products will cause customers to shop elsewhere, resulting in a reduction of a shop's profitability. Mr Massey accepts this, but believes that there is a certain degree of elasticity in the pricing of non-tobacco products that allows a retailer to increase prices to a point which does not affect customer traffic within a particular premises. In his oral evidence, Professor Foley pointed out that it would be extremely difficult for a small retailer to identify with any precision the degree of elasticity which might enable it to increase prices of non-tobacco products without losing custom.

27. Outcome three identified by the experts is that manufacturers/suppliers will increase the maximum retail price, thereby increasing retailers' margins on tobacco products, offsetting the licence cost. This is the outcome which Mr Massey believes most likely. It will allow retailers to recoup the cost of the licences, minimising any negative effect the increased cost may have. He notes that it will be in manufacturers' interest to increase the maximum retail price, to ensure that their products are available as widely as possible. Professor Foley disagrees that this is a likely outcome.

28. As regards the final potential outcome, that some retailers may cease selling tobacco products, both expert witnesses agree that low profit retailers and those with a low volume of cigarette sales will most likely cease selling tobacco products. Professor Foley believes

that a significant number of retailers will choose this option and that this will, in due course, lead to some retailers being forced to close.

29. During cross examination, Professor Foley gave evidence of some of the quantitative analysis he undertook for the purpose of his report, including interviews with a small number of CSNA members. He accepted that the evidence was limited. He acknowledged that the example provided in his report of the impacts of the new regime on a retailer with a turnover of €500,000 per annum, was based on a hypothetical retailer rather than any real-world example.

30. Professor Foley also accepted in his evidence that the new licencing fees would affect different members of CSNA differently and that larger retailers, able to easily absorb the increased cost, might benefit, at least indirectly, from the fact that smaller retailers cannot do so.

31. Mr Massey, during his cross examination, expressed the view that if it was the Minister's intention that the new regime would have the effect of disincentivising the sale of tobacco and nicotine inhaling products, thereby reducing use of those products, he did not think it would be successful in achieving that objective, since, in his view, manufacturers and suppliers would likely seek to absorb the costs on behalf of retailers, *i.e.* it would have little impact on retailers. Of course, Professor Foley disagreed that it was likely that manufacturers/suppliers would absorb the additional cost.

Standing

32. Professor Foley's evidence that the introduction of the new licence fees will impact different members of the CSNA differently highlights a significant obstacle to the applicant in these proceedings. CSNA is a company limited by guarantee; it represents a range of retailers it describes as its members. It is those members who will have to pay the licence fees set by the 2024 Regulations, not CSNA. In those circumstances, the respondents plead that CSNA has no standing to challenge the 2024 Regulations.

33. At the hearing of the action, CSNA confirmed that it was not pursuing ground (vii) above, the plea that the licensing fee would have a disproportionate impact on its members, especially "*smaller retailers less able to absorb the exorbitant increase in costs*". Leaving aside that the concept of a "smaller retailer" was nowhere defined or described, and that the description of the increase as "*exorbitant*" appears no more than a rhetorical flourish in light of CSNA's own expert evidence, such a plea, in its own terms, would have involved comparing the impact of the 2024 Regulations on notional "smaller retailers" who are members of the CSNA against the impact *on other members* of the CSNA. It is quite impossible to understand how such a plea could have been maintained by CSNA, even if it could otherwise argue that an impact on its members gave it standing to challenge the 2024 Regulations.

34. Notwithstanding the confirmation in relation to ground (vii), CSNA confirmed that it *was* pursuing ground (vi) of its claim, which also relates to the disproportionate impact on small retailers over large retailers, but also references that the impact of the 2024 Regulations will be the closure of small retailers "*which is not a lawful purpose envisioned by the Act*". CSNA contends that it has standing to plead this ground, notwithstanding that it will not have to pay the licence fee mandated by the 2024 Regulations. It contends that it has standing to challenge the 2024 Regulations on this ground, and also on all the other grounds, which may be regarded as purely legal grounds, in its capacity as a representative body, or in the alternative, on the basis that it will be indirectly affected by the 2024 Regulations because the effect of them may be to put retailers out of business, thereby reducing its membership.

Arguments re standing

35. CSNA argues that it has standing to challenge the Regulations in its representative capacity for its members. It describes the rules on standing as fundamentally flexible and highlights various cases in support of this proposition.

36. At the hearing of the action, it argued for the first time that, in any event, it has standing because it will be indirectly affected by the Regulations, because the negative impact on its members will have a knock-on effect on it by potentially reducing the number of retailers

who could remain as members of CSNA. This was not a proposition reflected in the affidavit of Mr Jennings, or the expert report of Professor Foley.

37. At the hearing, CSNA referred to various authorities, including, *Irish Penal Reform Trust v Governor of Mountjoy Prison* [2005] IEHC 305, *Rafferty and Ors v Bus Éireann* [1997] 2 IR 424, *Digital Rights Ireland v Minister for Communication* [2010] 3 IR 251, and *Friends of the Irish Environment v Government of Ireland* [2021] 3 IR 1, in support of its claim that a flexible approach should be taken to the question of standing.

38. Each of those cases recognised the decision of Henchy J in *Cahill v Sutton* [1980] IR 269 as the starting point for a consideration of the question of *locus standi*.

39. CSNA also contends that the respondents are too late to contest its standing, having not opposed leave, and refer in this regard to *Lancefort Ltd v An Bord Pleanála* [1999] 2 IR 270, 311:

> "*In* Reg. v. I.R.C.; Ex p. Fed. of Self Employed *[1982] A.C. 617, the House of Lords took the view that, save in simple cases, the question of* locus standi *should not be determined until the substantive application is heard, since the question should not be considered in the abstract, but rather in a particular legal and factual context. Walsh J. in* The State (Lynch) v. Cooney *[1982] I.R. 337, also laid emphasis on the importance of determining the issue of standing by reference to the facts of the particular case and, although he was speaking before the new judicial review procedure came into being in Ireland, his approach would also be consistent with determining standing as a threshold issue, on the application for leave, only in simple cases where it is obvious that the person has not a sufficient interest. Those considerations do not apply, however, to applications seeking judicial review of decisions by planning authorities or the first respondent since in such cases the application must be made on notice to the authority concerned and the applicant must at that stage show that there are substantial grounds for contending that the decision in question was invalid. As a general rule, there should be sufficient evidence before the court at that stage to enable the judge to determine the question of standing: to require the court in every case to reserve the question until the hearing of the substantive application would be inconsistent with the general statutory scheme.*"

40. The respondents contend that *Cahill v Sutton* remains the applicable test in determining standing and that to challenge an administrative decision or legislation, a litigant must be able to show that they are directly affected by it. They accept that there may be exceptional cases in which a challenge may be brought by a party not directly affected, and reference *Irish Penal Reform Trust v Governor of Mountjoy Prison* [2005] IEHC 305 and *SPUC v Coogan* [1989] IR 734. However, they argue that this is not such an exceptional case, and contend that none of the other cases relied on by CSNA provides any support for its contention that it has standing.

41. Rather, the respondents argue, the position here is analogous to that considered by the Supreme Court in *Construction Industry Federation (CIF) v Dublin City Council* [2005] 2 IR 496, in which the Court determined that CIF did not have standing to challenge an administrative decision, the adoption of a planning contribution scheme by Dublin City Council, which would have affected its members.

Discussion on standing

42. I do not agree that *Lancefort* is authority for the proposition that the question of standing *must* be addressed at leave stage, where, as happened here, the leave application was made on notice to the respondents, still less that a failure to do so precludes a respondent from contesting an applicant's standing at the substantive hearing. The passage relied on from the Court's judgment in *Lancefort* is no more than a question of practice regarding how the issue of standing may best be addressed in judicial review proceedings. Moreover, as made clear in the Court's judgment, the question of when standing should be challenged was not in issue in that appeal. There was, therefore, no suggestion that a failure to challenge standing at leave (on notice) stage precluded such a challenge at a substantive hearing.

43. The reason the Court suggested that standing should be challenged at leave stage (where on notice) is that it may well be possible to identify whether there are grounds to dispute an applicant's standing at that early stage in a judicial review, something less likely in plenary proceedings. In fact, in this case, the hypothetical basis for the applicant's claim here only

became fully apparent in the course of the cross-examination of Professor Foley. Thus, even if *Lancefort* did suggest a procedural bar to a challenge to standing at a substantive judicial review hearing – which it does not – that bar would not operate in this case.

44. The respondents are, therefore, entitled to put in issue the applicant's standing to maintain these proceedings.

45. It is very clear that CSNA does not have standing to maintain the ground advanced at (vi) of its grounds, quoted above, regarding the economic impact of the new Regulations on smaller retailers. This ground is beset with the same difficulties as ground (vii), no longer being pursued by the applicant, and is clearly a ground which could only be advanced by a retailer able to show that they are at risk of suffering the economic impact complained of. Advanced, as it is, on the basis of the evidence from Professor Foley, it is an invitation to the court to engage in an analysis of a hypothetical, and poorly defined, scenario, which the court ought not to do, save in the most exceptional circumstances. No such exceptionality arises here.

46. Nor am I persuaded that CSNA has standing to pursue any of the other grounds pleaded. CSNA is not directly affected by the 2024 Regulations and, accordingly, does not meet the requirement for standing identified in *Cahill v Sutton*. As identified in that case, it is not generally in the public interest that a person not personally affected by legislation be permitted to challenge it (at p. 283):

> *"While a cogent theoretical argument might be made for allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional, there are contravening considerations which make such an approach generally undesirable and not in the public interest. To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, the case tends to lack the force and urgency of reality. There is also the risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadequately presented."*

47. There is nothing in the more recent cases relied on by CSNA which displaces this general rule, that the courts will not permit a *ius tertii*, in which one party seeks to assert the rights of another in support of its claim (see, for instance, *Friends of the Irish Environment*, and *Mohan v Ireland* [2021] 1 IR 293, [2019] IESC 18), save in exceptional circumstances.

48. CSNA rely on the decision of the High Court in *Rafferty*, in which the court (Kelly J, as he then was) concluded that the third plaintiff, the National Bus and Rail Union, was "*perfectly entitled*" to bring an action in a representative capacity as representing all its members. It claims that, similarly, CSNA should be entitled to bring this claim in a representative capacity on the part of its members. Leaving aside that it is not clear, based on its own expert evidence, that CSNA can represent *all* its members in relation to the impact of the 2024 Regulations, given that it may impact different members in different ways, the decision in *Rafferty* is clearly distinguishable from the instant case. Firstly, in that case, there were plaintiffs who *were* directly affected. Secondly, the court's observations were not made in response to an argument based on *Cahill v Sutton*, but rather in response to an argument that the union was nothing more than an agent for its members. There was, in fact, no reference to *Cahill v Sutton* in the judgment at all.

49. More fundamentally, it is apparent from subsequent Supreme Court authority that, typically, litigants will not be permitted to pursue claims in a representative capacity, where the litigants are not themselves affected by the subject matter of the proceedings. This is apparent from the decision in the *CIF* proceedings (at p. 526):

> "*I have no doubt but that there are circumstances in which it may be permissible, and even desirable, that a representative body such as the applicant may be entitled to bring judicial review proceedings. A classic example of such a situation is probably* Reg. v. Inspectorate of Pollution, Ex parte Greenpeace Ltd *[1994] 1 W.L.R. 570, where Greenpeace was held to have a sufficient interest to challenge certain authorisations given to British Nuclear Fuels Limited. However, in such circumstances there are usually if not invariably, good practical reasons why, in the discretion of the Court, the applicant ought to be allowed to make the application. There undoubtedly are cases where administrative errors would go unchallenged if an application was refused on the grounds of* locus standi. *Clearly consideration of this question must depend largely on the circumstances of the individual case.*

In the present case, the applicant claims to have a sufficient interest on the basis that the proposed scheme affects all or almost all of its members in the functional area of the Respondent, and, therefore, the applicant has a common interest with its members. However, it appears to me that to allow the applicant to argue this point without relating it to any particular application and without showing any damage to the applicant itself, means that the court is being asked to deal with a hypothetical situation, which is always undesirable. This is a challenge which could be brought by any of the members of the applicant who are affected, and would then be related to the particular circumstances of that member. The members themselves are, in many cases, very large and financially substantial companies, which are unlikely to be deterred by the financial consequences of mounting a challenge such as this. Unlike many of the cases in which parties with no personal or direct interest have been granted locus standi *there is no evidence before the Court that, in the absence of the purported challenge by the applicant, there would have been no other challenger. Indeed, the evidence appears to be to the contrary.*"

50. As the Court acknowledged in *CIF*, there may be exceptions to the rule that a party must be directly affected in order to challenge proceedings, where it can be shown that the parties actually affected are not in a position to bring the claim themselves (see, for instance, *SPUC*, where the interests at issue were those of the unborn, or the *Irish Penal Reform Trust* proceedings, where it was accepted that the prisoners affected lacked the capacity to advance the claims on their own behalf). But CSNA has not advanced any basis upon which it, rather than one of its members, has brought the claim in these proceedings, or adduced any evidence to suggest that there was some obstacle to one of its members bringing the proceedings.

51. CSNA has not, therefore, identified any basis for distinguishing its position from that of the Construction Industry Federation. True, CSNA is a company limited by guarantee, and CIF appears to have been, at that time, an unincorporated association, but that status does not appear to have informed the Court's views on standing in any way.

52. The argument that CSNA will be *indirectly* affected by a potential reduction in its membership is beyond speculative. The expert evidence, at its height, suggested that an

increase in the cost of selling tobacco products might, at some point in the future, be a contributory factor in a vaguely defined category of small retailers becoming unviable. Even if one were to accept that at some point in the future, a member of CSNA might go out of business, and thus cease to be a member, due to increased costs, to which the licence fee contributed, or due to the fact that it no longer sold tobacco products, it is almost impossible to imagine that the thread of causation would or could be traced back to the 2024 Regulations. Though not necessary for me to decide, I conclude that CSNA had fallen a long way short of establishing that it was a likely outcome of the imposition of a licence fee at the level set by the 2024 Regulations. Professor Foley's evidence was based on a series of hypotheticals and variables, and, moreover, did not take into account at all the fact that, even on CSNA's case, a licence fee sufficient to cover the cost of the new licensing regime would have to be fixed under the 2024 Regulations.

53. There is a greater difficulty faced by CSNA in claiming that it is affected in its own right. Professor Foley's evidence acknowledged that if some of CSNA's members will be 'losers' under the new licensing regime, others, better able to absorb the increased costs, will be 'winners'. Moreover, it seemed to be accepted by CSNA that one purpose of the licensing regime is to tackle illegal sales of tobacco products which, it seems likely, would operate to the benefit of all legal retailers. Thus, there is no consistent interest represented by CSNA, and accordingly, no evidential basis upon which it could be concluded that CSNA will be affected, negatively or positively, by the new licensing regime.

54. Accordingly, CSNA lacks standing to maintain these proceedings and the proceedings should, therefore, be dismissed on those grounds alone. However, lest am I wrong about that conclusion, and in circumstances where the issues were fully argued, I propose to consider the merits of CSNA's claims insofar as it is possible to do so. In that regard, a distinction must be drawn between ground (vi), which cannot be addressed, based as it is on hypothetical factual scenarios, and the grounds at (i) to (v) which concern only questions of law. Before dealing with those grounds, I will briefly address the further preliminary argument advanced by the respondents, that the proceedings should have been commenced as plenary proceedings rather than judicial review.

Improper form of proceedings

55. The respondents contend that the proceedings should be dismissed on the grounds that it is only permissible to challenge the validity of secondary legislation in plenary proceedings. They refer to the following passage from *Administrative Law in Ireland*, Hogan, Morgan and Daly (5th ed., 2019, Round Hall) at 2.107:

> *One practical problem relates to the methods by which a statutory instrument may be challenged. The normal rule is that the validity of the statutory instrument should be challenged directly in High Court plenary proceedings, but this question can also be raised in judicial review proceedings if it arises* collaterally *in a challenge to the validity of an administrative decision: strictly speaking, it would seem that the validity of a statutory instrument cannot be* directly *challenged in judicial review proceedings.*

56. The footnote to this passage explains that this is because *certiorari* is not available in respect of a legislative rather than an administrative measure. But as the respondents themselves acknowledge, this may not preclude the making of a declaration in judicial review proceedings.

57. Subsequent to the hearing of these proceedings, the Supreme Court delivered judgment in *G v Ireland* [2025] IESC 49, a challenge by way of judicial review to the compatibility of section 39 of the Residential Tenancies Act 2004 with the Constitution. In his judgment, O'Donnell CJ observed that whether judicial review was the correct method for such a challenge was an issue "*which had been discussed in the case law but never definitively resolved*". He referred to the recent decision in *Donnelly v The Minister for Social Protection* [2023] 2 IR 415, [2022] IESC 31, in which O'Malley J expressed the view that proceedings which challenge the constitutionality of a primary piece of legislation will often be dealt with more appropriately by plenary hearing. The Chief Justice continued:

> "*22. I entirely agree and consider that in light of the Court's subsequent experience, the Court should go further and indicate that where a case consists of a direct challenge to the validity of a piece of primary legislation enacted by the Oireachtas and entitled therefore to a presumption of constitutionality, such a claim should be brought by way*

of plenary proceedings. That does not mean that oral evidence must be given in all cases or that a prompt hearing cannot be provided. It may be possible to address any factual issues by way of admissions on the pleadings or short formal evidence. In other cases, and this is one of them, the issues may be highly fact-sensitive and it is unhelpful to have to address such claims through judicial review proceedings based on affidavit evidence. Where the argument is nuanced and involves an understanding and exploration of facts, it is unsatisfactory to address such cases on the basis of evidence presented in the form of professionally drafted affidavits, presenting a curated picture of the evidence shaped with a view to the legal argument, and without the depth and reality that oral evidence by an affected individual can provide. Where it is sought to challenge a piece of public general legislation enacted by the Oireachtas and where it is said that it offends the Constitution in a particular case, then it is to be expected that evidence should be given of that impact and be capable of being explored in plenary proceedings.

23. Where, however, proceedings are brought to challenge the validity of an administrative decision as a matter of public law, and one of the grounds advanced is that the primary legislation underpinning the decision is repugnant to the Constitution in some respect, then it is permissible to advance that claim by way of judicial review, although in the course of the management of such a claim it may be appropriate to direct that it proceed by way of plenary proceedings, particularly if it is apparent that the claim of constitutional invalidity is a significant component of the claim."

58. Though the grounds advanced by CSNA here do not concern compatibility with the Constitution, it appears from the foregoing that the arguments regarding economic impact would, if they had been pursued by a person with standing to make those grounds, have been arguments more appropriately advanced in plenary proceedings. I have, however, concluded that CSNA has no standing to maintain those arguments, and that they cannot be addressed by the court on a hypothetical basis.

59. Insofar as I propose considering the other grounds, for completeness, there does not appear to be an absolute bar to them being pursued by way of judicial review, though the form of proceedings may have a bearing on the nature of the relief available. I would not, therefore, have dismissed the proceedings on this ground alone.

Arguments on substance

60. The applicant argues that the Minister was bound by the Act in making the Regulations and fixing the licence fees, and that it was impermissible for him to set a licence fee at a particular level for an ulterior purpose. In written submissions, CSNA characterised that ulterior purpose as being to "*close retail outlets*". Ground (ii), at least implicitly, contains a more neutral characterisation, that one of the purposes of the Regulations was that the fee might disincentivise the use of tobacco products. The applicant contends that the only legitimate purpose permitted by the Act was that the licence fee would cover the costs of the licensing regime. It refers to the decisions in *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317*, Cassidy v Minister for Industry and Commerce* [1978] IR 297*, Island Ferries Teo v Minister for Communication* [2015] 3 IR 637, and *Doyle v An Taoiseach* [1986] ILRM 693.

61. In addition, it contends that there was no evidence before the Minister to support the fees as fixed by the Regulations, and that they are therefore irrational.

62. The respondents agree that the 2023 Act is an Act to regulate tobacco sales and the setting of fees for licences must be understood as part of that regulatory system. They argue that the Act, and therefore, section 18, must be understood against a consistent policy background aimed at reducing tobacco use on public health grounds.

63. The respondents point to the fact that the introduction of a licensing regime is required by international conventions, including the World Health Organisation Framework Convention on Tobacco Control, ratified by the State in November 2005 ("**the Convention**"). They argue that the Act must be understood as part of a public health policy framework directed at reducing tobacco use, and therefore it must have been within the contemplation of the Oireachtas that licence fees would be set at a level which could, even if only indirectly, reduce the use of tobacco products, by disincentivising their sale. In any event, they say that there is nothing in the 2023 Act, by contrast to the 2002 Act, which suggests that licensing fees must be fixed by reference to the cost of maintaining the licensing regime.

Assessment

64. It is helpful to consider briefly each of the grounds advanced at the outset to understand what remains at issue between the parties. As pointed out by the respondents, CSNA advanced no argument in written or oral submissions regarding ground (iv), that the Regulations are irrational because they draw an arbitrary distinction between tobacco products and nicotine inhaling products. It is a ground which was, in any event, bound to fail, even without considering whether there is any rational basis for distinguishing between the two (though, it should be noted, there is ample basis for distinguishing between them, and CSNA's own case, focussed entirely on the licence fees for tobacco products, implicitly accepts that different considerations arise in respect of each). A distinction between tobacco products and nicotine inhaling products is made in the 2023 Act. The fact that that distinction is reflected in the Regulations is, accordingly, entirely consistent with the Act. CSNA has not challenged the Act or contended that the Oireachtas acted unlawfully in distinguishing between the two. It cannot, therefore, maintain a claim that the Regulations are unlawful for also recognising that distinction. Ground (iv), therefore, falls away.

65. At grounds (ii) and (v), CSNA contends that the Minister failed to have regard to the fact that retailers must sell tobacco products at a fixed price. There is no evidence to support this claim, and it is not a necessary inference which must be drawn from the Minister's actions. Indeed, the analysis, set out in the briefing note, that the imposition of the licence might discourage retailers from selling tobacco products seems to rest on the assumption that it is the retailer, not the consumer, who would bear the cost. Accordingly, this claim must also be rejected. The argument that the Minister's purpose of reducing the sale of tobacco will not be met, since the cost of the licence cannot be passed on to consumers, will be considered as part of CSNA's arguments regarding the purpose of the Regulations.

66. At grounds (i) and (ii), CSNA claims that the Minister intended to impose an excise duty (ground (i)), or the equivalent of an additional tax or duty (ground (ii)). In argument, it was repeatedly stated that the licence fee was the equivalent of an excise duty on tobacco products and was, therefore, unlawful. No attempt was made to explain the nature of the illegality or how or why the imposition of a licence fee should or could be regarded as an excise duty or tax. It is not. It is a fee paid by the retailer for a licence, not a tax or duty

placed on the sale of tobacco products. Indeed, on CSNA's argument, it cannot even be passed on to the consumer. In any event, the 2023 Act imposes a requirement for a licence fee to be paid by retailers, and section 18 confers on the Minister the entitlement to fix the amount. Absent a challenge to the Act, CSNA cannot challenge the fact that retailers are now required to pay that fee. Accordingly, this ground also falls away.

67. The balance of CSNA's case can, accordingly, be reduced to four propositions:

(i) The Regulations are unlawful because they fail to comply with the only lawfully permitted purpose of the Act, that is, setting fees which cover the cost of the licensing regime.

(ii) The Regulations are unlawful because they pursue a purpose not permitted by the Act, that is, disincentivising the sale of tobacco products.

(iii) The Regulations are irrational, because there was no evidence to support the fees set thereby.

(iv) The Regulations are irrational because they are incapable of achieving their apparent purpose.

68. I will address each of these propositions in turn.

(i) Regulations not for permitted purpose

69. The starting point for consideration of CSNA's claim in this respect is the 2023 Act. Does section 18 of the Act, construed in accordance with the principles set out in *Heather Hill Management Company CLG v An Bord Pleanála* [2024] 2 IR 222, [2022] IESC 43, limit the scope of the Minister's discretion in the manner contended by CSNA?

70. Section 18 provides as follows:

The Minister may prescribe a fee where an application is made for—

(a) a licence under section 12,

(b) the renewal of a licence under section 15, or

(c) a copy of a licence under section 17,

and such fee shall be recoverable by the Executive as a simple contract debt in any court of competent jurisdiction.

71. It is a little difficult to know what to make of the last clause in section 18. Section 11(7) of the Act requires that an application for a licence must be accompanied by the prescribed fee, and this provision also applies in relation to a copy licence application under section 17. Similarly, section 15(2) requires that an application for renewal of a licence be accompanied by the prescribed fee. It is not obvious, therefore, in what circumstances the HSE would ever need to "*recover*" the prescribed fee, whether as a contract debt or otherwise.

72. That anomaly aside, it is immediately obvious that there is nothing in section 18 itself which imposes the limitation contended for by CSNA. Nor did CSNA argue that the power to set fees for a licensing regime must typically be understood as being confined by an implied limitation that the fees be calculated by reference to the cost of the scheme. No authority was identified for such a proposition.

73. The respondents do not contend, however, that the discretion under section 18 is unconstrained. They acknowledge that it must be exercised in accordance with the principles identified in *East Donegal*, by reference to, as Walsh J put it in that case "*the objects of the Act and the general context*". Absent any guidance from section 18 as to what, if any, constraints might be imposed on the Minister's discretion, an assessment of the Act as a whole is therefore required.

74. Confining the assessment to the wording of the Act itself, there is little by way of further guidance. As is evident from the Long Title to the Act, in simple terms, it creates a system of licensing for the sale of tobacco and nicotine inhaling products, for the enforcement of that system and for related offences. The Act is silent on the *purpose* of the creation of such a licensing regime. That is, of course, other than in the title to the Act itself, which identifies that the Act is a Public Health Act. The licensing regime must, therefore, be understood as a public health measure. CSNA did not explain why an understanding of the Act as a public health measure necessitated reading a limitation into section 18 that the fees charged for a licence must be calculated be reference to the cost of maintaining that licensing regime. I cannot identify such a reason by reference to the public health nature of the Act. On the

contrary, the public health nature of the Act entirely supports the respondents' position that the Minister was entitled to exercise his discretion in setting fees in a manner which promoted public health.

75. Nor can I identify a reason why the introduction of a licensing regime for tobacco products should necessarily carry with it the implication that such a licensing regime must require that the fees charged should be confined to covering the cost of the scheme. Understanding that the Act is a public health measure, the increased regulation of tobacco can reasonably be understood as something intended to promote public health. Insofar as any limitation is to be read into section 18, it is a limitation which must be consistent with the promotion of public health. Imposing fees which are calculated other than by reference to the cost of the licensing regime is not inconsistent with the public health objectives of the Act. Accordingly, I cannot conclude that the only permitted basis for calculating licence fees is that identified by CSNA.

76. When one considers the legislative history of the provision, a permissible interpretative tool (see, for instance, *DPP v Brown* [2019] 2 IR 1 at paragraph 94, as cited in *Heather Hill*), this becomes all the more apparent. The 2023 Act repeals the 2002 Act which provided for a system of registration of tobacco retailers. Section 37(2) of the 2002 Act provides a mechanism for the setting of fees for registration:

> *(2) The Office may, for the purpose of defraying any expense incurred in establishing or maintaining the register, charge each person registered under this section a fee of such amount as may be determined by the Minister (in this section referred to as the "appropriate fee").*

77. Thus, the direct statutory predecessor to the new licensing system *expressly* restricted the Minister, when fixing the appropriate fee, to doing so at a level which defrayed the expenses of that earlier registration system. It might be too much to suggest that the absence of such an express restriction in the new regime necessarily implies that there is no similar restriction here, but it is certainly the case that the express provision in the 2002 Act undermines any suggestion that such a restriction must be implied here, as CSNA's case requires.

78. In the circumstances, I reject CSNA's argument that the 2024 Regulations are unlawful because the licence fees were not fixed by reference to the cost of maintaining the licensing system.

(ii) Regulations are for an unlawful purpose

79. In the alternative to claiming that the Regulations were not made for the only lawful purpose permitted by the Act, CSNA argues that, in any event, the purpose for which the Regulations *were* made was not permitted by the Act. The Statement of Grounds is not entirely clear as to the Minister's purported unlawful purpose. At f(xx), CSNA pleads that the Regulations will have the *effect* of concentrating sales of tobacco in larger retailers which, it is pleaded, is not a purpose envisioned by the Act. Ground (ii), quoted above, refers to an unlawful purpose and then suggests that the Minister intended to impose a tax to disincentivise consumption of tobacco products.

80. In their written submissions, CSNA argues that purpose of the Regulations was to "*set a licence fee at such a high level that it resulted in a reduction in the density of retail outlets. In other words, the Minister intended to close retail outlets by setting a high licence fee in the 2024 SI*." This is described as the "*dominant purpose*" of the Minister in enacting the Regulations.

81. Expressed in these exaggerated terms, CSNA's claim can readily be rejected. There is simply no evidence to support the contention that the Minister intended, or even considered, that the Regulations would have this impact or that it was any part of the Minister's purpose in making the Regulations that retail outlets would close. There is nothing in the briefing document, on which CSNA relies, suggesting such a purpose.

82. Rather, what the briefing document reveals is that the Minister was made aware that licence fees at the levels suggested might have the effect of disincentivising some retailers from selling tobacco products. The evidence presented was that this is what had occurred in Australia. True, the briefing note does then say that the evidence shows "*the density of retail outlets contributes to usage of tobacco products and that a licence fee can act to reduce density*", but this can only be understood, by reference to the evidence referred to, as

meaning a reduction in retail outlets *which sell tobacco products*. The Australian evidence relied on was of retail outlets stopping selling tobacco products, not closing. There is a world of difference between a purpose of discouraging retailers from selling tobacco, and one of forcing them to close. The briefing note does not refer to the possibility of closures, let alone suggest that fees should be set at a level which would cause closures.

83. The briefing note does identify that the fees are set at a higher end comparable to other jurisdictions because the overall policy objective is to reduce tobacco use. It identifies a possible *effect* of the fees proposed, disincentivisation of sales, consistent with this objective. What informs the level chosen are, therefore, the comparators from other jurisdictions, and, critically, "*the comparable licensed product*", alcohol. The fee proposed for a licence to sell tobacco products is, in fact, less than for a full off-licence even though the "*health harms from alcohol are less severe than those for tobacco products…. [and] could be set far higher on health harm grounds.*" The briefing note suggests that the licence fee should not be set any higher at this time, because it is the first time that retailers will have to pay an annual fee. Thus, the fees have been set at a level which reflects the health harms of the product being sold, but mitigated to enable retailers to adjust to the introduction of a new charge. CSNA has fallen far short of establishing that licence fees at the level fixed by the 2024 Regulations were not within the contemplation of the Oireachtas when conferring discretion on the Minister to set the fees.

84. The parties appeared to agree that the relevant test was that set out in *Cassidy* (at p. 310/311):

> "*The general rule of law is that where Parliament has by statute delegated a power of subordinate legislation, the power must be exercised within the limitations of that power as they are expressed or necessarily implied in the statutory delegation. Otherwise it will be held to have been invalidly exercised for being* ultra vires*. And it is necessary implication in such a statutory delegation that the power to issue subordinate legislation should be exercised reasonably. Diplock LJ has stated in* Mixnam's Properties Ltd v Chertsey Urban District Council *[1964] 1 QB 214 at p. 237 of the report:-*
>
> > "Thus, the kind of unreasonableness which invalidates a by-law [or, I would add, any other form of subordinate legislation] is not the antonym of

> 'reasonableness' in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.'"

85. In *Cassidy*, the court recognised that where the dominant purpose of secondary legislation is within the powers conferred by an Act, then the existence of some subsidiary purpose not within the contemplation of the legislature will not render the secondary legislation unlawful. By reference to the briefing document, the dominant purpose of the Minister in imposing fees at the level he did was to set a fee which reflected the harmful nature of the product in a manner consistent with a comparable product, alcohol. A *consequence* of so doing was that this might discourage the sale of tobacco by some retailers. That does not render the Regulations unlawful.

86. Nor would the Regulations be unlawful even if their dominant purpose was to be regarded as discouraging the sale of tobacco, still less the disincentivisation of the use of tobacco products. The respondents argue that such a purpose can be understood as being permitted by the Act by reference to various policy documents and the Convention, material CSNA argues is inadmissible. I think it is unnecessary to call in aid such extraneous material and I do not rely on it. CSNA, in *its* submissions, repeatedly acknowledged that tobacco products are harmful to health, albeit it was emphasised that it was lawful to sell them. It is inconceivable that the Oireachtas, in passing a Public Health Act, with the clear purpose of more strictly regulating the sale of tobacco products, did not have it within its contemplation that the 2023 Act's purpose was to promote public health, and that the exercise of powers given under the Act would be pursued to that end. In passing the 2023 Act without expressly imposing any limit on the discretion afforded to the Minister when setting the appropriate fee for a licence to sell this harmful product, common sense suggests that those fees would be set at a level which reflected the harmful nature of the product, and would, if anything, be calculated to reduce tobacco consumption, rather than promote it, or even maintain it at its current levels.

87. None of the cases relied on by CSNA suggest a contrary conclusion. In *East Donegal*, the Supreme Court held that any discretion afforded to a Minister by parent legislation must be exercised in accordance with the requirements of constitutional justice. A particular

provision affording the Minister an unfettered power to exempt particular *businesses* from the scope of the legislation was found to offend the constitution, though a similar provision permitting the Minister to exempt particular *classes* of business was not. Here, there is no challenge to the parent Act and no claim that the Minister acted in breach of the principles of constitutional justice, other than in respect of the irrationality claim, addressed below. The decision in *East Donegal* does not assist the applicant here.

88. In *Cassidy*, the Court concluded that the Minister had acted arbitrarily in making a pricing order for the sale of alcohol in public houses which applied in a precisely defined geographic area, and which failed to distinguish between lounge and bar areas in those public houses. No such arbitrary distinctions are present in this case: CSNA, correctly in my view, did not advance any argument in support of its pleaded claim that a distinction between tobacco products and nicotine inhaling products was arbitrary.

89. *Island Ferries* was a competition law case in which the Supreme Court concluded that the relevant Ministerial Order, fixing the charge to be paid by ferry operators to the Aran Islands, had been made for a purpose not permitted by the Act, and without regard to the fact that the charges could not be passed on to customers. The evidence does not disclose any similar error on the part of the Minister here.

90. Section 18 is expressed in terms which suggest that the Minister has broad discretion in determining what is an appropriate fee. The onus is on the CSNA to prove that he has exceeded the limits of that discretion. It has not done so and, accordingly, this ground of challenge must also be dismissed.

(iii) The Regulation is irrational – no evidence to support the fees

91. It is perhaps surprising that this ground was maintained by the applicant following receipt of the respondents' opposition papers. Although Mr Jennings averred in his affidavit that it was difficult to avoid the conclusion that the fees had been plucked from thin air, it is clear that the fees fixed by the 2024 Regulations were based on the figures contained within the briefing document. That document, therefore, constitutes evidence before the Minister

when making the Regulations. It was clearly, therefore, not an irrational decision, *i.e.* a decision unsupported by any evidence.

92. CSNA thus advance a different argument, in effect, that the *briefing document* was irrational. But that argument – even if it were permissible – must fail too. The document proposes licence fee amounts, provides comparable figures from other jurisdictions, and critically, compares the figures proposed with those charged in this jurisdiction for alcohol. It then explains why, despite the fact that tobacco is more harmful to health than alcohol, the proposed fee for a licence to sell tobacco products should not be higher than that for a full off-licence. The briefing document is thus reasoned, and reasonable, *i.e.* based on evidence. CSNA's sceptical reaction to the round figures selected for fees seems to be based on its incorrect assumption that the fees imposed were required to be based on the cost of operating the licensing regime. Once that assumption is discarded, there is nothing at all unusual about fees being fixed at a round number and it cannot be the case that a Minister, when fixing fees, should be required to justify a decision to charge €1000 rather than €900 or €1100 (or indeed €990 or €1010).

(iv) The Regulation is irrational – it won't achieve its purpose

93. It is important to note that the pleaded claim here appears to be that the Regulation will not achieve the purportedly unlawful purpose of imposing a tax on tobacco products which will be passed on to customers, thus disincentivising the use of tobacco. CSNA refers to the decision in *Doyle and Ors v An Taoiseach* [1986] ILRM 693, in which the High Court and Supreme Court struck down an excise duty imposed in respect of bovine animals slaughtered in the State. The evidence showed that it was impossible for butchers and exporters to pass on the levy to the seller of animals, as had been envisaged by the levy. The High Court described the levy as unreasonable and unworkable. The Supreme Court concluded that since the liability fell upon exporters rather than, as had been intended, producers, the levy operated outside the impliedly intended scope of the delegation given by the relevant Act.

94. As discussed above, there is no evidence that the Minister intended to impose a tax on tobacco products, or that he was operating under the misapprehension that the cost of the licence could be passed on to consumers. There is no basis for implying an intention in the 2023 Act that any licence fee would be passed on to consumers. No doubt, increasing the price of tobacco products through taxation is one way in which the legislature could attempt to disincentivise the use of tobacco products, but there are far more straightforward ways of so doing: there are, as discussed in Mr Jennings' evidence, significant excise duties already directly imposed on tobacco products which must be borne by the consumer. The challenge here is clearly, therefore, distinguishable from that at issue in *Doyle*.

95. It is true that the respondents own expert expressed doubts that the 2024 Regulations would be effective in disincentivising the sale of tobacco products, based on his view that the most likely response will see manufacturers absorb the cost, in effect, on behalf of retailers. That falls far short of rendering the 2024 Regulations irrational, and is, in any event, disputed by CSNA's expert.

96. Furthermore, the *Oireachtas* has expressly provided a mechanism which enables the effectiveness of the licensing regime to be considered. Section 10 of the 2023 Act expressly provides that the Minister shall carry out a review of the operation of the Act 12 months after the passing of the Act.

97. The 2024 Regulations will achieve their straightforward purpose of imposing a licence fee on retailers of tobacco products, precisely as required by the 2023 Act. They may or may not have one of the effects contemplated by the Minister when making them, of disincentivising the sale of tobacco products. The possibility that the Regulations may not have this effect does not render them unlawful. Even if the Minister's primary purpose was to achieve such disincentivisation, the evidence falls far short of establishing that the Regulations are, therefore, irrational as incapable of having the effect intended.

Conclusion

98. The applicant does not have standing to challenge a statutory instrument by which it is not directly affected.

99. In any event, the statutory instrument was made in the exercise of the Minister's discretion for a purpose not inconsistent with the Act conferring on him a power to do so. Accordingly, the reliefs sought by CSNA must be refused.

100. I will list the matter at 10.30 am on Friday, 16 January 2026 for the purpose of making final orders in this matter.