

To whom it may concern at the World Health Organization,

Following the public consultation on the draft “WHO Guideline on policies to protect children from the harmful impact of food marketing” (the Draft Guideline), the Global Center for Legal Innovation on Food Environments at the O'Neill Institute for National and Global Health Law at Georgetown University celebrates the initiative for its potential to strengthen legal and advocacy efforts to protect and promote the realization of the right to health and other interrelated human rights at the domestic and international levels. In this context, it would like to offer the following comments and suggestions to help enhance the Draft Guideline's power to contribute to these aims, by being more robustly grounded on human rights and bolstering its recommendations.

Recommendations:

1. Frame the Draft Guideline as a materialization of States' obligations to tackle NCDs under international human rights law, stressing that marketing regulations are a suitable and rights-compliant measure to fulfil such duties.
2. Explicitly recommend that marketing regulations prioritize public health and human rights over commercial interests and properly acknowledge the need to tackle undue influence of corporate actors in policymaking.
3. Stress the need for policy to be informed by the best available evidence free from conflicts of interest, while leaving space for policy experimentation and progress.
4. Ensure that the Draft Guideline builds upon existing recommendations, to contribute to the progressive realization of human rights.

Rationale for recommendations:

1. **Frame the Draft Guideline as a materialization of States' obligations to tackle NCDs under international human rights law, stressing that marketing regulations are a suitable and rights-compliant measure to fulfil such duties.**

There are well-established links between non-communicable diseases (NCDs) and human rights, as recognized extensively by experts, authoritative human rights interpreters and scholars alike. Particularly, the need to address behavioral risk factors, including unhealthy diets, by creating environments that not only enable, but also foster, healthy food choices has long been acknowledged as fundamental to address the NCD epidemic, where marketing restrictions constitute a key policy priority.

The right to health has been at the forefront of the rights-based discussions, with authoritative interpretation by human rights bodies and experts developing standards on States' obligations to address the NCD epidemic. While the Draft Guideline reasonably focuses on work by the Committee on the Rights of the Child (CRC)- in light of its child's-rights approach- these references omit relevant rights and associated obligations developed by other human rights bodies, that are applicable to everyone, regardless of age. Moreover, the core part of the Draft Guideline includes only very limited references to equity and human rights, which could be enhanced to support its grounding and strengthen its recommendations.

Starting more than 20 years back, the Committee of Economic, Social and Cultural Rights (CESCR) has repeatedly stressed that the content of the right to health extends to its determinants, including food,

nutrition, potable water and a healthy environment.¹ Moreover, recognizing the interconnected, indivisible and interdependent nature of human rights, the CESCR has acknowledged not only that health is indispensable for the exercise of other human rights,² but also that it is dependent upon their realization; including the rights to food, education, dignity, life, non-discrimination, equality, privacy and access to information, amongst others.³ In the context of women's rights, the Committee on the Elimination of Discrimination against Women (CEDAW) has equally stressed that the right to health requires promoting "women's fundamental human right to nutritional well-being throughout their lifespan by means of a food supply that is safe, *nutritious* and adapted to local conditions"⁴ (emphasis added)

Under international human rights law, States have three levels of obligations: to respect, protect and fulfill human rights. The obligation to *respect* requires States to refrain from interfering either directly or indirectly with the enjoyment of human rights. Therefore, in the context of the right to health, States cannot engage in behaviours that may contribute to preventable morbidity and mortality.⁵ Second, under the obligation to *protect*, States must take legislative and other measures to prevent non-State actors, including corporations, from interfering with the enjoyment of human rights.⁶ Lastly, States must, under the obligation to *fulfil*, adopt legislation and national health policies to advance the full realisation of human rights. In the context of the right to health, this includes, but is not limited to, the need to provide information that supports healthy decisions.⁷

Acknowledging resource limitations, some of these obligations are of *progressive* nature, where realisation of human rights is to be incrementally achieved in accordance with State's available resources. Nonetheless, international human rights law also imposes obligations of *immediate* realization, which include the duty to take "deliberate, concrete and targeted" ⁸ measures towards human rights realisation without discrimination. Consequently, "States parties have a specific and continuing obligation to move as *expeditiously* and *effectively* as possible" towards human rights realisation.⁹ (emphasis added) This has been recognized by the CESCR not only in the context of general State obligations under the

¹ Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, E/C.12/2000/4, 4, 11 (2000).

² *Id.* at 1.

³ *Id.* at 3; Committee on Economic, Social and Cultural Rights, *General Comment 12: The right to adequate food*, E/C.12/1999/5, 4 (1999).

⁴ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 4 (1999).

⁵ Committee on Economic, Social and Cultural Rights, *supra* note 1 at 34; Anand Grover, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Unhealthy foods, non-communicable diseases and the right to health*, 14 (2014); Danius Puras, *Statement by the UN Special Rapporteur on the right to health on the adoption of front-of-package warning labelling to tackle NCDs*, (2020).

⁶ Committee on Economic, Social and Cultural Rights, *supra* note 1 at 35; Grover, *supra* note 5 at 15; Danius Puras, *supra* note 5.

⁷ Committee on Economic, Social and Cultural Rights, *supra* note 1 at 36.

⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, E/1991/23, 2 (1990).

⁹ Committee on Economic, Social and Cultural Rights, *supra* note 1 at 31.

International Covenant on Economic, Social and Cultural Rights,¹⁰ but also in the context of the right to health¹¹ and education,¹² amongst others.¹³

In this context, while much of the legal debate around measures to regulate products or corporate behavior to tackle NCDs tends to focus around whether States *are allowed to* intervene (which is reflected in the Draft Guideline's language that marketing restriction are "in accordance with" human rights),¹⁴ human rights law in the context of social, economic and cultural rights actually impose an *obligation* to take action. Hence, State inaction is not an option, particularly where human rights risks are tangible, as with NCDs, and rights-promoting measures are not substantially dependent on resources, as is the case with marketing regulations. In fact, the evidence referenced in the supporting documents of the Draft Guideline indicates that marketing regulations are not only not resource-dependent but can actually be a source of long-term health and economic benefits.¹⁵ Thus, it could be argued that marketing regulation is an immediate State obligation not subject to progressive realization, where inaction constitutes a State violation of its human rights duties.

The CESCR addressed the need for States to regulate private actors in the context of the right to health early in its General Comment 14.¹⁶ However, it has more recently specifically addressed State obligations regarding business activities, by recognizing that "the obligation to protect means that States parties *must* prevent *effectively* infringements of economic, social and cultural rights in the context of business activities"¹⁷ (emphasis added). Acknowledging that such actions are not mere "good practice," but a direct reflection of States' human rights obligations, the CESCR has stressed that compliance with such duties requires State parties to adopt legislative, administrative, educational or other appropriate measures, to "ensure *effective* protection against Covenant rights violations linked to business activities".¹⁸ This reiterates that State duties are not fulfilled by the adoption of *any* measures aimed at preventing human rights violations. On the contrary, measures must be "deliberate, concrete and targeted,"¹⁹ as referenced earlier, and also "*effective*" in achieving that aim.

In the context of business activities affecting public health, the CESCR has stressed that "the obligation to protect sometimes necessitates direct regulation and intervention," where "States parties should consider measures such as restricting marketing and advertising of certain goods and services in order to protect public health."²⁰ This echoes the CRC's call for States to "ensure that marketing and advertising

¹⁰ Committee on Economic, Social and Cultural Rights, *supra* note 8 at 2.

¹¹ Committee on Economic, Social and Cultural Rights, *supra* note 1 at 30–1.

¹² Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (Art. 13)*, 43 (1999).

¹³ For example, the right to science. See: Committee on Economic, Social and Cultural Rights, *General comment 25 on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)*. E/C.12/GC/25, (2020).

¹⁴ WORLD HEALTH ORGANIZATION, *Draft guideline on policies to protect children from the harmful impact of food marketing*, 15 and 45 (2022).

¹⁵ WORLD HEALTH ORGANIZATION, *Implementing policies to restrict food marketing: a review of contextual factors*, 12–5 (2021), <https://www.who.int/publications/i/item/9789240035041>.

¹⁶ Committee on Economic, Social and Cultural Rights, *supra* note 1 at 55–6.

¹⁷ Committee on Economic, Social and Cultural Rights, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 14 (2017).

¹⁸ *Id.*

¹⁹ Committee on Economic, Social and Cultural Rights, *supra* note 8 at 2.

²⁰ Committee on Economic, Social and Cultural Rights, *supra* note 22 at 14, 19.

do not have adverse impacts on children's rights by adopting appropriate regulation,"²¹ as acknowledged in the Draft Guideline²².

The CESCR has also addressed the need to take effective measures to tackle NCDs in the context of its Concluding Observations to specific countries. In its conclusions on the fourth periodic report of Argentina, the Committee expressed concern for the country's increasing overweight and obesity rates and the absence of State measures to address the issue, calling for "effective measures to discourage the consumption of unhealthy foods and beverages, including (...) restrictions on the advertising of unhealthy foods and beverages, especially those directed towards children."²³ Likewise, in Mauritius, it extended its worry about the high incidence of non-communicable diseases and related deaths, demanding the country "take effective measures to reduce the risk factors of non-communicable diseases."²⁴

The work by the CESCR has been complemented by different UN Special Rapporteurs on the right to health and food, who have linked human rights directly with NCDs and have called for State action, specifically referencing the need to regulate unhealthy food marketing to children (some of this work was acknowledged in the Draft Guideline's supporting documents, although not in its core recommendations).²⁵

Remarkably, the former Special Rapporteur on the right to health, Anand Grover, issued a report focusing specifically on *Unhealthy foods, non-communicable diseases and the right to health*, where he recalled that States have an obligation to protect people from violations of their right to health from activities of non-State actors, including private food corporations.²⁶ Thus, he stressed that "States have a positive duty to regulate unhealthy food advertising and the promotion strategies of food companies,"²⁷ in order to prevent harm to people's health and fulfil State obligations under the right to health.²⁸ His successor, Danius Puras, also highlighted the human-rights implications of the growing NCD epidemic, this time specifically addressing the need for a different regulatory measure, front-of-package warning labels, as an effective means to protect and promote human rights.²⁹

The issue was also discussed by the former Special Rapporteur on the right to food, Hilal Elver, who published a report discussing the underlying factors affecting nutrition, including industrial food systems, unhealthy eating environments and the growing threat of non-communicable diseases. On that occasion, she highlighted the impact of food corporations in the growing NCD epidemic and called for State action, including marketing restrictions.³⁰

Moreover, the need to restrict unhealthy food marketing to children was also acknowledged by experts in areas unrelated to health and food. The Special Rapporteur in the field of cultural rights, Farida Shaheed, also expressed concern about the negative effect of commercial advertising to people's health,

²¹ Committee on The Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*. CRC/C/GC/16, 59 (2013).

²² WORLD HEALTH ORGANIZATION, *supra* note 14 at 15 and 49.

²³ Committee on Economic, Social and Cultural Rights, *Concluding observations of the fourth periodic report of Argentina*. E/C.12/ARG/CO/4, 46.f (2018).

²⁴ Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Mauritius*. E/C.12/MUS/CO/5, 52.a (2019).

²⁵ WORLD HEALTH ORGANIZATION, *supra* note 15 at 16–21.

²⁶ Grover, *supra* note 5 at 15.

²⁷ *Id.* at 25.

²⁸ *Id.* at 22.

²⁹ Danius Puras, *supra* note 5. Significantly, this statement was also endorsed by the Special Rapporteur on the right to food and the Working Group on Business and Human Rights.

³⁰ Hilal Elver, *Interim report of the Special Rapporteur on the right to food*. A/71/282, (2016).

social relationships and the environment, stressing that, in the context of food, “by promoting mainly manufactured products with a high content of fat, sugar or salt, food and beverage companies contribute to altering previous eating and cooking practices that often were healthier and more ecologically sound” and “have contributed to shifting dietary patterns towards those closely linked with non-communicable diseases.”³¹ As a result, concerned for the effect of advertising on cultural rights, including education and leisure, she recommended strong marketing regulations, including a “ban [on] all commercial advertising and marketing in public and private schools”³² (emphasis added). Moreover, she emphasized the shortcomings of self-regulation, stressing that it is “unsatisfactory, leading to poor overall implementation, gaps, inconsistencies and legal uncertainty for both the industry and the public”³³ and called for government regulation instead.

The developments described in the universal system have also been echoed in the InterAmerican Human Rights system, where the jurisprudence of the InterAmerican Court of Human Rights (IACtHR) has established that failure to prevent human rights violations can make States directly responsible, even when carried out by non-State actors. The Court has been developing these standards progressively through its jurisprudence both in relation with the right to health³⁴ and in the context of risky activities threatening other human rights.³⁵ Thus, the Court has established that, where States’ failure to adequately regulate or supervise private parties result in human rights violations, the fact that actions were perpetuated by non-State actors still constitutes lack of State due diligence to prevent harm.³⁶ For example, in a recent case against Honduras, where private companies were exploiting vulnerable populations through risky fishing practices, the IACtHR defined that the obligation to guarantee human rights was not fulfilled by the mere existence of a legal system designed for that effect, but “requires the government to conduct itself so as to *effectively ensure* the free and full exercise of human rights”³⁷ (emphasis added). Hence, this obligation “extends beyond the relations between State agents and the persons subject to their jurisdiction, and encompasses the duty to prevent third parties, in the private sphere, from violating the protected rights.”³⁸

The above is directly applicable to the topic discussed in the present document, as, in line with the standards described by the CESCR, the IACtHR directly acknowledges States’ obligation to take positive steps towards *effective* human rights realization. Echoing these issues, the Inter-American Commission on Human Rights (IACHR) has emphasized that increased consumption of unhealthy products, including unhealthy foods, reflects a lack of State compliance with its human rights obligations to prevent and address the negative effects of business practices, which require decisive State measures, including appropriate marketing regulations.³⁹

³¹ Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights*, 48, 50 (2014).

³² *Id.* at 101.

³³ *Id.*

³⁴ See, e.g., *Caso Poblete Vilches y otros vs. Chile* (2018) and *Caso Vera Rojas y otras vs. Chile* (2011).

³⁵ See, e.g., *Caso empleados de la Fábrica de fuegos en Santo Antonio de Jesús y sus familiares vs. Brasil* (2020) and *Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras*, 43 (2021).

³⁶ For a comprehensive account of InterAmerican human rights standards in relation to healthy diets, see: Belén Ríos, Isabel Barbosa & Ariadna Tovar Ramírez, *State Obligations in the Context of Unhealthy Diets: Paving the Way Within the Inter-American Human Rights System*, 11 REVISTA INTERNACIONAL DE DERECHOS HUMANOS 43–72 (2021).

³⁷ CASO DE LOS BUZOS MISKITOS (LEMOTH MORRIS Y OTROS) VS. HONDURAS, *supra* note 49 at 43.

³⁸ *Id.* at 44.

³⁹ RELATORÍA ESPECIAL SOBRE DERECHOS ECONÓMICOS SOCIALES CULTURALES Y AMBIENTALES & MUÑOZ, *Informe Empresas y Derechos Humanos: Estándares Interamericanos*, 211 360–1 (2019), <https://www.oas.org/es/cidh/informes/pdfs/EmpresasDDHH.pdf>.

As the above shows, prevention of human rights violations is a core State obligation, specifically where business practices can cause such a harm, as in the context of unhealthy food marketing. Significantly, though, State duties are not exhausted by harm prevention, but rather entail a concomitant duty to positively promote human rights realization, to the maximum of their available resources, as an expression of their duty to fulfill human rights.⁴⁰

In this context, marketing restrictions are necessary and human-rights compliant measures to address the growing burden of NCDs. This neither ignores nor undermines the fact that marketing restrictions can represent limitations of some commercial freedoms, but rather highlights that such limitations are lawful and legitimate from the perspective of international human rights law and domestic constitutional standards. In fact, given its inherently economic underpinning, even commercial freedom of expression, where protected, has been considered a form of expression with a lesser degree of protection both by international human rights scholars and experts⁴¹ and in domestic Courts.⁴² By stating that “no undesirable effects of restricting food marketing were identified,”⁴³ the Draft Guideline falls short of acknowledging such relevant discussions, which it would do well in recognizing in anticipation of stakeholder complaints.

The above leads to an important conclusion: State action to address NCDs risk factors, including unhealthy diets and unhealthy food marketing, as its driver, is mandated under international and regional human rights law, where State’s omission to take effective measures would constitute a violation thereof. This is not only on account of violations to the right to health, but also of other interrelated human rights, including food, education, non-discrimination, and culture, amongst others. In this context, unhealthy food marketing restrictions appear as an appropriate measure to prevent human rights violations and promote their realization, as has been repeatedly acknowledged by authorities in the matter.

Therefore, the Draft Guideline’s “good practice statement” that “children *should* be protected from the harmful impact of food marketing”⁴⁴ (emphasis added) fails to properly reflect States’ obligations to protect and promote human rights. This is true regardless of age, but includes additional and reinforced duties when the rights of children and other vulnerable populations are at stake. Similarly, the claim that “policies to protect children from the harmful impact of food marketing *appear to be in accordance with* human rights standards”⁴⁵ (emphasis added) is inaccurate and potentially misleading. Far from a discussion on semantics, the framing of the issue as a hortatory matter, subject to States’ good will, wrongfully and unnecessarily waters down the Draft Guideline’s grounding on human rights and represents a missed opportunity to remind States that their binding obligations call for decisive and urgent action.

Instead, we suggest using stronger language in the text of the recommendations, to **explicitly acknowledge that effective actions to address NCDs are necessary to comply with international**

⁴⁰ Committee on Economic, Social and Cultural Rights, *supra* note 22 at 23.

⁴¹ See e.g., Shaheed, *supra* note 45 at 99; Commercial Speech and Commercial Determinants of Health: special issue, 50 JOURNAL OF LAW, MEDICINE & ETHICS (2022).

⁴² Supreme Court cases in Argentina and Colombia have recognized the lesser protection of commercial expression in the context of tobacco marketing restrictions. See e.g., *Nobleza Piccardo S.A.I.C. y F. c/ Santa Fe, Provincia de s/ acción declarativa de inconstitucionalidad*, 2006 for Argentina and Sentencia C-830/10 for Colombia.

⁴³ WORLD HEALTH ORGANIZATION, *supra* note 14 at 15.

⁴⁴ WORLD HEALTH ORGANIZATION, *supra* note 14 at 14 and 48.

⁴⁵ *Id.* at 13 and 45.

and regional human rights obligations and that marketing restrictions are a suitable means to achieve that end according to well-established human rights standards.

Finally, the evidence analyzed under the equity part of the Draft Guideline's supporting documents⁴⁶ shows that children of lower socioeconomic status are more exposed to food marketing than children of higher socioeconomic status. However, this consideration was given little weight in the core recommendations because the same review determined that there was no evidence that implementing food marketing restrictions had a positive impact on equity. In this respect, under the human rights framework, it should first be noted that the disproportionate impact of food marketing on children of lower socioeconomic status requires States to take specific measures to correct this situation of *de facto* discrimination.⁴⁷ Second, these measures can then be assessed and adjusted as needed to increase their effectiveness in light of the goal of addressing disparities.⁴⁸

2. Explicitly recommend that marketing regulations prioritize public health and human rights over commercial interests and properly acknowledge the need to tackle undue influence of corporate actors in policymaking.

The food and beverage industry has consistently and persistently thwarted rights-compliant regulations that threaten to harm their economic interests, employing a broad array of tactics to deny the existence of a problem (or the industry's role in it), deflect attention, divide advocates, or delay the sanction or implementation of norms, both at the political levels or resorting to Courts to challenge them.⁴⁹ These tactics have been systematically deployed and well-documented in multiple countries in Latin America and other regions of the world.⁵⁰

The undue influence of corporations in policymaking has also been addressed by international and regional human rights bodies and experts.⁵¹ Discussing front-of-package labelling regulations, the

⁴⁶ WORLD HEALTH ORGANIZATION, *supra* note 15.

⁴⁷ UN Human Rights Committee, *General Comment 18: Non-discrimination*. CCPR/C/21/Rev.1/Add.1, (1989).

⁴⁸ Grover, *supra* note 5.

⁴⁹ WORLD CANCER RESEARCH FUND, *Building momentum: lessons on implementing a robust front-of-pack food label*, 48 (2019).

⁵⁰ Méliisa Mialon et al., *Food industry political practices in Chile: "the economy has always been the main concern,"* 16 GLOBALIZATION AND HEALTH 107 (2020); COLECTIVO DE ABOGADOS, *La interferencia de la industria es nociva Para la salud, Estrategias corporativas contra el etiquetado frontal de advertencia: un estudio comparado de Chile, Perú, México y Uruguay*, (2020); Gastón Ares et al., *Argumentos de la industria alimentaria en contra del etiquetado frontal de advertencias nutricionales en Uruguay*, 44 REVISTA PANAMERICANA DE SALUD PÚBLICA e20 (2020); Méliisa Mialon & Fabio da Silva Gomes, *Public health and the ultra-processed food and drink products industry: corporate political activity of major transnationals in Latin America and the Caribbean*, 22 PUBLIC HEALTH NUTR 1898–1908 (2019); Arsenios Tselengidis & Per-Olof Östergren, *Lobbying against sugar taxation in the European Union: Analysing the lobbying arguments and tactics of stakeholders in the food and drink industries*, 47 SCAND J PUBLIC HEALTH 565–575 (2019); PopLab, *Las fichas de Coca Cola*, LAS FICHAS DE COCA COLA.; Andrea Pedroza-Tobias et al., *Food and beverage industry interference in science and policy: efforts to block soda tax implementation in Mexico and prevent international diffusion*, 6 BMJ GLOB HEALTH e005662 (2021); Chantal Julia & Serge Hercberg, *Big Food's Opposition to the French Nutri-Score Front-of-Pack Labeling Warrants a Global Reaction*, 108 AM J PUBLIC HEALTH 318–320 (2018); Méliisa Mialon et al., *Beyond nutrition and physical activity: food industry shaping of the very principles of scientific integrity*, 17 GLOBALIZATION AND HEALTH 37 (2021); Melissa Mialon et al., *"A consistent stakeholder management process can guarantee the 'social license to operate': mapping the political strategies of the food industry in Brazil*, 37 CADERNOS DE SAÚDE PÚBLICA e00085220 (2022).

⁵¹ The UN Working Group on Business and Human Rights has also acknowledged how undue influence by businesses, sometimes termed "corporate capture," threatens human rights. Thus, it has opened a public consultation

former UN Special Rapporteur on the right to health, Danius Puras, described the efforts by the food and beverage industry to “strongly and extensively” undermine government public health efforts; through misinformation, pressure on policymakers, and other attempts to interfere or directly influence government decision-making processes. Moreover, as the Rapporteur highlighted, industry actors also draw on campaigns and tactics to delay and/or block implementation of these regulatory measures, to overturn them or diminish their effect, which “constitutes an undue influence of corporations on government decision-making that should be addressed by States to ensure that regulations to prevent harm to people’s health, derived from the consumption of unhealthy foods and beverages, are driven by human rights and scientific evidence free from conflicts of interest.”⁵²

Similarly, the Special Rapporteur Hilal Elver has expressed concern on how food corporations “vehemently opposed calls to regulate marketing” and, instead, promote voluntary commitments on labelling and advertising or sponsor nutrition and health education programmes as part of their “corporate social responsibility”. She has also highlighted that such practices are “concerning” as they are “blurring the lines between education and marketing, and potentially allowing companies to disseminate misleading information.”⁵³

In the context of the InterAmerican Human Rights System, the IACHR issued a report where it used the food and beverage industry as an example of corporate capture in policymaking, citing the case of lobby against regulation of the marketing of unhealthy food to children and other regulatory measures.⁵⁴ In addition, in another thematic report on corruption and human rights, the IACHR also discussed the practice of corporate capture using a human rights lens. In that report, the IACHR underlined how decision-making that serves private interests rather than the common good undermines policymaking oriented towards the realization of human rights and can constitute corruption.⁵⁵

The known impact of corporations on public health has even led to the crafting of the term “commercial determinants of health,” which refers to “strategies and approaches used by the private sector to promote products... that are detrimental to health.”⁵⁶ Such a framework has been recently adopted by WHO itself.⁵⁷

In this context, it is imperative that the Draft Guideline appropriately acknowledges the evidence on how corporate capture of governments impairs and obstructs unhealthy food regulations, particularly evidence coming from Latin America, which is not comprehensively reflected in the Draft Guideline or in its supporting documents.⁵⁸ **Building on this evidence, the Draft Guideline should make it an explicit requirement that marketing regulations are informed by evidence that is free from conflicts of**

for inputs to draft an information note on the matter. See: <https://www.ohchr.org/sites/default/files/2021-12/call-for-Inputs-responsible-corporate-political-engagement.pdf>

⁵² Danius Puras, *supra* note 5.

⁵³ Elver, *supra* note 44 at 72.

⁵⁴ RELATORÍA ESPECIAL SOBRE DERECHOS ECONÓMICOS SOCIALES CULTURALES Y AMBIENTALES AND MUÑOZ, *supra* note 53 at 265–6.

⁵⁵ COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *Corrupción y Derechos Humanos: estándares interamericanos*, (2019).

⁵⁶ Ilona Kickbusch, Luke Allen & Christian Franz, *The commercial determinants of health*, 4 LANCET GLOB HEALTH e895–e896 (2016).

⁵⁷ WORLD HEALTH ORGANIZATION, *Commercial determinants of health: Key facts*, (2021), <https://www.who.int/news-room/fact-sheets/detail/commercial-determinants-of-health> (last visited May 30, 2022).

⁵⁸ Except for a brief reference in WORLD HEALTH ORGANIZATION, *supra* note 15 at 27 and in the Draft Guidelines, where industry opposition is addressed simply as an “implementation consideration” that fails to address the complexity and pervasive nature of the issue.

interest and prioritize public health and human rights over commercial interests. While this does not necessarily imply that industry actors cannot participate in policymaking processes (an option that may still be legitimate at the domestic level at the light of industry interference in policymaking), it does provide a framework of engagement where human rights are the primary consideration. This is not only in accordance with the aforementioned human rights standards, but also builds upon previous WHO recommendations which have called for government to be the key stakeholders in marketing policy development and prioritize public interest while also avoiding conflict of interest.⁵⁹

3. Stress the need for policy to be informed by the best available evidence free from conflicts of interest, while leaving space for policy experimentation and progress.

Marketing restrictions should be informed by the best available scientific evidence and be designed to suit public health and human rights goals. This not only constitutes “good practice” in policymaking but is a materialization of the right to access scientific benefits and its applications, as the use of scientific knowledge in public decision-making constitutes a “clear benefit of scientific progress” and, consequently, States should “endeavor to align their policies with the best scientific evidence available”⁶⁰ that is free from conflicts of interest.⁶¹

In the context of policymaking, while producing evidence to inform decision-making may be costly (and, as such, subject to progressive realization), both the right to health and other interrelated rights (like the right to scientific progress) mandates that, where evidence is readily available, States rely on it to inform decision-making, prioritizing evidence-based policies over those which are not. Hence, the Draft Guideline’s evidence-informed approach is welcome and compliant with a rights-based approach.

Nonetheless, the requirement for evidence-informed policies should not be read in isolation, but rather in conjunction with the urgency to act at the face of other human rights violations, in order to avoid transforming evidence-related requirements into standards that are too difficult (or impossible) for States to meet and, thus, become an excuse for inaction. In the context of NCDs and its risk factors, evidence on both food marketing’s effect on children’s behavior and the effectiveness of policy solutions, although arguably incomplete, is relevant and consistently signals towards the need to restrict children’s exposure to marketing to prevent human rights violations.

Hence, the Draft Guideline should frame the discussion on the available evidence constructively, to acknowledge its limitations while also fostering policy implementation and the construction of better evidence as a result of policy experimentation and evaluation. By enabling knowledge development and progress, this too is a manifestation of the right to scientific progress, abiding by the mandate to regularly review the adequacy of laws relating to the regulation of business practices to identify and address compliance and information gaps, as well as emerging problems.⁶²

In this light, the fact that the Draft Guideline highlights the “low certainty” of evidence in its recommendations can be misleading and be illegitimately used to hamper policy action, particularly by powerful industry actors who repeatedly signal the lack of evidence as an excuse to obstruct policy

⁵⁹ Recommendation number 6: “Governments should be the key stakeholders in the development of policy and provide leadership, through a multistakeholder platform, for implementation, monitoring and evaluation. In setting the national policy framework, governments may choose to allocate defined roles to other stakeholders, while protecting the public interest and avoiding conflict of interest.” WORLD HEALTH ORGANIZATION, *Set of recommendations on the marketing of foods and non-alcoholic beverages to children*, (2010), <https://www.who.int/dietphysicalactivity/publications/recsmarketing/en/> (last visited Oct 19, 2020).

⁶⁰ Committee on Economic, Social and Cultural Rights, *supra* note 13 at 54.

⁶¹ Danus Puras, *supra* note 5.

⁶² Committee on Economic, Social and Cultural Rights, *supra* note 22 at 15.

progress. In fact, the Draft Guideline's focus on the evidence's limitations, rather than its progress in over a decade since the last WHO marketing recommendations, could be read to imply that the evidence base has moved backwards, rather than forward. This is not only factually wrong but could also feed into the food industry's narrative to thwart any attempts at human-rights promoting regulation. Additionally, evaluating evidence with standards that are too strict to meet, while scientifically desirable, may further skew evidence towards high-income-countries, who are the only ones with the resources to produce it. Thus, **we suggest reframing the language of the recommendations, eliminating the reference to the "low certainty" of evidence to acknowledge the level of progress achieved**, as well as the above considerations.

4. Ensure that the Draft Guideline builds upon existing recommendations to contribute to the progressive realization of human rights.

The Draft Guideline is a welcome and necessary update of existing WHO recommendations⁶³ and should therefore consider such recommendations as a floor upon which to build the path towards more effective regulations for the realization of human rights. In this quest, besides considering WHO guidance, it should also integrate the rich developments in the human rights arena that were outlined in the previous subheadings, taking into consideration that there is a strong presumption that retrogressive measures taken in relation to human rights are not permissible.⁶⁴

The Draft Guideline is remarkable in some of its advances. Particularly, its focus on reducing the *exposure* of children to marketing (rather than advertising that is *directed to* or *targeted at* them), acknowledges the reality that children are impacted by marketing regardless of it being subjectively directed at them, which is especially relevant in the digital arena. Moreover, the emphasis on *mandatory* regulations is also in accordance with evidence on the ineffectiveness of self-regulation, amongst other progresses.

Nonetheless, the Draft Guideline fails to acknowledge previous WHO recommendations in other respects, outlined below. While it is true that some of these issues are acknowledged in the Draft Guideline as "Implementation considerations," they should be incorporated more straight-forwardly as part of the core recommendations.

- a. *Corporate capture*: as outlined in subsection 2, the Draft Guidelines should include a specific recommendation that marketing policies prioritize public health and human rights over commercial interests and properly acknowledge undue influence of corporate actors in policymaking, building on and expanding existing WHO recommendations.⁶⁵
- b. *Extraterritorial obligations*: the Draft Guideline should acknowledge the increasing impact of cross-border marketing, particularly in the digital realm, and recommend State action towards reducing its impact, enhancing existing recommendations.⁶⁶
- c. *Schools and places where children gather should be free from all forms of marketing*. This has been directly required by recommendations of the CRC, UN Special rapporteurs and

⁶³ Most notably, but not only the following: WORLD HEALTH ORGANIZATION, *supra* note 77; WORLD HEALTH ORGANIZATION, *A framework for implementing the set of recommendations on the marketing of foods and non-alcoholic beverages to children*, (2012), https://apps.who.int/iris/bitstream/handle/10665/80148/9789241503242_eng.pdf;jsessionid=89899A92BBF01A4637C4CE020A7B55A6?sequence=1 (last visited Oct 14, 2020).

⁶⁴ Committee on Economic, Social and Cultural Rights, *supra* note 1 at 32.

⁶⁵ Recommendation 6. WORLD HEALTH ORGANIZATION, *supra* note 77.

⁶⁶ Recommendation 8. *Id.*

WHO itself.⁶⁷ Hence, the Draft Guideline should include a specific mandate in that direction.

- d. *Monitoring, enforcement and evaluation mechanisms* should be specifically included as part of the Draft Guideline recommendations, following previous WHO guidance.⁶⁸ This is an essential component of rights-compliant regulations that adequately integrate scientific evidence into policymaking and evolve according to its progress.

⁶⁷ Recommendation 5. *Id.*

⁶⁸ Recommendations 9, 10 and 11. *Id.*