

To whom it may concern at the World Health Organization,

The Global Center for Legal Innovation on Food Environments at the O'Neill Institute for National and Global Health Law at Georgetown University (GC4LIFE) acknowledges the importance of the drafting of the “WHO guideline on fiscal policies to promote healthy diets” (the Draft Guideline) and the related open public consultation process. The Draft Guideline has the 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, the GC4LIFE 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 in human rights and bolstering its recommendations.

Recommendations:

1. Strengthen the human rights’ approach in the Draft Guideline, to acknowledge that its adoption can materialize States’ obligations to tackle non-communicable diseases (NCDs) under international human rights law, stressing that fiscal policy is a suitable and rights-compliant measure to fulfil such duties.
2. Stress the need for fiscal policies to be coherent across the board - to prevent tax breaks, subsidies or other fiscal measures from undermining health outcomes.
3. Include artificially sweetened foods and beverages within the scope of the Draft Guideline to reflect that the right to health includes a duty to prevent NCDs and other diseases, as well as adverse impacts on health.
4. Stress the need for policy to be informed by the best available evidence free from conflicts of interest, while leaving space for policy innovation and progress.

Recommendation 1: Strengthen the human rights’ approach in the Draft Guideline, to acknowledge that its adoption can materialize States’ obligations to tackle NCDs under international human rights law, stressing that fiscal policy is a suitable and rights-compliant measure to fulfil such duties.

Although the Draft Guideline includes human rights considerations in its reasoning, it does not engage with international human rights law (IHRL) extensively. Since States’ obligations under IHRL are relevant to the prevention of NCDs, they serve as a basis for the adoption of fiscal and pricing policies.¹ Therefore, we recommend grounding the Draft Guideline more strongly in human rights standards. This would appropriately reflect international legal obligations, making it clear that States have a duty to prevent and address NCDs, grounding fiscal measures as suitable means to fulfill that end. Such a framing would be a powerful tool for advocates working to promote health and human rights and for public officers facing opposition to adopt effective NCD prevention measures.

NCDs associated with preventable risk factors, like unhealthy diets, not only constitute a public health crisis but also hamper the realization of human rights.² In this context, States’ obligations to respect,

¹ Since the Draft Guideline does not include specific recommendations for pricing policies, the present document will refer to fiscal policies exclusively. However, it is important to acknowledge that pricing policies can be a relevant component of NCDs prevention measures. Therefore, they should also be addressed in accordance with human rights standards.

² This has been acknowledged repeatedly by human rights experts and authoritative interpreters. See e.g., High-Level Meeting of the General Assembly, *Political Declaration of the 3rd High-Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases*, UN Doc. A/66/L.1 (16 September 2011); UN Secretary General, *Prevention and Control of Non-*

protect and fulfill human rights require them to address unhealthy diets in a proactive manner to comply with their obligations under IHRL. Within this realm of obligations, with respect to economic, social and cultural rights, States have the duty to take steps, to the maximum of their available resources, to achieve progressively the full realization of human rights.³ Specifically, those measures that do not require the allocation of economic resources have been considered of immediate nature.⁴ That can be the case of some regulations aimed to prevent NCDs, like health-promoting taxes.

Under the right to health, States have an obligation to refrain from interfering with the enjoyment of the right (respect),⁵ as well as a duty to prevent non-State actors, including corporations, from hampering the right to health (protect).⁶ Moreover, States must, under the obligation to fulfil, adopt legislation and national health policies to advance towards the full realisation of the right.⁷

The right to health is an inclusive right that extends to its underlying determinants, such as food, nutrition, potable water and a healthy environment.⁸ Therefore, States have a duty to promote those conditions that allow people to enjoy the highest level of health and to modify those that hamper such a possibility. Moreover, States have an obligation to prevent, treat and control epidemic and endemic diseases,⁹ a duty that has been considered a priority by the Committee on Economic, Social and Cultural Rights (CESCR), the authoritative interpreter of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁰

Unhealthy diets are influenced by the environment where people live and develop and such environments are largely shaped by the activity of private actors that promote products and behaviors that are unhealthy, constituting commercial determinants of health.¹¹ Therefore, States' obligation to address the underlying determinants of health, including the commercial ones, through a preventative approach requires fostering health-promoting environments.

Since price is an important driver of food choice, fiscal and pricing policies are fundamental to enable such rights-promoting environments, where healthy foods choices are accessible and affordable and unhealthy

Communicable Diseases, Report of the Secretary-General, UN Doc. A/66/83 (19 May 2011); 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*, UN Doc. A/HRC/26/31 (1 April 2014); Dainius Pūras, *Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs* (27 July 2020).

³ International Covenant on Economic, Social and Cultural Rights (ICESCR), Art 2.1.

⁴ *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil*. Inter-American Court of Human Rights (15 July 2020). United Nations High Commissioner for Human Rights. *Report of the United Nations High Commissioner for Human Rights*, UN Doc. E/2007/82 (25 June 2007).

⁵ Committee on Economic, Social and Cultural Rights (CESCR). *General Comment 14: The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4 (11 August 2000), para 34; Grover, *Unhealthy Foods, NCDs and the Right to Health*, para. 14; Pūras, *Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs*.

⁶ CESCR. *General Comment 14: The Right to the Highest Attainable Standard of Health*, para 35; Grover, *Unhealthy Foods, NCDs and the Right to Health*, para. 15; Pūras, *Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs*.

⁷ CESCR. *General Comment 14: The Right to the Highest Attainable Standard of Health*, para 36.

⁸ ICESCR, Art 12; CESCR. *General Comment 14: The Right to the Highest Attainable Standard of Health*. paras 4, 11.

⁹ ICESCR, Art 12.2 (c). [“The steps to be taken by the States Parties to the present Covenant to achieve the full realization of [the right to health] shall include those necessary for (...) (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases” “].

¹⁰ CESCR. *General Comment 14: The Right to the Highest Attainable Standard of Health*, para 44.c.

¹¹ World Health Organization, ‘Commercial Determinants of Health: Key Facts’, 5 November 2021, <https://www.who.int/news-room/fact-sheets/detail/commercial-determinants-of-health>.

alternatives are discouraged by making them less affordable.¹² Such measures could contribute to making healthy choices the easier and preferred option, in accordance with the right-to-health framework.¹³ Moreover, fiscal measures are also relevant towards realizing the right to adequate food, that requires both physical and economic access, at all times, to food that is adequate in its nutritional value and cultural appropriateness.¹⁴

Inaction at the face of preventable NCDs risk factors is not an option. On the contrary, under human rights law States have the immediate obligation to take measures that are “deliberate, concrete and targeted” towards realizing economic, social and cultural rights without discrimination.¹⁵ In the context of the rights to health and adequate food, this entails a specific and continuing obligation to move “as expeditiously and effectively as possible” towards their attainment.¹⁶ This includes through measures that extend to regulating the activities of private actors that infringe human rights realization or put them at risk¹⁷ and the adoption of measures that effectively facilitate the enjoyment of human rights, like a fiscal framework that discourages the consumption of unhealthy commodities and incentivizes healthy choices.¹⁸ As mentioned before, the immediate nature of such duty is particularly relevant when rights-promoting measures are not substantially dependent on resources, as is the case with some fiscal measures.

In fact, as acknowledged in the Draft Guideline, fiscal measures are either cost-effective or cost-saving and taxes on unhealthy products can, in fact, provide additional resources to fund rights-promoting activities. Hence, besides having tangible health benefits (extensively backed up by evidence that is addressed in the Draft Guideline), fiscal measures –particularly taxes– can serve the double purpose of health promotion and resource mobilization. The latter provides additional justification for their adoption under IHRL, as States’ obligation to move progressively towards human rights realization “to the maximum of their available resources” and “by all appropriate means”¹⁹ carries the implicit promise that resources will be collected and

¹² The CESCR has addressed the need to tackle NCD and its risk factors on several occasions [e.g., CESCR. *Concluding observations on the fifth periodic report of Mauritius*. UN Doc. E/C.12/MUS/CO/5 (2019), para 52], including through measures to foster healthy diets [e.g., CESCR. *Concluding observations on the combined fifth and sixth periodic reports of Mexico*. UN Doc. E/C.12/MEX/CO/5-6 (17 April 2018), para.48-9] and discourage unhealthy foods and beverages [e.g., CESCR. *Concluding Observations of the Fourth Periodic Report of Argentina*. UN Doc. E/C.12/ARG/CO/4 (2018), para. 46.f.].

¹³ Pūras, *Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs*; Grover, *Unhealthy Foods, NCDs and the Right to Health*, para.64 [“With a view to respecting, protecting and fulfilling the right to health, the Special Rapporteur recommends that States take the following steps: (a) Increase availability and accessibility of healthier food alternatives through fiscal and agricultural policies that discourage production of unhealthy foods. Also take measures to incentivize farmers to grow healthier products; (b) Make nutritious and healthy foods available and geographically and economically accessible, especially to low-income groups”].

¹⁴ CESCR. *General Comment 12: The Right to Adequate Food*. UN Doc. E/C.12/1999/5 (5 December 1999), paras 6-7.

¹⁵ CESCR. *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*. UN Doc E/1991/23 (14 December 1990), para. 2.

¹⁶ The continuing obligation to as expeditiously and effectively as possible towards human rights realization has been recognized repeatedly by the CESCR, both in the context of general State obligations under the ICESCR [CESCR. *General Comment No. 3*, para. 2] and in its interpretations on specific rights, including the rights to health [CESCR. *General Comment No. 14*, para. 31] and food [CESCR. *General Comment No. 12*, para. 14].

¹⁷ CESCR. *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*. UN Doc. E/C.12/GC/24 (10 August 2017), para. 19.

¹⁸ CESCR. *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, para. 19 [“The obligation to protect sometimes necessitates direct regulation and intervention. States parties should consider measures such as restricting marketing and advertising of certain goods and services in order to protect public health”]; Grover, *Unhealthy Foods, NCDs and the Right to Health*, para. 19 [“To reduce the intake of unhealthy foods, States should adopt policies to create disincentives for consuming them. For instance, some States have levied a consumption tax on sugar-sweetened beverages to curb the obesity epidemic”].

¹⁹ ICESCR, Art 2.1.

utilized towards making them a reality. Hence, States' unwillingness to mobilize and use the maximum of their available resources to fully guarantee human rights can constitute a breach of their international obligations.²⁰

The importance of resource mobilization for human rights was stressed in the United Nations Agenda 2030, which calls Member States to strengthen domestic resource mobilization (...) to improve domestic capacity for tax and other revenue collection (Goal 17) as well as reduce the NCD burden (Goal 3.4), end all forms of malnutrition (Goal 2.2) and decrease overall inequalities to benefit vulnerable populations which bear larger health burdens (Goals 1, 5 and 10).²¹ In the context of States obligations to fulfill human rights, this can require the adoption of progressive taxation schemes.”²²

States also have an immediate duty to respect, protect and fulfil human rights without discrimination²³ and to address the needs of people in vulnerable conditions with priority.²⁴ NCDs have a disparate impact on some individuals and groups that are in a situation of special vulnerability, who suffer a higher burden of disease, are most exposed to NCD risk factors and encounter special challenges to face them on account of their socioeconomic status, racial or ethnic belonging, amongst others.²⁵ Therefore, under the human rights framework, States must take specific measures to correct this situation of *de facto* discrimination, where the adoption of NCD prevention measures, including fiscal policies, can have an impact on the realization of the right to equality and non-discrimination. In turn, in order to be compliant with such rights, the fiscal system should be structured so that it enables poverty alleviation and progressive human rights realization, as well as not unjustifiably burden specific persons or groups.²⁶

The potentially regressive impact of health-promoting taxes, that can financially burden people in socioeconomically vulnerable positions more, and could generate indirect discrimination against those

²⁰ The CESCR has stressed not only that “[a] State which is unwilling to use the maximum of its available resources for the realization of the right to health is in violation of its obligations under article 12,” but also that “[i]f resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the [core] obligations.” It is clear from this interpretation that “every effort” could extend to resource mobilization and allocation. CESCR. *General Comment 14: The Right to the Highest Attainable Standard of Health*, para 47.

²¹ United Nations. *Sustainable Development Goals* (2015). Available at: <https://sdgs.un.org/goals>.

²² CESCR. *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, para 23.

²³ International Covenant on Civil and Political Rights (ICCPR), Art 2; ICESCR, Art. 2; amongst other human rights treaties.

²⁴ CESCR. *General Comment 14: The Right to the Highest Attainable Standard of Health*, para 43.

²⁵ See e.g., JD Mackenbach et al., ‘A Systematic Review on Socioeconomic Differences in the Association between the Food Environment and Dietary Behaviors’, *NUTRIENTS* 11, no. 9 (September 2019), <https://doi.org/10.3390/nu11092215>; Jay L. Zagorsky and Patricia K. Smith, ‘The Association between Socioeconomic Status and Adult Fast-Food Consumption in the US’, *Economics & Human Biology* 27 (2017): 12–25; Mina Qobadi and Marinelle Payton, ‘Racial Disparities in Obesity Prevalence in Mississippi: Role of Socio-Demographic Characteristics and Physical Activity’, *International Journal of Environmental Research and Public Health* 14, no. 3 (2017): 258; Tamar Adjoian, Rachel Dannefer, and Shannon M. Farley, ‘Density of Outdoor Advertising of Consumable Products in NYC by Neighborhood Poverty Level’, *BMC Public Health* 19, no. 1 (2019): 1–9; Rebecca T. Adeigbe et al., ‘Food and Beverage Marketing to Latinos: A Systematic Literature Review’, *Health Education & Behavior* 42, no. 5 (2015): 569–82; Gopal K Singh, Michael D Kogan, and Stella M Yu, ‘Disparities in Obesity and Overweight Prevalence Among US Immigrant Children and Adolescents by Generational Status’, *Journal of Community Health* 34, no. 4 (2009): 271–81, <https://doi.org/10.1007/s10900-009-9148-6>.

²⁶ See e.g., *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona*, UN Doc. A/HRC/26/28 (22 May 2014); *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston*, UN Doc. A/HRC/29/31 (27 May 2015).

groups, is often alleged as an argument against them.²⁷ However, the progressive nature of fiscal policies is only properly understood when considering the redistributive effect of the fiscal system as a whole. This requires taking into consideration that the products whose price is increased by health-promoting taxes are inherently harmful to individuals and societies, generating disparate impact on some protected groups.

In line with this, allegations of indirect discrimination require showing that an apparently neutral measure has an adverse impact on groups that are protected by anti-discrimination norms. Therefore, the first step towards concluding that health-promoting taxes are discriminatory is to show that they have an adverse impact on protected groups overall. However, this is not the case. Although it may be true that consumption taxes can have a greater financial impact on people who are in a socioeconomically more vulnerable position, they also offer benefits that offset such financial burden, including on health, increased productivity, and reductions in health-related costs. Hence, they are beneficial overall.

Moreover, even if taxes did have an adverse impact – albeit temporary – this would not necessarily make them unlawful under the anti-discrimination framework, or regressive, since there can be measures to compensate for such negative impact. Significantly, when coupled with mechanisms to funnel tax revenues into health promoting programs, health-promoting taxes can serve a positive redistributive function that actually promotes equity.²⁸ In fact, considering the redistributive effect of the fiscal system as a whole, it is the combination of revenue mobilization and spending choices that matter to assess fiscal measures from a rights-based perspective,²⁹ including an evaluation of whether, along with discouraging unhealthy products, fiscal measures are promoting healthier alternatives. Acknowledging this fact, the Draft Guideline could recommend investing in such measures alongside promoting food and beverage taxes and subsidies.

There has also been extensive development by diverse human rights bodies in relation to fiscal policies to promote healthy diets specifically. This includes but is not restricted to the developments by Special Rapporteurs on the right to health that are referenced in the Draft Guideline. Further grounding the Draft Guideline's recommendations on these other sources, outlined below, could help strengthen its justification and become a more powerful tool, particularly for public health and human rights advocates as well as public servants advancing or defending these measures.

In 2011, the UN Secretary-General issued a report on the prevention and control of NCDs, expressing concern over the rise of what he deemed the “new frontier in the fight to improve global health.”³⁰ On that occasion he recommended the introduction of food taxes and subsidies to promote a healthy diet as a “cost-effective and low-cost population-wide interventions that can reduce risk factors for non-communicable diseases.”³¹ Shortly after, in September of the same year, the UN General Assembly echoed his concern in

²⁷ See, e.g., Forbes Staff, ‘Hogares Pobres Serán Los Más Afectados Con Los “impuestos Saludables” de La Tributaria - Forbes Colombia’, 10 October 2022, <https://forbes.co/2022/10/10/economia-y-finanzas/hogares-pobres-seran-los-mas-afectados-con-los-impuestos-saludables-en-la-tributaria>.

²⁸ E Blas, A Sivasankara Kurup, and World Health Organization, ‘Equity, Social Determinants and Public Health Programmes / Editors Erik Blas and Anand Sivasankara Kurup’, 2010, <https://apps.who.int/iris/handle/10665/44289>.

²⁹ Olivier De Schutter, ‘Taxing for the Realization of Economic, Social and Cultural Rights’, in *Tax, Inequality, and Human Rights* (Oxford University Press, 2019), 63. See also Asociación Civil por la Igualdad y la Justicia (ACIJ) et al., ‘Principles for Human Rights in Fiscal Policy’, May 2021 Principle 3.

³⁰ UN Secretary General, *Prevention and Control of Non-Communicable Diseases, Report of the Secretary-General*, UN Doc. A/66/83 (19 May 2011)

³¹ UN Secretary General, ‘Prevention and Control of Non-Communicable Diseases, Report of the Secretary-General’, 19 May 2011, para. 42, A/66/83, UN Doc. A/66/83.

a Political Declaration on the control and prevention of NCDs, again recommending fiscal measures, including taxation, to address the most common NCD risk factors.³²

The Committee on Economic, Social and Cultural Rights (CESCR) has also expressed concern over the rising levels of malnutrition and NCDs on several occasions. In Mexico, worried about the rising levels of overweight and obesity, the CESCR recommended the State party develop a comprehensive national strategy to address food insecurity and promote a healthier diet.³³ Likewise, in Mauritius, it extended its worry about the high incidence of NCDs and related deaths, demanding the country “take effective measures to reduce the risk factors of non-communicable diseases.”³⁴ The CESCR expressed similar concern in its Concluding Observations to Argentina’s fourth periodic report, this time recommending the adoption of health promoting taxes specifically, urging Argentina to “[t]ake effective measures to discourage the consumption of unhealthy foods and beverages, including an increase in the tax on sugary beverages.”³⁵

In the context of children’s right to health, the Committee on the Rights of the Child (CRC), the authoritative interpreter of the Convention on the Rights of the Child, has raised the need to limit children’s exposure to “fast foods” that are high in fat, sugar or salt, energy-dense and micronutrient-poor, and drinks containing high levels of caffeine or other potentially harmful substances.”³⁶ Although the CRC has not referred to fiscal measures in particular, since taxes can achieve the objective of reducing children’s exposure to unhealthy products, they could be included under the umbrella of such recommendation.

UN Special Rapporteurs have also addressed the need for health-promoting taxes to realize the right to health and food. In 2011, Special Rapporteur on the right to food, Olivier de Schutter, assessed the links between health and malnutrition, recommending both be dealt with through a life-course approach. He then recommended the use of taxation to encourage healthy diets, raising equity concerns by expressing that, in the current food system “the poor are penalized for being poor, both because “HFSS [high fat, sugar and salt] foods and soft drinks are cheap and because healthy diets are expensive.”³⁷ Hence, he emphasized the need for relative prices of food to change, through both proper taxation and subsidies. On a similar note, upon a visit to Mexico and concerned about the rise in overweight and obesity, the same Special Rapporteur recommended Mexico to “consider the use of taxation to discourage energy-rich diets, including in particular the consumption of soft drinks, and the subsidization of poor communities’ access to water, fruit and vegetables.”³⁸

Accordingly, on a report focusing specifically on NCDs, the Special Rapporteur on the right to health also acknowledged the interdependence of the rights to health and adequate food, calling for States to formulate policies that positively affect the availability and accessibility of healthy foods, including trade and fiscal policies in order to respect, protect and fulfill human rights.³⁹ Upon making such recommendation, the

³² High-Level Meeting of the General Assembly, *Political Declaration of the 3rd High-Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases*, UN Doc. A/66/L.1 (16 September 2011), para 43.

³³ CESCR. *Concluding observations on the combined fifth and sixth periodic reports of Mexico*. UN Doc. E/C.12/MEX/CO/5-6 (17 April 2018), para.48-9.

³⁴ CESCR. *Concluding observations on the fifth periodic report of Mauritius*. UN Doc. E/C.12/MUS/CO/5 (2019), para 52.

³⁵ CESCR. *Concluding Observations of the Fourth Periodic Report of Argentina*. UN Doc. E/C.12/ARG/CO/4 (2018), para. 46.f.

³⁶ Committee on The Rights of the Child. *General Comment 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health*. UN Doc. CRC/C/GC/15 (11 2000), para. 47.

³⁷ Olivier De Schutter. *Report Submitted by the Special Rapporteur on the Right to Food*. UN Doc. A/HRC/19/59 (26 December 2011), para. 39.

³⁸ Olivier De Schutter, ‘Report of the Special Rapporteur on the Right to Food, Olivier De Schutter - Mission to Mexico’, 17 January 2012, para. 60.f, A/HRC/19/59/Add.2, UN Doc. A/HRC/19/59/Add.2.

³⁹ Grover, *Unhealthy Foods, NCDs and the Right to Health*, para. 16 and 64.

Special Rapporteur stressed that “to reduce the intake of unhealthy foods, States should adopt policies to create disincentives for consuming them,” for example taxation.⁴⁰

Relatedly, in 2016 the Special Rapporteur on the right to food, Hilal Elver, echoed the recommendations above by encouraging States to implement health taxes to promote the right to food. Acknowledging international trade disputes emerging from health-promoting taxes, she also stressed the need for such rights-promoting measures not to be subject to World Trade Organization standards.⁴¹

All things considered, while much of the legal debate around measures to prevent NCD has focused on whether States *are allowed to* intervene (which is reflected in the Draft Guideline’s language that fiscal measures are “in accordance with” human rights), IHRL actually imposes an *obligation* to take action. Hence, failing to take decisive action towards NCD prevention could constitute a violation of States’ human rights duties, including on the right to health and adequate food. Moreover, fiscal measures, in particular, are suitable and appropriate measures to fulfill IHRL obligations, especially those derived from the rights to health and adequate food. Therefore, such framing could be strengthened in the Draft Guideline.

Recommendation 2: stress the need for fiscal policies to be coherent across the board - to prevent the existence of tax breaks, subsidies or other fiscal measures that can benefit private actors and undermine health outcomes.

The effect of fiscal policy is best assessed comprehensively, considering the combination of revenue mobilization and spending choices rather than individual measures in isolation.⁴² Hence, even if it excludes some measures from its scope (e.g., food production subsidies), it is advisable for the Draft Guideline to stress the need for fiscal policy to be coherent across the board and to be adopted with proper mechanisms to ensure transparency and accountability, to avoid incoherent policies or industry interference from undermining health-promoting efforts.

Subsidies to unhealthy food and beverages are particularly concerning in this regard, as they can concomitantly erode the tax base and promote products that harm health. Moreover, subsidies to unhealthy products often lack transparency and are hidden from the public view, as well as not being subject to proper accountability measures.⁴³

In Australia, for example, recent research revealed that companies that manufacture ultra-processed foods were granted a plethora of tax breaks that essentially resulted in these companies paying 0% in taxes. According to this research, these industries receive nearly \$5 billion a year in subsidies, one company alone costing Australian taxpayers over one billion dollars each year in lost tax revenue.⁴⁴ Moreover, advertising, marketing and sponsorship costs are tax deductible in Australia. Hence, Australian taxpayers are indirectly subsidizing the marketing of junk foods.⁴⁵ The issue of subsidies was also raised with concern in the US,

⁴⁰ 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’ (1 April 2014), para. 19.

⁴¹ Hilal Elver. *Interim Report of the Special Rapporteur on the Right to Food*, UN Doc. A/71/282’ (3 August 2016), para. 99.f.

⁴² De Schutter, ‘Taxing for the Realization of Economic, Social and Cultural Rights’, 63. *See also* Asociación Civil por la Igualdad y la Justicia (ACIJ) et al., ‘Principles for Human Rights in Fiscal Policy’ Principle 3.

⁴³ Paolo de Renzio, ‘La transparencia en los gastos tributarios en América Latina’, June 2019.

⁴⁴ James Muecke, Grant Ennis, and James Muecke and Grant Ennis, ‘Sugar Shovellers Are Making Us Sick, Fat and Poor (and Check out What They Pay in Tax!)’, *Michael West* (blog), 15 November 2022, <https://michaelwest.com.au/sugar-shovellers-are-making-us-sick-fat-and-poor-and-check-out-what-they-pay-in-tax/>.

⁴⁵ *Ibid.*

where corn syrup was flooding the market as a result of federal subsidies on corn.⁴⁶ Elsewhere, sugar is often included amongst “necessary” food items that are therefore exempt from taxes, again indirectly subsidizing the consumption of a product that it is harmful to health.⁴⁷ These benefits make unhealthy products cheaper and prevalent, jeopardizing both government revenue and public health and should therefore be avoided.

The issue of subsidies was addressed by the Special Rapporteur on the right to health Anand Grover in the aforementioned report, where he urged to reduce the price of nutritious foods, for example by removing agricultural subsidies benefiting unhealthy foods and shifting those to subsidies for increasing the production of healthier foods.⁴⁸ This makes it clear that a rights-promoting fiscal policy, that concomitantly discourages unhealthy products while making healthy products more affordable, should assess the effects of fiscal measures across the board, considering *all* the incentives and disincentives that fiscal policy creates – and not just taxes or subsidies that are expressly created with health-promoting aims.

Similarly, tax expenditures (including concessions, exemptions or other kinds of deliberately differential treatment that reduce the tax that individuals or companies pay)⁴⁹ can also benefit unhealthy commodities and the companies that produce them, undermining public health efforts. In Brazil, for example, tax benefits on industrialized products in the Manaus Free Trade Zone benefit soft drink producers, an issue denounced by civil society organizations on account of the health and environmental implications of the soft drink industry. However, attempts to remove such benefits were successfully challenged by industry and ultimately withdrawn.⁵⁰ In this context, it is advisable that such measures are considered within the holistic assessment of fiscal systems and included within the scope of the Draft Guideline.

Notably, tax expenditures often lack transparent objectives and appropriate assessment on the public costs and benefits of their implementation, leading to unjustified fiscal privileges that hinder equity-promoting efforts. A recent comparative study in Latin America showed that, although tax expenditures reduce public revenue significantly (by between 10 to 20%), public information on tax expenditures is often inadequate, decisions to concede them are not transparent and are prone to corruption and their impact –where it is measured– is generally negative.⁵¹ Significantly, public information on the objectives, beneficiaries and impact of tax expenditures is often lacking, making it difficult to foster their accountability and leading to potential abuse.⁵² This again raises the need for systemic assessment of fiscal and taxation systems in order to evaluate their potential for human rights realization accurately.

Fiscal measures that hamper human rights realization could breach the duty to *protect* human rights, as they can promote activities of non-State actors that have adverse human rights implications. Additionally, to the extent that States spend their own resources towards rights-hindering actions (through either subsidies or tax breaks), this could also breach the duty to *respect* human rights, that demands State actors to refrain from actions that can hamper human rights realization. Moreover, the use of economic power to obtain prerogatives or benefits, sometimes illegally, can constitute corruption. Thus, in the report on

⁴⁶ Ezra Klein, ‘The Problem with Corn Syrup’, 12 September 2008, <https://prospect.org/article/problem-corn-syrup/>.

⁴⁷ Bridget J. Crawford and Carla Spivack, ‘Tampon Taxes, Discrimination, and Human Rights’, *Wis. L. Rev.*, 2017, 498.

⁴⁸ Grover, ‘Unhealthy Foods, NCDs and the Right to Health’, para. 19.

⁴⁹ Tax expenditures can be defined as concessions, exemptions or other kinds of deliberately differential treatment that reduce the tax that individuals or companies pay, or will pay, to the government. They include tax exemptions, tax incentives and differentiated tax rates. Asociación Civil por la Igualdad y la Justicia (ACIJ) et al., ‘Principles for Human Rights in Fiscal Policy’, 9.

⁵⁰ Aline Brandão Mariath and Ana Paula Bortoletto Martins, ‘Atuação da indústria de produtos ultraprocessados como um grupo de interesse’, *Revista de Saúde Pública* 54 (14 December 2020): 107–107, <https://doi.org/10.11606/s1518-8787.2020054002127>.

⁵¹ de Renzio, ‘La transparencia en los gastos tributarios en América Latina’.

⁵² *Ibid.*, 1.

Interamerican Standards for Business and Human Rights, the Interamerican Commission on Human Rights (IACHR), exemplified how corporate actors leverage their influence to resist or reject unhealthy food taxes, and lobby for subsidies that benefit their businesses, emphasizing the negative human rights implications of such practices.⁵³

Recommendation 3: Include artificially sweetened foods and beverages within the scope of the Guideline to reflect that the right to health includes a duty to prevent NCDs and other diseases, as well as adverse impacts on health.

The Draft Guideline does not refer to the need to tax artificially sweetened beverages and food products. Considering evidence that artificial sweeteners can be harmful to health⁵⁴ and to the environment,⁵⁵ and on account of artificially sweetened beverages being potentially close substitutes for SSBs, it is advisable for these products to be acknowledged as part of the WHO's Draft Guideline recommendations. Such an approach is in accordance with the right-to-health framework, that includes a duty to prevent NCDs and other diseases, as well as other adverse impacts on health.

As explained in depth in Recommendation 1, the right to health entails addressing its underlying determinants and taking measures to prevent diseases, including NCDs and its risk factors.⁵⁶ Since evidence shows that artificial sweeteners can be harmful to health and the environment,⁵⁷ the obligation to prevent such harm to human rights requires acknowledging and addressing the issue both on account of the risks of the products themselves and in light of possible substitution effects, where States have the duty to implement due diligence in preventing such risks from materializing.

The Draft Guideline does address the issue of substitution effects, emphasizing that “close substitutes should be healthier to minimize substitution to similarly less healthy (and untaxed) foods” (p. 57). However, regarding beverages, it concludes that the available evidence indicates no significant substitution to untaxed beverages (p.44). Although evidence of harm as a consequence of the use of artificial sweeteners is not as extensively developed as with other products (like sugar), this does not mean States’ can remain inactive to address the risks.

Some countries, like Mexico and Argentina, have already taken a preventive approach towards artificial sweeteners and other additives, implementing front-of-package labels to warn against their consumption by children. Recommendations on fiscal measures that are meant to complement such efforts as part of

⁵³ Relatoría Especial sobre Derechos Económicos Sociales Culturales y Ambientales. *Informe Empresas y Derechos Humanos: Estándares Interamericanos* (January 2019) para. 265.

⁵⁴ See e.g., Charlotte Debras et al., ‘Artificial Sweeteners and Risk of Cardiovascular Diseases: Results from the Prospective NutriNet-Santé Cohort’, *Bmj* 378 (2022); Meghan B. Azad et al., ‘Nonnutritive Sweeteners and Cardiometabolic Health: A Systematic Review and Meta-Analysis of Randomized Controlled Trials and Prospective Cohort Studies’, *Cmaj* 189, no. 28 (2017): E929–39; Olivier Bruyère et al., ‘Review of the Nutritional Benefits and Risks Related to Intense Sweeteners’, *Archives of Public Health* 73, no. 1 (2015): 1–10.

⁵⁵ Evidence indicates that ultra-processed products (often containing artificial sweeteners) are harmful for the environment. See e.g., Liwen Zheng et al., ‘Ultra-Processed Food Is Positively Associated With Depressive Symptoms Among United States Adults’, *Frontiers in Nutrition* 7 (2020), <https://doi.org/10.3389/fnut.2020.600449>; Josefa Maria Fellegger Garzillo et al., ‘Ultra-Processed Food Intake and Diet Carbon and Water Footprints: A National Study in Brazil’, *Revista de Saúde Pública* 56 (2022): 6; Jacqueline Tereza Da Silva et al., ‘Greenhouse Gas Emissions, Water Footprint, and Ecological Footprint of Food Purchases According to Their Degree of Processing in Brazilian Metropolitan Areas: A Time-Series Study from 1987 to 2018’, *The Lancet Planetary Health* 5, no. 11 (1 November 2021): e775–85, [https://doi.org/10.1016/S2542-5196\(21\)00254-0](https://doi.org/10.1016/S2542-5196(21)00254-0).

⁵⁶ PIDESC, Art. 12.2 (c)

⁵⁷ See references 50-1 above.

comprehensive policy responses to the NCD crisis should be careful not to foster inconsistencies that could undermine ongoing public health efforts.

More worryingly, the Guideline's silence on artificial sweeteners can be interpreted to mean they are considered healthier (or even healthy) alternatives, and therefore, be granted the subsidies that the Guideline itself promotes, hindering the cohesiveness of the fiscal policy to promote good health outcomes.

Recommendation 5: Stress the need for policy to be informed by the best available evidence free from conflicts of interest, while leaving space for policy innovation and progress.

The human rights framework, including the right to enjoy the benefits of scientific progress and its applications, requires aligning public policies with the best available scientific evidence.⁵⁸ However, in the context of NCD prevention, this must neither be interpreted to mean that evidence gaps allow governments to remain inactive nor that all evidence needs to meet gold standards before governments are mandated to act. Therefore, we suggest reframing the language of the recommendations to clarify that the available evidence points towards the effectiveness of fiscal measures, instead of focusing on the “low certainty” or the “conditional” nature of the recommendations, which could be misinterpreted as an obstacle towards taking decisive action, particularly at the face of strong and well-documented industry interference.⁵⁹

Aligning public policies with the best available scientific evidence not only constitutes “good practice” but is a materialization of human rights’ obligations.⁶⁰ In this context, 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 obligation to act at the face human rights violations.

Hence, where evidence of a problem that affects human rights is clear, as in the case of NCDs, there is a duty to take action,⁶¹ even if the evidence on the specific policy solutions is still not consolidated. Therefore, it is important that the language of the Draft Guideline regarding shortcomings or limitations in the evidence is not interpreted in any way as hampering States’ ability and obligation to adopt measures to tackle NCDs.

The Draft Guideline would be wise to frame the discussion on the available evidence constructively, to acknowledge its limitations while also fostering policy adoption that enables further real-world evaluations and progress. By enabling knowledge development and progress, this too is a manifestation of the right to scientific progress that abides by the mandate to regularly review the adequacy of laws regulating business practices to identify compliance and information gaps and address emerging problems.⁶²

⁵⁸ PIDESC, Art. 15.1 (b); CESCR. *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)* (2020), para 52 and 54; Dainius Pūras, *Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs*.

⁵⁹ See e.g., Arsenios Tselengidis and 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’, *Scandinavian Journal of Public Health* 47, no. 5 (July 2019): 565–75, <https://doi.org/10.1177/1403494818787102>; Mélissa Mialon and 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’, *Public Health Nutrition* 22, no. 10 (July 2019): 1898–1908, <https://doi.org/10.1017/S1368980019000417>.

⁶⁰ *Ibid.*

⁶¹ PIDESC, Art. 2.1; CESCR. *General Comment No. 3: The Nature of States Parties’ Obligations* (1990).

⁶² CESCR. *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, para 15.

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 those actors who repeatedly signal the lack of evidence as an excuse to obstruct policy progress and to thwart any attempts at human-rights promoting regulation.⁶³ 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.

⁶³ Lack of evidence is often used by industry actors as a pretext to avoid effective public health regulations. See e.g., Gastón Ares et al., ‘Argumentos de La Industria Alimentaria En Contra Del Etiquetado Frontal de Advertencias Nutricionales En Uruguay’, *Revista Panamericana de Salud Pública* 44 (2020): e20.