

The role of soft law in the prevention and control of non-communicable diseases

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In an increasingly globalised world, health issues transcend the domain of national legislation. This holds true not only for infectious diseases, as seen with the current outbreak of the Corona-Virus, but also for non-communicable diseases (NCD) such as diabetes, cancer, obesity or cardiovascular diseases. According to the World Health Organisation (WHO), the latter are the leading global cause of death by killing [41 million people each year](#) worldwide.

A considerable number of NCDs could be prevented by measures implemented by state-, corporate- and non-state-actors at national, regional and international level. Yet, the question of how to frame legal action to control the spread of NCDs is far from answered. While it has proven difficult to adopt legislation in the field, a plethora of legally non-binding (soft law) instruments at the international and domestic level raise the question of the potential advantages of voluntary commitments for the prevention of NCDs.

After a short overview on the current global situation of NCD control, this post enquires these issues by leaving the international plane and providing a case study of NCD control in Switzerland. It thereby gives an insight into the difficulties to adopt hard measures in this field and into the potential advantages of soft law. As will be shown in the concluding section, the case study of Switzerland contributes to the general understanding of the challenges and prospects in the prevention and control of NCDs at the international level.

Hard or soft law? Current approaches to prevent NCDs

Legally binding measures to brake the spread of NCD imply, for example, taxes on fattening food or laws against tobacco and alcohol advertisements (cf. e.g. [the law on tobacco control](#) adopted by the Armenian parliament in February 2020). Meanwhile, the adoption of binding regulations in the field of global public health has proven to be an onerous procedure. Although the WHO is constitutionally equipped with extraordinary legislative competencies, the organisation referred to it only three times since its foundation in 1948 (cf. [International Health Regulations \(2005\)](#), [Framework Convention on Tobacco Control \(2003\)](#), [Nomenclature Regulations \(1967\)](#)).

Instead, the WHO as well as many national governments refer to soft law instruments to tackle the challenge of NCDs. Prominent international examples formulating voluntary targets for member states are the [WHO action plan for the prevention and control of noncommunicable diseases](#), the [Global Strategy on Diet](#),

The prevention and control of NCDs in Switzerland: a case study

In order to understand the difficulties of adopting legally binding measures to prevent NCDs on the one hand and to shed light on the potential advantages of soft approaches on the other, it is instructive to take a look at the national level. With its scepticism towards state inference in NCD-related issues and its strong federalist structure, Switzerland constitutes an interesting example. Hence, the following paragraphs provide a short case study by (a) addressing the political and legal situation in Switzerland with regard to the prevention of NCDs and (b) analysing the potential advantages of soft commitments.

Measures for the prevention of NCDs

(a) In Switzerland, comprehensive legal measures to fight NCDs are difficult to obtain due to the fragmented nature of the country's health policies: federalism attributes large competencies to the cantons and a multitude of private actors play an important role in the development and implementation of health measures. Furthermore, the political climate is traditionally hesitant towards legislation in the field of NCD control. This has been shown, for example, [by the rejection of the Federal Law on Health Prevention and Promotion by the council of states in 2012](#). This law aimed at establishing a comprehensive framework on health promotion and on the prevention and early detection of diseases. The [parliamentary debate revealed a deeply rooted critical stance](#) towards state interventions in this field and showed the considerable political influence of tobacco and nutritional industries. Another example is the [rejection of a sugar tax](#) by the Swiss parliament in 2019. One of the main arguments in this context was that voluntary measures as set out in the [Swiss Nutrition Strategy](#) and the strategic collaboration of the Swiss government with the food industry (['Milan Declaration'](#)) are sufficient in order to reduce the extensive consumption of sugar.

The tendency to prefer voluntary action to hard legal measures is further reflected in the adoption of the national strategies on the [Prevention of Non-Communicable Diseases](#) and ["Health 2020"](#) in 2013 ("Health 2020" was replaced by the strategy ["Health 2030"](#) in 2019). Both strategies define the prevention of NCDs as one of the main priorities of Swiss health policy.

Potential advantages of soft law

(b) The non-legal approaches developed to curb the challenge of NCDs are exemplary for the difficulties to adopt hard legal measures in this field. And although they are frequently used, legally non-binding agreements are often perceived as inferior to hard law. However, instead of regarding hard and soft law as binary, it might be instructive to see soft instruments as complementary to hard law. Furthermore, relating to the example of NCD prevention in Switzerland, the following paragraphs outline three specific advantages of soft law.

(i) One reason to adopt soft law instruments in the field of NCD control is the surmounting of deadlocks. In situations where it is not possible to adopt hard legislative measures, soft instruments can provide a viable alternative. This corresponds with a political reality in which many different and powerful actors impede legal action. The discussions on the introduction of a sugar tax and the rejection of the Federal Law on Health Prevention and Promotion in Switzerland are indicative of the difficulties to adopt hard legal measures for the prevention of NCDs. As a consequence, soft law instruments stepped into the breach: the voluntary commitments formulated in the Milan Declaration as well as the soft law-strategies on NCD prevention triggered [different measures to brake the spread of NCDs](#) at communal, cantonal and federal level.

(ii) Soft law instruments can have a coordinating function by bundling different activities under one strategic umbrella. Given the fragmented nature of the Swiss political system, these coordination efforts have an important standing. This has been shown for example in the [evaluation of the first health strategy "Health2020"](#) where the coordination effect of health activities at national, cantonal and communal level was declared as one of the key success factors.

(iii) Another advantage of soft law instruments is that they keep public discourse alive. In Switzerland, this was shown by the development of different strategies in the realm of NCD prevention which was triggered i.a. by the rejection of the Federal Law on Health Prevention and Promotion. The adoption and implementation of these soft law instruments were and are important factors in keeping measures of NCD prevention at the political agenda. Hence, it is mainly the merit of soft law that the importance of health promotion and prevention to fight chronic diseases did not fall into oblivion.

Soft Law and NCD control: Insights for the international level

The arguments set out in the previous paragraphs illustrate that soft law instruments and their distinctive advantages play an important role with regard to NCD prevention in Switzerland. From these insights, some general conclusions can be drawn for NCD-related health policies at the international scale:

Firstly, the field of NCD prevention is intricate and tangent upon many economic and political controversies. Against this background, soft law can function as a mean to resolve deadlocks in the making of hard law. This holds true for the national level as seen with the example of Switzerland but also for the international scale, where even more actors and interests are at stake. A historical example is the adoption of the [WHO's legally non-binding Code of Marketing of Breast-milk Substitutes](#) in 1981: the health-promoting regulation of marketing practices of infant nutrition stood against the commercial interests of [some WHO member states](#). Hence, in order to avoid the rejection of a binding instrument, a soft approach was chosen. Similar tendencies prevail today for international governance to prevent the health-damaging effects of alcohol, tobacco or unhealthy nutrition, which is often impetuously [opposed by multilateral companies exerting considerable influence on global public health negotiations](#). As seen in the case study of Switzerland, this tension between public

health protection and economic interests can potentially be mitigated through the adoption of non-binding Codes of Practice, guidelines or strategies.

Secondly, the coordinating effect of soft law instruments is valuable also at the international level. As set out for example in the WHO's global action plan on NCDs, the organisation's soft instruments can stimulate interaction with other UN agencies or international NGOs. They can further coordinate and support activities of WHO member states, i.a. by providing evidence-based knowledge, international advocacy and indicators to monitor progress.

And thirdly, the function of keeping public debates alive is an important aspect at the international scale. Soft law instruments on NCD prevention can be the expression of an authoritative and shared consensus of WHO member states that action is required. This could potentially encourage the development of legally binding commitments. Moreover, it could lead to the development of customary international law by laying the grounds for *opinio juris* and continuous state practice.

Yet, although these advantages of soft law constitute valuable contributions in the field of NCD prevention, they cannot replace 'hard' measures at national level as fiscal interventions (e.g. [taxation of sugary drinks](#)) or restrictions of advertisement (e.g. with regard to tobacco or alcohol). Therefore, in order to curb the global spread of NCDs effectively, the specific advantages of both approaches should be harnessed.

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