

Negative externalities: harmonizing health taxes and civil liability in the context of non-communicable diseases prevention¹

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Summary: In the context of non-communicable diseases prevention, this chapter aims to harmonize health taxes and civil liability as not necessarily exclusive measures. In doing so, it explores the argument of negative externalities, linking it to the Polluter-Pays Principle.

I. INTRODUCTION

Non-communicable diseases (NCDs), such as cancer, diabetes, and cardiovascular and chronic respiratory diseases, result from a combination of different risk factors, including genetic, physiological, and behavioral ones. The latter include tobacco use, alcohol consumption, and unhealthy diets, which are considered modifiable risk factors – and for this very reason, preventable. NCDs are responsible for 74% of all deaths worldwide; the majority of which occur in developing countries, such as Brazil, and disproportionately affect them on the global stage. Additionally, in these countries, people in a situation of socioeconomical vulnerability are more likely to die from these types of diseases, partly due to their elevated risk of exposure to harmful products.²

Modifiable NCDs risk factors could mistakenly be seen as individual choices. However, it is undeniable that a broader context shapes behaviors.³ In the global health field, several key concepts have been developed to address this complex reality. The first one is the social determinants of health, defined by the World Health Organization (WHO) as the circumstances that influence people's ability to live healthy lives: where and how they are born, grow, work, live, and age, as well as the broader set of forces and

¹ The authors thank Juliette McHardy and Natasha Lauletta for their assistance with the research.

² World Health Organization *Noncommunicable diseases*. Acesso em: 29 de março de 2023. Available at: <https://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases>

³ *For a further discussion on autonomy and food environments, see:* Constantin, Andrés; Hevia, Martín; Cabrera, Oscar A. *Commercial Speech and Unhealthy Food Products: Conceptual Foundations*. The Journal of Law, Medicine & Ethics, 50 (2022): 216-220.

systems that underlie these circumstances, including social norms and political and economic systems.⁴ The second one is the commercial determinants of health⁵, which WHO defines as the activities of the private sector that affect health either positively or negatively.⁶

A series of measures have been developed to curb modifiable NCDs risk factors.⁷ On one hand, there is taxation of harmful products (including "health taxes," which will be defined later); and, on the other hand, civil liability –by means of litigation– of companies that manufacture and sell such products. For example, the Framework Convention on Tobacco Control (FCTC), an international treaty of which Brazil is a party, highlights both measures as important tools for tobacco control: article 6 addresses price and tax measures to reduce demand, while article 19 deals with the adoption or promotion of existing laws to address criminal or civil liability.⁸ Despite other modifiable NCDs risk factors not having their own treaties like tobacco, health taxes have also gained prominence in their respective arenas across the world. At the same time, many countries also have legal frameworks that open the possibility of seeking civil liability (with greater or lesser chances of success) through litigation.

In this context, this chapter aims to harmonize health taxes and civil liability through litigation as measures that are not mutually exclusive. To this end, we first explore the argument of negative externalities –recently used in the public debate regarding both measures in Brazil– and connect it, in the legal sphere, with the Polluter-Pays Principle. Next, we examine the legal foundations of health taxes in the context of NCD prevention, as well as those of civil liability through litigation, particularly regarding civil liability for diffuse damages at the collective level. We argue that these are distinct yet potentially complementary measures, with the purpose of informing public

⁴ Commission on Social Determinants of Health. *Closing the Gap in a generation: health equity through action on the social determinants of health. Final Report of the Commission on Social Determinants of Health*. Geneva: World Health Organization, 2008.

⁵ Consult: Mialon, Melissa. *An overview of the commercial determinants of health*. Globalization and Health (2020) 16:74.

⁶ World Health Organization. *Commercial determinants of health*. Acesso em: 29 de março de 2023. Available at: <https://www.who.int/news-room/fact-sheets/detail/commercial-determinants-of-health>

⁷ Gostin, Lawrence O.; Monahan, John T.; Kaldor, Jenny; et al. *The legal determinants of health: harnessing the power of law for global health and sustainable development*. The Lancet (2019); 393: 1857–910.

⁸ Organização das Nações Unidas. *Convenção-Quadro para o Controle do Tabaco*. Acesso em: 29 de março de 2023. Available at: <https://www.gov.br/anvisa/pt-br/assuntos/tabaco/convencao-quadro/arquivos/convencao-quadro-tabaco>

debate and ultimately preventing that one such measure be used as a barrier to the other in defense of private sector interests.

II. NEGATIVE EXTERNALITIES IN THE CONTEXT OF NON-COMMUNICABLE DISEASES

Firstly, it is important to clarify what are externalities. They are defined as benefits or harms that affect people other than those directly involved in the decision-making process regarding a certain economic activity.⁹ In the case of benefits, these are positive externalities; in the case of harms, negative externalities.¹⁰ Pollution is a classic example: a polluting company makes decisions based on the profit opportunities associated with its economic activity, without considering the indirect costs –negative externalities– borne by third parties who suffer from the pollution resulting from the same activity.¹¹

In the legal field, negative externalities have been particularly addressed through the creation of the Polluter-Pays Principle (PPP). The Organization for Economic Co-operation and Development (OECD), in 1972, defined the PPP as: “(...) the principle used to allocate the costs of pollution prevention and control measures, to encourage the rational use of scarce environmental resources, and to avoid distortions in international trade and investment.” Following this definition originated from economics: “(...) this principle means that the polluter must bear the costs of implementing the above-mentioned measures decided by public authorities to ensure that the environment remains in an acceptable condition”.¹²

Originally, the PPP was created to prevent distortions in international trade by focusing only on the internalization of measures for the prevention and control of chronic pollution. However, over time, the OECD has improved and expanded the concept. Firstly, included the need to internalize measures related to the prevention and control of

⁹ Galle, Brian. *Tax, Command or Nudge: Evaluating the New Regulation*. Texas Law Review, v.92: 837-894, 2014.

¹⁰ Galle, Brian. *Tax, Command or Nudge: Evaluating the New Regulation*. Texas Law Review, v.92: 837-894, 2014.

¹¹ Helbling, Thomas. *Externalities: Prices Do Not Capture All Costs*. International Monetary Fund. 29 de março de 2023. Available at: <https://www.imf.org/external/pubs/ft/fandd/basics/38-externalities.htm>

¹² Aragão, Maria Alexandra de Souza. *O princípio do poluidor-pagador: pedra angular da política comunitária do ambiente*. São Paulo: Inst. O Direito por um Planeta Verde, 2014, p. 55-57.

accidental pollution,¹³ and then the damage resulting from environmental harms.¹⁴ Based on OECD provisions, the PPP was consolidated within the European Union¹⁵ and referenced in several multilateral conventions, most notably in Principle 16 of the Rio Declaration, in 1992.¹⁶

In Brazil, the PPP was first established in Law No. 6.938/1981, whose article 4, VII provides that the National Environmental Policy shall “impose on the polluter and predator the obligation to restore and/or compensate for the damages caused.” In turn, article 170, VI and article 225, paragraphs 1, V, 2 and 3 of the Constitution from 1988 enshrine the same principle. From these provisions, one can infer that in the Brazilian legal framework the PPP has a strong redistributive connotation. As Ingo Wolfgang Sarlet and Tiago Fensterseifer have asserted, the PPP aims to: “(...) internalize the ecological costs into productive practices (ultimately, into the price of products and services), preventing such costs from being indiscriminately (and thus unjustly) borne by society as a whole”.¹⁷

The PPP, however, is not limited to its redistributive function of internalizing the costs of pollution, which is primarily realized through the imposition of environmental taxes and fees. As Nicolas de Sadeleer points out, in addition to this prominent function, the principle has three other functions: economic integration, prevention, and remediation.¹⁸ The first, economic integration, is crystalized in the original concept by OECD. The second, prevention, involves the adoption of command-and-control measures seeking to curb pollution, along with taxes and fees tied to these measures. The preventive function should encourage polluters to reduce emissions in the most efficient and cost-

¹³ Organization for Economic Co-operation and Development. C(89)88/FINAL. *Recommendation of the Council concerning the application of the polluter-pays principle to accidental pollution*, 06 de julho de 1989. Available at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0251>

¹⁴ Organization for Economic Co-operation and Development. C(90)177/FINAL. *Recomendação do Conselho relativa ao uso de instrumentos econômicos em política ambiental*. 30 de janeiro de 1991. Acesso em 27 de março de 2023. Available at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0258>

¹⁵ Aragão, Maria Alexandra de Souza. *O princípio do poluidor-pagador: pedra angular da política comunitária do ambiente*. São Paulo: Inst. O Direito por um Planeta Verde, 2014, p. 49-50.

¹⁶ United Nations, General Assembly. *Relatório da Conferência das Nações Unidas sobre Ambiente e Desenvolvimento. Anexo I. Declaração do Rio sobre Ambiente e Desenvolvimento*. 12 de agosto de 1992. Acesso em 29 de março de 2023. Available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf

¹⁷ Sarlet, Ingo Wolfgang; Fensterseifer, Tiago. *Princípios do direito ambiental*. 2. ed. São Paulo: Saraiva, 2017, p. 113.

¹⁸ Sadeleer, Nicolas de. *Environmental principles: from political slogans to legal rules*. Oxford: Oxford University Press, 2005, p. 34.

effective way. Lastly, remediation holds the polluter accountable for causing residual damage. In other words, it imposes liability for environmental degradation on polluters, even if they acted with authorization and in compliance with the emission levels allowed by laws or regulations.

The PPP has also extended to the protection of public health, even though it was developed in the context of environmental protection. The reason is that the legal protection of both assets –the environment and health– is intertwined through associations, approximations, and coincidences, and sometimes even overlaps. Health was the first constitutional foundation for environmental standards in various legal systems, including Brazil. Building on the enshrinement of the right to health in the Brazilian Constitution, legislative efforts then culminated in the legal protection of the environment.¹⁹ Moreover, both the environment and health are diffuse transindividual interests, whose communal nature consolidates them as rights of solidarity, regarded as fundamental rights-duties. In this sense, the protection of the environment and health are not only States' obligations, but everyone's, whether individuals or legal entities.^{20 21}

The interrelationships between the legal protection of the environment and health are evident and consistent, having been recognized in precedents from Brazilian courts, particularly in the consolidated case-law of the Federal Supreme Court, which is Brazil's constitutional court (*Supremo Tribunal Federal* – STF, in Portuguese). The STF has even applied other environmental law principles –such as the principles of prevention and precaution– to the protection of public health.²²

¹⁹ Milaré, Édis. *Direito do ambiente*. 9. ed. rev., atual. e amp. São Paulo: Editora Revista dos Tribunais, 2014, p. 161.

²⁰ Sarlet, Ingo Wolfgang; Fensterseifer, Tiago. *Direito Constitucional Ambiental: Constituição, direitos fundamentais e proteção do ambiente*. 4. ed. São Paulo: Editora Revista dos Tribunais, 2014, p. 243-245.

²¹ Nabais, José Casalta. *O dever fundamental de pagar impostos: contributo para a compreensão constitucional do estado fiscal contemporâneo*. Coimbra: Almedina, 2012, p. 123-124.

²² The application of the environmental principles of precaution and prevention in the protection of public health by the Brazilian Federal Supreme Court (STF) is observed in several rulings of the Court, among which the following are some examples: ADPF 101, Justice Cármen Lúcia as Rapporteur, ruled on June 24, 2009, regarding the constitutionality of normative acts prohibiting the importation of used and retreaded tires; ADI 5592, Justice Cármen Lúcia as Rapporteur, ruled on September 11, 2019, concerning the dispersion of chemicals by aircraft to combat the mosquito that transmits dengue; ADPF 656 MC, Justice Ricardo Lewandowski as Rapporteur, ruled on June 22, 2020, regarding the tacit approval (due to the lapse of time) of pesticide use without prior technical studies; ADPF 709 MC, Justice Luís Roberto Barroso as Rapporteur, ruled on August 5, 2020, addressing failures and omissions in combating the COVID-19 pandemic among indigenous peoples; ADI 5938, Justice Alexandre de Moraes as Rapporteur, ruled on May 29, 2019, concerning the protection of maternity and workplace safety in the context of labor reform; and ADI 4066, Justice Rosa Weber as Rapporteur, ruled on August 24, 2017, regarding the use of asbestos.

III. HEALTH TAXES AND CIVIL LIABILITY: CONCEPTUAL DIFFERENCES

In the case of products harmful to health, externalities manifest as side effects unaccounted for by producers and consumers when deciding to produce or consume these products.^{23,24} Direct negative externalities include harm to the health or well-being of third parties,²⁵ such as the exposure to secondhand tobacco smoke and accidents or violence related to alcohol consumption.²⁶ Indirect negative externalities include the public healthcare costs for treating diseases and disabilities caused by these harmful products, as well as the loss of productivity caused by premature morbidity and mortality.^{27 28 29}

Recently, the debate on negative externalities has taken practical dimensions in the context of NCDs prevention in Brazil. On the one hand, there is a growing movement advocating for the taxation of sweetened beverages in the tax reform that is being discussed at the national level, using the concept of negative externalities as a key supporting argument.³⁰ On the other hand, a few years ago the Attorney General's Office of Brazil (*Advocacia-Geral da União – AGU*, in Portuguese) filed a lawsuit against the largest cigarette manufacturers in Brazil, both their subsidiaries in the country and their parent companies abroad, to uphold the right to health and recover healthcare costs associated with cigarette use. In doing so, AGU also employed the concept of negative

²³ McPake, Barbara, Normand, Charles; Smith, Samantha. *Health Economics: An International Perspective*. 3rd ed. Routledge: London, 2013. Chapter 7.2.

²⁴ Griffith, Rachel; O'Connell, Martin; Smith, Kate. *Corrective Taxation and Internalities from Food Consumption*. CESifo Economic Studies, v 64, n 1: 1-14, 2018.

²⁵ Nugent, Rachel. *Tobacco, alcohol, and sugary beverages in low- and middle- income countries: harms, consumption and costs*. Bloomberg Task Force on Fiscal Policy for Health. Março de 2018.

²⁶ U.S. National Cancer Institute and World Health Organization. *The Economics of Tobacco and Tobacco Control*. National Cancer Institute Tobacco Control Monograph 21. NIH Publication No. 16-CA-8029A. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute; and Geneva, CH: World Health Organization; 2016.

²⁷ U.S. National Cancer Institute and World Health Organization. *The Economics of Tobacco and Tobacco Control*. National Cancer Institute Tobacco Control Monograph 21. NIH Publication No. 16-CA-8029A. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute; and Geneva, CH: World Health Organization; 2016.

²⁸ Hunt, Allcott; Lockwood, Benjamin B.; Taubinsky, Dmitry. *Should We Tax Sugar-Sweetened Beverages? An Overview of Theory and Evidence*. The Journal of Economic Perspectives, v. 33, n. 3, 2019.

²⁹ World Bank. *Taxes on Sugar-Sweetened Beverages: International Evidence and Experiences*. Washington DC: World Bank Group; 2020. Available at: <http://hdl.handle.net/10986/33969>

³⁰ ACT; Aliança pela Alimentação Adequada e Saudável. *Tributo Saudável*. Available at: <https://tributosaudavel.org.br/>

externalities.³¹ The use of concept of negative externalities in public debate has thus been twofold; sometimes in the tax context and in other times in the civil liability context, where litigation has sought to address diffuse damages at a population level.

The first instance refers to health taxes, defined by the Pan American Health Organization (PAHO) as “taxes on products that have a negative impact on public health (for example, taxes on tobacco, alcohol, sugary beverages, and fossil fuels)”.³² This regulatory tool produces several positive outcomes, such as a healthier population and revenue for the government budget³³. It is important to highlight that this revenue may or may not be allocated for a public purpose related to the impact of harmful products, and that the actual revenue and its use should not affect the definition of the tax rate.³⁴ This is so because the primary objective of health taxes is to reduce the consumption of harmful products to an optimal level –while also generating revenue, as with any tax–, but they do not aim to recover any past or prospective costs for the treasury.³⁵

The second instance relates to civil liability through litigation, which rests upon the elements of conduct, damage, and causation (and, in the case of subjective liability, also the element of fault).^{36 37} Ideally, one could argue that civil liability through litigation would serve as an incentive for companies to internalize the negative externalities of their economic activities: assuming they would incur on civil liability for the damage caused by their products,³⁸ these companies might raise prices to cover residual marginal costs.³⁹

³¹ Advocacia-Geral da União. *Inicia da Ação Civil Pública de tutela do direito fundamental à saúde pública e ressarcimento ao erário*. Conjur. Acesso em: 29 de março de 2023. Available at: <https://www.conjur.com.br/dl/inicial-acp-agu-cigarro.pdf>

³² Organização Pan-Americana da Saúde. *Impostos da Saúde: Uma Introdução*. 2020. Available at: https://iris.paho.org/bitstream/handle/10665.2/52386/OPASWBRA20073_por.pdf?sequence=1&isAllowed=y

³³ Organização Pan-Americana da Saúde. *Impostos da Saúde: Uma Introdução*. 2020. Available at: https://iris.paho.org/bitstream/handle/10665.2/52386/OPASWBRA20073_por.pdf?sequence=1&isAllowed=y

³⁴ Hunt, Allcott; Lockwood, Benjamin B.; Taubinsky, Dmitry. *Should We Tax Sugar-Sweetened Beverages? An Overview of Theory and Evidence*. The Journal of Economic Perspectives, v. 33, n. 3, 2019.

³⁵ Hunt, Allcott; Lockwood, Benjamin B.; Taubinsky, Dmitry. *Should We Tax Sugar-Sweetened Beverages? An Overview of Theory and Evidence*. The Journal of Economic Perspectives, v. 33, n. 3, 2019.

³⁶ Gomes, Orlando. *Responsabilidade Civil*. Rev, atual. e ampl. Rio de Janeiro: Forense, 2011, p. 70-81.

³⁷ Tepedino, Gustavo; Terra, Aline de Miranda Valverde; Guedes, Gisele Sampaio. *Fundamentos do Direito Civil: responsabilidade civil*. V. 4. Rio de Janeiro: Forense, 2020, p. 8-9.

³⁸ Galle, Brian. *Tax, Command or Nudge: Evaluating the New Regulation*. Texas Law Review, v.92: 837-894, 2014.

³⁹ Griffith, Rachel; O’Connell, Martin; Smith, Kate. *Corrective Taxation and Externalities from Food Consumption*. CESifo Economic Studies, v 64, n 1: 1-14, 2018.

⁴⁰ However, in practice, this is often not the case because companies are aware of the hurdles that public and private plaintiffs face, such as long and costly litigation involving complex corporate structures (partly designed to shield defendants from any compensation claims).

Looking at the very concepts of health taxes and civil liability, it is evident that they are distinct and can even be complementary. This becomes even clearer in light of their objectives and temporal considerations.

Regarding objectives, in the case of health taxes, there is a primary extra-fiscal objective beyond the typical revenue-raising that is common to all taxes. This refers to “the financial activity carried out by the State without the primary aim of generating resources for the treasury, but with the objective of regulating or reordering the economy and social relations”.⁴¹ In contrast, civil liability seeks to restore the legal-economic balance that existed before the harm occurred giving rise to damages. In this sense, the principle of *restitutio in integrum* prevails; the main goal is to return the victim(s) to their state before the harm and damages occurred⁴². If this is not possible, compensation then becomes necessary.

In relation to the temporal considerations, health taxes operate under an *ex ante* logic, because tax collection depends on the existence of prior legislation. Therefore, taxation is generally forward-looking.⁴³ Conversely, civil liability follows an *ex post* logic, aiming to restore the *status quo ante*. It is essentially backward-looking (with some exceptions, such as punitive damages, based on ideas of redistribution and deterrence).⁴⁴

IV. CONCLUSION

In conclusion, health taxes and civil liability are distinct, potentially complementary legal mechanisms in addressing modifiable NCDs risk factors. This is even clearer when examining their conceptualization, with an emphasis on objectives and temporal considerations. For this reason, health taxes do not exempt companies from

⁴⁰ Levmore, Saul. *Internalities Regulation Through Public Choice*. Theoretical Inquiries in Law, v. 15: 447-469, 2014.

⁴¹ Falcão, Raimundo Bezerra. *Tributação e Mudança Social*. Rio de Janeiro: Forense, 1981. P. 48.

⁴² Cavalieri Filho, Sérgio. *Programa de Responsabilidade Civil*. 9a Edição revista e ampliada. Editora Atlas S.A.: São Paulo, 2010. P. 13.

⁴³ Constituição da República Federativa do Brasil, art. 150, I.

⁴⁴ Cavalieri Filho, Sérgio. *Programa de Responsabilidade Civil*. 9a Edição revista e ampliada. Editora Atlas S.A.: São Paulo, 2010. P. 98.

being held accountable in court for the damage caused to society by their harmful products. In this context, the use of the concept of negative externalities does not blur the legal basis for either approach; rather, it strengthens both.

This is especially true through the lens of the PPP, which underscores the complementary nature of fiscal and civil measures. Consider environmental protection. For instance, through the adoption of command-and-control measures aimed at reducing pollution, along with the taxes and fees associated with these measures, polluters are incentivized to reduce their emissions. Nonetheless, if environmental damage occurs, the PPP serves as the basis for holding the polluter accountable, triggering civil liability to ensure full reparation of the damage and thus promote the complete internalization of the negative externality imposed on society.

In the field of health, particularly regarding the modifiable NCDs risk factors, this conceptual clarity is crucial in advancing the internalization of negative externalities.

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