Caesarea Forum
Since 1992

The Eli Hurvitz Conference on Economy and Society

THE ISRAEL DEMOCRACY INSTITUTE

Regulation

November 3–4, 2014 Dan Carmel Haifa Hotel

Expanding the Regulatory Toolbox: Trust Building and Co-Regulation

Working Group

Head **Dr. Assaf Cohen**, Chief Strategist, Giza Singer Even

Members **Adv. Yahel Ben-Ner,** Deputy Director General, Economy & Regulation, Manufacturers' Association of Israel

Mr. Yoel Ben Or, Economist, National Economic Council, Prime Minister's Office

Dr. Orit Dayagi-Epstein, Director of Tel Aviv University Center for Regulation Policy; Consultant at Epstein, Rosenblum, Maoz Law Office (ERM)

Mr. Yuval Elgrably, Vice President, Rekah Pharmaceutical Industry Ltd.

Mr. Amichai Fisher, Senior Division Head, Department for Governance and Social Affairs, Prime Minister's Office

Adv. Edna Harel, Head of Department, Legislation and Counseling Department (Economic and Fiscal Matters), Ministry of Justice, Jerusalem

Adv. Noga Rubinstein, Head of Regulation and Competition Department, Goldfarb Seligman, Law Office

Research Assistant **Ms. Morin Hayo-Hemo**, The Israel Democracy Institute

Abstract

The prevalent method of regulation in Israel is traditional "command and control" regulation. This type of regulation essentially entails placing rigid restrictions on economic activity by setting mandatory standards and prohibiting certain activities; these measures are also accompanied by the threat of various types of sanctions (criminal, administrative, and so on). In general, the extent of government involvement in formulating and implementing regulations ranges from extensive (command and control) to minimal (self-regulation). In Israel, the regulatory involvement of the government is substantial. However, there are a number of cases in which there is also self-regulation and co-regulation.

The relations between the public, the regulatory authority, and the regulated entities are characterized by a high degree of mutual distrust. The public fears that a close relationship between the regulatory authority and the regulated entity produces weak and "captive" regulation that favors private interests over the broader public interest. The government (the regulator) does not trust the regulated entity; this attitude sometimes dictates an aggressive formulation of new regulations, with very specific directives (micro regulation) and broad prohibitions. For its part, the regulated entity does not believe in the regulator's sincerity, professionalism, or consistency.

This climate of distrust hampers the government's ability to operate, because it must invest great efforts in formulating detailed rules and measures for enforcing them. The business sector's distrust of the government is a disincentive for investment in areas that will be strongly affected by future regulation, which is inconsistent and unpredictable. There are also heavy costs entailed in complying with specific rules and in reporting on their implementation.

In these circumstances, it is understandable why the regulatory authorities in Israel do not promote approaches that include the regulated entity in the formulation and enforcement of regulations (self-regulation or co-regulation). The regulatory authority is afraid that the public may perceive self-regulation as a sign of the regulator's weakness and that the industry may violate the trust placed in it and fail to achieve the objectives of the regulation. These fears prevent the realization of the benefits inherent in self-regulation. One of these benefits is closer familiarity with the sector, which enables more precise measures for achieving the goals than those drawn up by the regulator in the command and control method. In some cases, self-regulation also enables a reduction in the supervision apparatus and allows the regulatory authority to channel its resources to more useful places.

In appropriate cases, self-regulation tools can be an important means for enhancing the efficiency of regulation processes and the government's ability to function. It can help build trust between the government regulator and the regulated entities and other stakeholders, with an optimum balance among the various interests. Co-regulation is based on relations of trust among the various

stakeholders, including the public, the regulators, and the regulated entities. Co-regulation cannot exist without relations of trust; such relations are hard to develop without the transfer of some responsibility from the government (with its command and control approach) to industry.

The inclusion of processes of self-regulation and co-regulation in the regulator's toolbox is an important and significant step towards improving the government's performance and the industry's ability to plan and operate, as well as towards building relations of trust between the regulatory authorities and the regulated entities. In addition to the adoption of self-regulation and co-regulation when appropriate, the team recommends efforts to improve the relations of mutual trust between the various entities during consultations about new regulations.

The team recommends:

1. Publication of a predefined work plan that focuses on the issues and fields the regulator will address in the coming years, pursuant to the general work plan of government ministries. The team also recommends consulting with the various stakeholders. Publication of the work plan and consultation with stakeholders will enable the regulated entities to prepare in advance and increase their certainty and the regulatory expectations. Of course, this would not detract from the regulator's power to initiate new regulations as needed, as a function of changing needs, even if they were not envisioned in the work plan.

2. Creation of system-wide mechanisms to facilitate the rapid and accurate flow of information and to prevent miscommunication and inaccurate or slanted information that undermine trust

3. Assignment to the relevant regulatory authority of responsibility for setting, implementing, and enforcing policy in a particular field and defining the mix of regulatory instruments. Nonetheless, stakeholders and the public, including the entities to be regulated, should be allowed to propose tools of self-regulation or co-regulation to help attain the policy objectives, as an alternative to traditional regulation.

4. Expansion of the processes of consultation among stakeholders as part of the improvement of trust and enhancement of the government's ability to function. There are two stages here:

    A. The preliminary stage: In this stage, the problem and the regulatory objective will be presented to all relevant parties and the public. This is intended, inter alia, to clarify aspects of what is needed and to elicit proposals for a solution.

    B. The hearing stage: In this stage, hearings will be held on the proposed solutions drafted by the regulator.

The discussions will be as transparent and open as possible. In the preliminary stage, the regulator will have no obligation vis-à-vis the regulated entity with regard to the suggestions. The latter will have to recognize that it is a preliminary stage aimed solely at improving the process of deliberation—in contrast to the official hearings, at which the regulator will address such concerns.

5. Formulation of the principles of self-regulation or co-regulation in accordance with the principles of "better regulation": proportionality, accountability, consistency, transparency, and definition of goals.

6. The drafting by the regulator of guidelines for co-regulation, as needed.

7. Constant examination by the regulator as to whether the self-regulation or co-regulation ensures the protection of the relevant public interest and the public good and helps achieve the policy objectives. In this context, the regulator will study the implementation of the self-regulation or co-regulation and the means employed to enforce it. If it is found that the self-regulation or co-regulation fails to protect the public interest and the public good, or does not achieve its goals, the regulator will move to apply other instruments from its toolbox.

8. In order to strengthen public trust in the mechanisms of self-regulation or co-regulation, examination of the possibility of government review of self-regulation. In appropriate cases, the extension of official government sponsorship to self-regulation will also be examined, as will the possibility of involving independent third parties in shaping and enforcing self-regulation.