



COMMENTS ON DRAFT OF OECD BEST PRACTICE PRINCIPLES ON STAKEHOLDER ENGAGEMENT IN REGULATORY POLICY

A. Background

OECD has released draft of Best Practice Principles on Stakeholder Engagement in Regulatory Policy (Principles) for public consultation. CUTS International (www.cuts-international.org) is a global independent non-profit economic policy research and advocacy organisation. It has significant expertise and experience in working towards improving the quality of regulation and policy making in emerging economies.

CUTS' comments on the draft Principles are set out below.

B. CUTS comments

1. **Scope of the Principles** (paragraphs 3, 6 etc) – It appears from the Principles are intended to provide policy makers and civil servants practical instruments to better design their stakeholder engagement strategies. The mention of regulatory agencies in regulation making is conspicuous by its absence. The principles must be equally applicable to regulatory agencies as to other arms of the government in regulatory policy making. Regulatory agencies are required to perform much more complicated task than other agencies engaged of regulatory policy making, as they have monitoring, supervision and quasi-judicial powers as well. Consequently, it becomes important that regulatory agencies conduct efficient and effective stakeholder engagement/ consultation in regulation policy making.

A good model which involves stakeholders participation in the decision making process is that by NWASCO, the water regulator in Zambia. This regulator involves various stakeholders at levels of decision making process. Infact, from the beginning of the reform process in the sector, particular emphasis was put on stakeholder's participation. The media was regularly briefed to sensitise on key issues and policies. As a result, water issues became high on national development agenda of the politicians and other policy makers¹.

2. **Stakeholders** (paragraph 9) – While the Principles consider a variety of groups as potential stakeholders, consumers are not considered as an independent stakeholder group. It is important to recognise importance of consumers as independent stakeholders as they are ultimate beneficiaries of the regulatory policy. Similarly, consumers are required to bear the burden of sub-optimal regulatory policy. Consequently, it is important that consumers' perspective is understood and assessed as an independent stakeholder group. As mentioned in Box I, the three progressively higher rungs of consumer engagement, namely Information, Consultation and Partnership ensure effective consumer participation in the regulatory process. (Box I also discusses empowerment as the fourth rung emerging from the mentioned three rungs).

¹ CUTS Research Report (2009), 'Creating Regulators in not the End, Key is the Regulatory Process'

BOX I: Ladder of Consumer Participation in the Regulatory Process

The literature exploring citizen participation in the government policy making depicts each level of citizen involvement in the political process as a distinct rung in the “ladder of citizen engagement”, with successive rungs of the ladder corresponding to progressively higher degrees of citizen empowerment in determining the outcome of the decision-making process. Similarly, there are different gradations of consumer participation in the regulatory process, varying to a significant extent across countries and sectors and depending on the type of regulatory model in place. The following levels of involvement could be identified as four critical rungs of the ladder of consumer participation in the regulatory process:

- Information
 - Information is the first step toward legitimate consumer involvement in the regulatory process. At this rung of the ladder, emphasis is placed on one-way flows of communication (from regulators to consumers) with no channel provided for feedback. Hence, when consumer participation is limited to information, consumers have little opportunity to influence the outcome of the decision-making process.
- Consultation
 - Regulators rely on consultation with consumers and other interest groups as a valuable source of non-binding advice to inform the regulatory process. Consultations can either be conducted on an *ad hoc* basis on specific consumer issues or throughout the regulatory process. However, if not combined with other modes of consumer involvement, consultations may not be sufficient to ensure effective consumer participation, as it offers no assurance that consumer input will be taken into account in the decision-making process.
- Partnership (acting and deciding together)
 - The third rung of the ladder, partnership, involves some degree of “redistribution” of decision-making power as consumers are granted the right to negotiate with the regulator and other stakeholders the outcome of the regulatory process. Given the diffuse interests of the consumer constituency, effective partnership with consumers hinges on the appointment of consumer spokespersons fully accountable to the consumer constituency.
- Empowerment (delegating decision-making power to consumers)
 - At this rung of consumer engagement, consumers are empowered to manage their own infrastructure. Consumer empowerment works best when infrastructure networks are small and can be within the control of a single community – for example, small town water supply systems are often ideal candidates for local community management. However, consumer empowerment is generally unfeasible in the case of large-scale infrastructure, due to the complexity of managing diffuse consumers groups with conflicting interests.

At the first two rungs of the ladder of consumer engagement (information and consultation), consumer participation plays an advisory role. At the topmost rungs of consumer engagement (partnership and empowerment), consumer participation leads to some degree of sharing of the decision-making power. However, given that the topmost rung of the ladder (empowerment) is seldom feasible in large infrastructure industries, this study adopts a three-rung ladder (information, consultation, partnership) to illustrate the different levels of consumer participation in infrastructure regulation.

Depicting different forms of consumer participation as ladder rungs is a useful tool to capture different gradations in consumer participation in the regulatory process. However, the tool presents limitations. First, the ladder is a simplification, as the distinction between different levels is often blurred. For example, even when consumer advice is not binding, consumers' opposition to regulatory reforms may be strong enough to de-legitimise the role of the regulator. Second, higher rungs of consumer participation may not necessarily lead to better regulatory outcomes, in particular in newly-established regulatory frameworks without a tradition of consumer representation. In fact, ascending the ladder of consumer participation is a lengthy and difficult process, which needs to be supported by an enabling institutional environment – the higher the rung of consumer participation, the more sophisticated the institutional environment, needs to be to accommodate additional layers of consultations.

Source: <http://www.eapirf.org/MenuItems/Resources/Papers/General/rsrsc502.pdf>

Such independent assessment will aid in understanding the net impact of draft regulations on the relevant stakeholder group and assess its reaction to the regulation, should it be finalised. It is essential to recognize potential consumers as an important stakeholder to be consulted. Their perception regarding the services and reasons for not availing the services could add much value to regulatory policy making. Further, some stakeholders will be unique to some sectors and it is essential to take into account the concerns of such sector specific stakeholder groups. For instance, it is important to understand the perspective of utilities/ service providers in consultation regarding tariff setting in utility sectors.

3. Models of co-operation with stakeholders (paragraph 36) – One of the interesting models of co-operation between government and stakeholders is www.mygov.in website/app launched by the Government of India. This portal enables stakeholders to respond to public consultation launched by governments; participate in significant government initiatives and provide comments, feedback and suggestion; participate in poll/ surveys and online training courses. While the portal could be better utilised through awareness generation, periodic response by government on comments and suggestions received and intelligent comment moderation, it could be good practice to highlight for public consultation.

4. Addressing regulatory capture (paragraphs 15, 26 etc) – The Principles correctly highlight the risk of regulatory capture. In order to address such risk, one of the mechanisms could be uploading all comments received in public domain and allowing filing of counter-comments by stakeholders. Such mechanism has been adopted by the Telecom Regulatory Authority of India.² Such mechanisms help in balancing different points of views and also enable stakeholders to understand different perspectives. Stakeholders are encouraged to back their arguments through data and analysis, which is open to challenge, given that comments are uploaded in public domain. This mechanism becomes extremely relevant when divergent opinions from differently placed stakeholders are expected (such as consumers and service providers in consultation on tariff setting).

5. Reaching out to the unrepresented (paragraph 43) – The Principles correctly highlight the importance of reaching out to the unrepresented. In this regard, it might be useful to note the mechanism adopted by Telecom Regulatory Authority of India (TRAI), which plans consumer outreach programmes in non-metro and tier-III cities in advance in order to reach out to hitherto

² For details, see <http://www.trai.gov.in/open-consultation>

under-represented in regulation making. Such events are in form of open house discussion, meetings, etc. Details of such events are uploaded in advance on TRAI website,³ and senior TRAI officers are often present in such events to enable serious and structured discussions.

Other mechanisms to reach out to the unrepresented could be putting a toll-free number in public domain wherein interested stakeholders could call and record their statements about the consultation. Allowing anonymous submissions could also be allowed to encourage submission of comments.

In addition, expert independent civil society organisations could aid government agencies in reaching out to the hitherto unrepresented. Government agencies could partner with such organisations in generating awareness about draft government proposals, conducting outreach and advocacy seminars in rural areas, and collecting and collating comments received. For instance, CUTS International has set up a Parliamentarians' Forum on Economic Policy Issues (PARFORE), a non-partisan and informal policy forum to discuss core economic issues in the field of trade, competition, regulatory reforms, investment and their cross linkages with Members of the Parliament.⁴ CUTS International hosts such forums as a neutral organisation by facilitating venue for the meetings and by providing research-based inputs for discussions on key regulatory policy issues. It has replicated this model for encouraging discussion at sub-national level.⁵ Simulation exercises could also be utilised to encourage regulatory policy related discussions.⁶

6. Availability of relevant material for decision making (paragraph 47) – It is important to ensure that public has access to all the materials on which proposed regulation is designed. This includes data, analysis and assumptions made by the governments. In many cases, data interpretation and analysis might require significant time from stakeholders, and they might not be in a position to respond to draft government proposals in a comprehensive manner. In such situations, submissions of work-in-progress/ draft comments could be allowed with a possibility of submitting final comments in due course.

In addition, the governments and regulators must follow an open data policy wherein all data relied upon to make regulatory policies must be easily and freely available in public domain. This is particularly important in emerging economies wherein access to quality data is a challenge. As a result, governments must encourage review of its data and assumptions by independent third parties and support civil society organisations to conduct ex-ante impact assessment and evaluation of government proposals and policies.

7. Oversight of regulatory policy procedures (paragraph 32) – The Principles rightly recognise importance of institutions and mechanisms to provide oversight of regulatory policy procedures and goals. It is important that such institutions act independently of government, despite its managers mostly likely being appointed by government. Consequently, it will be necessary that such institutions take inputs from independent non-partisan stakeholders/ watchdogs which can provide necessary feedback on the success of regulatory policy making processes.

³ For details, see <http://www.trai.gov.in/events>

⁴ For details, see <http://www.parfore.in/index.htm>

⁵ For details, see http://www.cuts-international.org/cart/Vidhayak_Samvaad.htm

⁶ This has been piloted in India by a non-government organisation, Fields of View. For details, see <http://fieldsofview.in/>

8. **Evaluation of comments** (paragraphs 27, 60 etc) – The Principles correctly highlight the importance of providing feedback to stakeholders on comments received. It might be useful if some indicators on review and evaluation of comments are released in public domain to enable stakeholders prepare relevant comments. For instance, stakeholders should be encouraged to submit supporting documents, respond to broad policy questions, cost-benefit analysis through distributional weightage approach,⁷ process of stakeholder consultations, among other issues. Such approach could help the government in dealing with large number of comments, designing responses to comments received, analyse and review conflicting comments.

9. **Advisory boards** (paragraphs 38, 46) - The membership of advisory boards constituted to provide comments on regulatory policy proposals must be periodically reviewed to assess the quality of feedback received from such boards to identify if members of such boards suffer from inherent biases. It must be ensured that such boards have representations from different stakeholder groups, with all stakeholders having equal voice. In addition, newly created credible bodies could be frequently added in such boards. In addition to national level, such boards could also be constituted at sub-national and local levels to aid local level stakeholders provide feedback in stakeholder consultations.

10. **Educate and Build Capacity of Stakeholders (paragraph 58):** In the changing regulatory scenario, consumers have to play a vital role in making the system more transparent and accountable. Therefore, a significant but reasonable share of the annual budget of the regulatory authorities should be available for educating consumers on various regulatory and policy issues through training and other educational programmes.

11. **Ex-post review of regulation** (paragraphs 72, 74 etc) – Ex-post review of regulations could be triggered by use of mechanisms like sunset clauses. Such clauses mandate review of existing regulations after specific time period in operation. The regulations can continue only if their benefits outweigh costs.

12. **Plain language drafting** (paragraph 86) – The Principles rightly highlight the importance of plain language drafting. Archaic phrases, provisos, explanations and notwithstanding provisions could be avoided in the legal text.⁸ To address the interpretation related risks associated with such drafting, it will be useful to pre-empt the misinterpretations and detail them in supporting documents to the draft text. It will also be necessary to ensure that the legal texts along with supporting documents are available in local languages to ensure greater awareness and understanding by stakeholders.

13. **Capacity building of regulators and stakeholders** – In order to ensure that regulators and stakeholders are informed of the importance and global best practices in regulation policy making, services of expert organisations working towards improving the quality of regulation, could be solicited.

14. **Incorporating inter-systems/inter-stakeholders dynamics approach (paragraph 54, 55, etc.):** There is enough merit in using behavioural insights as a feedback to assess regulatory policies.

⁷ For details, see Adler, *Cost-Benefit Analysis and Distributional Weights: An Overview*, Duke University, September 2013

⁸ Such approach was adopted for drafting of the Indian Financial Code by the Financial Sector Legislative Reforms Commission.

15th March 2017

However, it would be helpful for government agencies to adopt Feedback Systems Approach, to understand the dynamics related to co-functioning of various elements/stakeholders in the system. The dynamics might change with the change in policies. The tools are helpful in gauging the impact of policies on stakeholders' behaviour and also help in connecting the dots between the problem, policy objective and policy provisions.
