

Draft Regulatory Reform Bill

August 2004 saw the Prime Minister of India speak about the need to revamp the regulatory framework and this led to the creation of a Committee on Infrastructure, chaired by the Prime Minister and assisted by a Secretariat (anchored by the Planning Commission of India). In August 2006, the Planning Commission produced a consultation paper titled 'Approach to Regulation - Issues & Options'. A "Draft Regulatory Reform Bill (Draft Bill)" was prepared to give effect to the recommendations contained in the consultation paper. In addition to various other provisions, it proposed "an institutional framework for regulatory commissions, their role and functions, accountability to the legislature and interface with the markets and the people."

The Bill at a Glance

Highlights

- ◆ Identifies the need for keeping regulatory bodies distant from the use of at least one of the three powers - legislative, executive and judiciary. Adjudication of disputes might be left to an appellate tribunal [Sec 3(7)]
- Constitution of a selection committee to select the Chairperson and Members of each Regulatory Commission coming under its ambit. [Sec 4(1)]
- The Chairperson and members have been given a fixed tenure of not more than four years with possibility of re-appointment ruled out [Sec 6(1)].
- The Bill highlights that all regulators should make regulations, issue licenses, determine tariffs, take punitive measures including suspension or cancellation of licenses in case of violation, etc. [Sec 11(3)].
- Provision to constitute a National Advisory Committee on Consumer related issues. [Sec 41]

Lowlights

- The Bill must be extended to cover social infrastructure such as health, education, as they play a significant role in human capital formation.
- The proposed composition of the Selection Committee is marked by an imbalance: unnecessarily large presence of bureaucrats and absence of academia, civil society or professional representatives. [Sec 4].
- The bill provides for investigation and enforcement but it is not clear whether it empowers the Commissions with *suo moto* powers.
- The Bill does not provide for a Consumer Advocacy Fund for awareness and capacity building among consumers.
- The Bill does not clarify whether a regulatory commission for a sector created in accordance with its provisions will replace the existing regulator, if any, or whether the existing regulatory commission will be modified to ensure consistency with the recommendations of the bill.

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Action Points

- Delay on part of the Government to notify sections of acts or powers of the Regulatory Commission needs to be checked.
- The Bill should provide for mandatory consultation between the sectoral regulator and the CCI, when specified issues coming under either's jurisdiction are being investigated and determined by the other.
- The Bill should provide for certain time limitation within which the Ministry should appoint the Chairperson and Members and if there is a delay, then certain penalties for non-action on part of the relevant Ministry should be mentioned.
- Transfer of funds should be channelled through a Parliamentary Standing Committee and not the concerned line ministry so that curbs on regulatory autonomy and independence can be avoided [Sec 20(1)]
- Each regulatory agency must have access to a separate fund which would be raised through fees and cess. This would ensure financial autonomy and ensure independence.
- Need to create a Consumer Advocacy Fund (managed by a steering committee comprising of representatives from the government, regulatory commissions and consumer organisations) which can support activities towards building of capacity of consumers/CSOs in raising consumer concerns.

Introduction

Good economic democracy helps economic management and growth by making active participation by a large number of actors in the market possible and averting market failures. A sound regulatory policy and a competition policy are important pillars of economic democracy. Much has been debated on both policies, and views have been expressed in government documents such as the Policy Document on the 11th Five Year Plan entitled "Inclusive Growth". Such debate has led to policy responses through new laws and/or administrative measures, but more needs to be done.

For example, the regulatory environment in India, which has evolved over a period of time, does not appear to be homogeneous or coherent across sectors or states. An important step towards achieving such homogeneity is the drafting of the Regulatory Reform Bill (Bill) by the Planning Commission of India. An overarching regulatory framework for infrastructure sectors would ensure that regulation of various infrastructure sectors is in conformity with accepted best practices. Regulatory uniformity across sectors also helps them act as complements to each other in enhancing economic welfare. The infrastructure needs of the future also call for much larger reliance on public-private-partnerships. An overarching regulatory framework which ensures that regulation meets minimum required standards of quality, neutrality and independence would facilitate such reliance.

A survey of the provisions of the existing statutory and institutional framework suggests the absence of a common regulatory philosophy guiding the evolution of regulatory institutions in infrastructure sectors. Political constraints and ministerial preferences over time seem to have dominated the reform agenda in different infrastructure sectors. This is inconsistent with the regulatory needs – in a well designed regulatory set up

the regulator needs to be directly responsible to the legislature so that it can effectively remove barriers to competition and eliminate the abuse of market power.

The proposed approach aims at an orderly development of infrastructure services marked by the full expression of competition enhancing forces which in turn can help consumers secure access to affordable and quality infrastructure.

The Bill seeks to govern the constitution, power & functioning of regulatory commissions for public utilities and take measure conducive to:

- Development of public utilities
- Tariff determination
- Enforcement of performance standards
- Promotion of investment and competition
- Protection of consumer interest

The Bill recognizes the need to establish a framework to create uniform regulatory mechanism for public utility services (overriding sector specific laws), with the focus on:

- Constitution, staffing & security of tenure for regulatory commissions and appellate tribunals
- Clearly delineated functions & powers of regulatory commissions and appellate tribunals
- Statutory basis for combining two or more regulatory commissions and /or tribunals
- Enables staggered implementation of provisions of the Bill

Summary of the key provisions and challenges as presented in the Regulatory Bill are addressed in the Bill Blowup.

Constitutional Challenge

The Bill appropriates overarching powers to the Parliament and Govt of India on state subjects effectively undoing the decentralization, reform and liberalization undertaken in the last 20 years. The Bill needs to be

evaluated in light of the 73rd and 74th amendment to the Constitution.

Notification of Provisions/Powers within a stipulated time period

The Government is empowered to issue the notifications, but time period has not been specified. Delay on part of the Government to notify sections of Acts or powers of the Regulatory Commission needs to be checked. For example, PNGRB cannot issue licenses for oil and gas pipelines, as a particular section (16) on these powers in the Act has not been notified as yet. Reference to delay in notifications of certain provisions by the Government, has been articulated in the RTI Act, that whether the Government notifies the provisions or not, within 120 days the Act will come into force.

The draft bill must provide for notification by the Government of all sections in the Act, as passed by the legislature, at one go and within a stipulated time period. If there is a delay, then the Bill should provide for certain penalties for non-action on part of the Government.

Separation of Powers

The consultation paper and subsequently the Bill make a good point in emphasising the need for keeping the regulator distant from one of three kinds of powers: legislative, executive and judiciary. It suggests that adjudication of disputes might be left to an appellate tribunal. This type of institutional framework has emerged in telecom and electricity sectors — the regulators function as quasi-judicial bodies while appeals against their orders are heard by appellate tribunals.

Regulatory Autonomy and Accountability

The bill proposes that there should be legislative accountability of regulatory commissions. This is to be achieved through periodic reports capturing rules, regulations and notifications formulated during the relevant period; recommendations made to

government; and methodology used for inviting public opinion on important matters details of general directions given to commission, etc. The Bill follows the approach paper in encouraging greater financial autonomy through levy of fees, cesses etc but wants Commissions to submit annual plans to the line ministry. Such a requirement is not desirable as explained below.

Maintaining an arm's-length distance between the regulators and the line-ministry concerned is desirable to ensure that the latter does not influence the former unduly. Hence, a mechanism needs to be developed to make the regulators directly accountable to the legislature. Transfer of funds and relevant budget approvals should be channelled through a Parliamentary Committee and not through the concerned line ministry so that curbs on regulatory autonomy and independence can be avoided. Thus, there is a need to create a Parliamentary Committee and which should be empowered to approve the budget of the regulatory commissions

Furthermore, having appropriate processes in place to facilitate consultations between the line ministry and the regulator are required to avoid a possible compromise on regulatory autonomy. The manner of consultations between the Reserve Bank of India (RBI) and the Ministry of Finance is a good model: the RBI holds consultations with the Ministry of Finance on a regular basis, at formal and informal levels, without compromising its autonomy.

Selection and Appointments

The Bill proposes a Selection Committee for search and selection of the Chairperson and members of a regulatory commission consisting of the Cabinet Secretary, members of the union public service commission, outgoing Chair or senior member of

the regulatory commission and the Secretary of the concerned Ministry. At least one of the members should be drawn from a non civil servant (academia, private sector, Professionals) background as this would enrich the functioning of respective regulatory bodies, provide the necessary balance and ensure neutrality.

As proposed, the President would appoint the members on the recommendation of the Prime Minister and the high level selection committee. The term in office of a member would be 4 years and reappointment would not be possible. This prevents them from feeling too comfortable in their positions and keeps the neutrality of regulatory commissions intact. The same process would be followed in the case of appellate tribunals except in the case of judicial members who would be appointed on the recommendation of the Chief Justice. Further, the retirement age for members of regulatory bodies should be the same as that for the civil service to prevent these from becoming parking lots for retired bureaucrats and judges. Such a recommendation is not motivated by the observation that a person's ability gets diminished by age but that sinecures are vigorously pursued by poor quality bureaucrats and judges through compromises on integrity as a means to ingratiate themselves towards the end of their careers with those in power.

The Bill does not pay attention to the remunerativeness of the terms of service. This should be attractive enough to facilitate the entry of qualified and experienced persons. However, Clause 5 (1) (a)to (c) gets frustrated as no young professional would be interested, because no young professional would like a four year tenure unless a provision of re-appointment or extension on merit. The provision of the Bill that an

outgoing member cannot take up employment for a certain length of time after demitting office is too restrictive and should be removed. However, the related provision that an outgoing member of a commission cannot henceforth appear before that Commission should be retained.

In the Bill, there is a time limit provided for appointment of chairperson/members but there is no consequence for inaction. The Bill should provide for certain time limitation within which the Ministry should appoint the Chairperson and Members and if there is a delay, then the Bill should provide for certain penalties for non-action on part of the relevant Ministry.

Reference to Competition Commission of India (CCI)

One important aspect that needs attention is the identification of specific and delineable roles for regulatory authorities and the Competition Commission of India (CCI). Interface between the regulatory commissions and CCI needs to be formalised in legal terms and cannot be facilitated in an ad-hoc manner. It is best to leave the determination of behavioural issues to CCI and structural issues to the regulatory authorities, as is the practice in European Union member states.

The Bill should provide for mandatory consultation between the sectoral regulator and the CCI, when specified issues coming under either's jurisdiction are being investigated and determined by the other. This would entail provisions and requirements for a reasonable degree of formal inter-institutional communication. However, the Bill has no such provision. The Bill says that the regulatory commission must prevent market domination, cartelisation, and anti-competitive behaviour, and promote orderly growth of the industry while referring relevant matters to Competition Commission of India (CCI), where

necessary, for opinion, investigation, or adjudication of disputes. In other words, the Bill stresses that it is the Regulatory Commission's discretion to refer relevant matters to CCI but it is not obliged to do so (Section 44).

National Advisory Committee

The Bill proposes constitution of a National Advisory Committee. The National Advisory Committee will meet at least four times in a year and shall advise the regulatory commission on policy, quality, continuity and extent of service provided by the licensees, compliance by licensees, and protection of consumer interest.

Consumer Protection

There is no provision in the Bill that can empower consumer organisations and other civil society groups to appear before the Regulatory Commission. The Bill must provide for creation of a Consumer Advocacy Fund (managed by a steering committee comprising of representatives from the government, regulatory commissions and consumer organisations) through a small cess on charges for service to support select and capable consumer organisations so that these can maintain a sustained watch, educate consumers and effectively represent consumers before the regulatory commissions/competition authority,

and do all other things necessary to promote consumer interest.

Conclusion

The Draft Bill makes useful recommendations for the institutional framework underlying regulatory commissions, their role and functions, accountability to the legislature and interface with the market and people. The proposed statute would facilitate sound regulatory principles and practices in concerned sectors provided the issues, concerns and options identified here are clearly clarified before the enactment of the Bill.

In terms of the way forward, the Planning Commission should facilitate wider consultations with key stakeholders for their inputs on the draft bill. The stakeholders include, but are not limited to, parliamentarians, civil society, media, business, regulatory bodies, state governments etc.

The need is to go beyond the political boundaries of Delhi and consult key stakeholders such as media, consumer organisations, regulatory commissions, business houses, state government representatives, etc in four metropolitan cities to factor their views into finalisation of the Bill. The Planning Commission could also engage with state governments

through the National Development Council or Chief Ministers' Conference. It would ensure a better buy in from the stakeholders and thus expedite the process of adoption of the Bill and render its implementation more effective.

We would also propose the following time line to prevent further delays:

- Further consultations with stakeholders and state governments to be completed by August, 2010.
- Revised draft bill to be circulated to various ministries and their views sought by October, 2010.
- Bill moved in the Parliament during the winter session in 2010 and possibly referred to the Standing Committee on Finance and/or Planning which can then be expected to deliberate on the bill and complete the process before the budget session of 2011 is over.
- President and the Finance Minister mentioning this bill in their speeches to the Parliament in 2011 so as to get the desired support.
- Given the attainment of the listed milestones, probable adoption of the bill as Act in the summer of 2011.

Other Bill Blowups

- The Competition (Amendment) Bill, 2006: What needs to be done?
- The Petroleum and Natural Gas Regulatory Board Bill, 2005
- Patent (Amendment) Ordinance, 2004
- Competition Bill of India, 2001: A Right Step in Right Direction

For viewing other Bill Blowups, please visit our website www.cuts-international.org

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