

# Communications Convergence Bill



The proposed Communications Convergence Bill 2001 of India (CCB) aims to deal with regulatory issues in the current set-up arising from 'convergence' in the communications sector. One of the purposes of this is to establish a structured mechanism to promote, facilitate and develop, in an orderly manner, the carriage and content of communications in the current scenario of increasing convergence between communications related technologies. The Bill proposes the establishment of the Communications Commission of India, which would replace the existing separate regulators in telecommunications, broadcasting and multimedia.

## The Bill at a Glance

### Highlights

- ♦ The Bill is timely and in line with changes in the communications sector brought by technological advances.
- ♦ It intends to bridge the gaps between existing communications regulation regimes.
- ♦ It proposes the establishment of the Communications Commission of India (CCI) to end the overlap between regulatory institutions.
- ♦ The Government of India's privilege to provide telecommunications services as a monopoly is withdrawn.
- ♦ Licenses will no longer be given by the Government, as is currently the case in telecommunications, but by the statutorily established CCI.
- ♦ The Commission is to be staffed by eminent persons in the fields of literature, performing arts, media, culture, education, tele-communications, broadcasting and information technology, finance, law, etc.
- ♦ The Commission's guiding principle will be, *inter alia*, that the communication sector develops in a competitive environment and in the consumer interest.
- ♦ The Bill also proposes the establishment of an appellate tribunal.

### Lowlights

- ♦ Lack of transparency and clarity in the rules.
- ♦ A separate Information Technology (IT) Act may continue to exist, even though the Bill proposes to regulate multimedia.
- ♦ The CCI will not necessarily be established at the same time as the Bill comes into force. Therefore the overlap between the existing institutions could continue even after the enactment of the CCB.
- ♦ The independence of the Commission could be thwarted by the obligation to follow (policy) directives from the Central Government.
- ♦ The Bill provides discretionary powers to regulate, without any check on transparency, clarity or non-discrimination.
- ♦ It continues to rely on a 'vertical' approach to regulation in which several 'functions' are performed by a single regulator.
- ♦ Infrastructure regulation is not specifically differentiated from content regulation
- ♦ The Commission will be dependent on Government for funding.
- ♦ The Bill provides the Central Government wide powers to make exemptions.
- ♦ There are no safeguards against arbitrary and discriminatory application of the rules.

## Action Points

- The Commission's powers to make regulations should be embedded in a legislative framework that will provide transparency, clarity and non-discrimination.
- The Bill should push for a regulatory framework where separate 'functions' are carried out by different regulatory institutions.
- The final word as to what constitutes a 'policy' directive should not be left to the Central Government, but for the judiciary to decide.
- There should be a clear division between infrastructure licensing and content licensing.
- The transitional provisions should be bundled in a separate section.
- The Bill should aim to remove entry barriers and not create them through extensive licensing procedures. Therefore the guiding principle should be to abolish licensing requirements wherever possible, especially in infrastructure development.
- The Bill should include proper safeguards to service providers against arbitrary decision-making.
- The IT Act should be subsumed into the Convergence Act in the near future as part of an evolutionary approach.
- The responsibility for content regulation could be handed over to an existing body like the Prasar Bharati Board.
- Adequate safeguards should be in place to prevent the government from influencing the CCI through funding.

# Bill Blowup

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## Introduction

Rapid developments in the communications sector are leading to the 'convergence' of historically different types of services. This convergence is caused by (i) digitalisation; (ii) the fall in the price of computing; (iii) a reduction in the cost of bandwidth; and (iv) liberalisation in the telecom sector, which allows for new entrants. These processes have led to both a convergence in market-structure (broadcasters, internet providers and telecom firms offer high-bandwidth two-way communication services), as well as in 'content' (separate content markets for newspapers, television, film, and internet are combining into a single multimedia market for content).

### The Communication

**Convergence Bill 2001** will be an important instrument to fill up the existing regulatory gaps and take away the existing overlaps. It will repeal the Indian Telegraph Act 1885, the Indian Wireless Telegraphy Act 1933, the Telegraph Wires (Unlawful Possession) Act 1950, the Telecom Regulatory Authority of India Act 1997, and the Cable Television Networks (Regulation) Act 1995.

### The CCB 2001

The introduction of the Communication Convergence Bill, 2001, proposes to establish a structured mechanism to promote, facilitate and develop in an orderly manner the carriage and content of communications in this context.

One of the most important tools to achieve the Bill's objectives (Chapter V of the Bill) will be effective competition in a converged market. However, the Bill does not provide enough safeguards to achieve this objective and guiding principle.

- There are few boundaries to the CCI's regulatory powers, which could lead to arbitrary decisions.
- Different types of services could be subject to the same licensing procedures, creating unnecessary entry barriers.
- Competition in the converged sector is to be regulated by the same institution that sets the initial entry barrier (license).

### What needs to be changed?

It is clear that the proposed CCB 2001 needs to be changed/improved. The following sections will indicate where and why. The recommendations are dealt with in three general sections:

- Regulation of entry;
- The power of the Commission;
- Regulatory structure;

### Regulation of entry

Historically, the reason for regulating broadcasting and telecommunications was the limited bandwidth and frequencies. Government regulation was judged to be the best way to allocate this scarce resource. With technological developments the resource is becoming less and less scarce and thus the economic rationale for regulation slowly diminishes.

The other major reason for government regulation of the communications sectors was the public interest. The government has always viewed the broadcasting sector as a powerful medium. They have therefore been particularly active in regulating 'content'. For the purposes of the CCB 2001, 'content' means any sound, text, data, picture (still or moving), other audio-visual representation, signal or intelligence

of any nature or combination thereof which is capable of being created, processed, stored, retrieved or communicated electronically.

Like the existing legislation, the new Bill regulates entry into the communications sectors through the use of licenses (Chapter II of the Bill). The costs, delay and conditions necessary to obtain a license can act as barriers to entry. If the licensing procedure is burdensome and subjective, this is more likely. Given the special interests, this is especially true for 'content' regulation. Even when 'content' regulation is done by an independent authority, it remains subjective as to what is allowed and what is not. It will, therefore, continue to be a burdensome entry-barrier.

The promotion of competition in the broadcasting/multimedia sector requires that regulatory entry barriers be lowered as far as possible.

In order to achieve competition and access to affordable services for all consumers, the requirements for infrastructure providers and content providers should be different. In its current set-up the Bill does not take this into account.

In general, the costs for providing infrastructure are high, so there are already significant natural entry barriers. Because of these high natural entry barriers the possible level of competition is already restrained. In the content providers industry entry barriers are generally lower, creating greater possibilities for competition. Therefore high entry barriers in the form of complicated and subjective licensing procedures will be more damaging to competition in the service infrastructure providers industry.

Subjecting both to the same complex regime will work against the aim of creating a competitive market.

Therefore it is necessary to separate the regulation of content from the licensing requirements for service infrastructure providers. If this is done, there will be no more public policy reasons for onerous licensing conditions for the provision of networks and/or application services in a multimedia environment.

**The power of the Commission**

The Bill does not provide clear, transparent or non-discriminatory rules. Instead, it gives the Communications Commission of India enormous discretionary powers. Although the Bill specifies a number of practices that may be regulated, in a number of clauses the Commission is given the very broad power to make regulations in *such other conditions as may be considered necessary from time to time (inter alia* clauses 14, 26, 27, 29).

A good, transparent and clear legal regime should have outcomes which are reasonably predictable for the benefit of the general public. The proposed Bill provides very few safeguards in this respect. The Commission is given large discretionary powers to regulate. Dealing with issues through ‘regulations’, rather than writing them down in a particular law, can enhance efficiency, especially when dealing with new issues. As long as the process is transparent and clear enough, and the regulations are non-discriminatory, there is no problem. To ensure this, the Communications Act must have a clear framework that sets the borders of the Commission’s regulatory powers. The current Bill does not do that. The only safeguard (border) is the provision that

registration fees shall not exceed thirty thousand rupees (Clause 26(3)). The service providers have no say in the matter whatsoever, and they could face regulations that change from case-to-case without warning.

Whereas the Commission or the Government can make and amend rules and regulations very easily, modification of rules by Parliament takes the full legislative process (clause 90). The Commission’s power to regulate should not be reduced, but should be set in a clear legal framework that sets the boundaries of these regulatory powers.

The Commission should publish its regulations either on their own or in a scheme or plan, which should be published three months before they take effect. This would give service providers enough time to assess their implications. The publication would make the licensing process less prone to arbitrariness and more transparent over time. This would

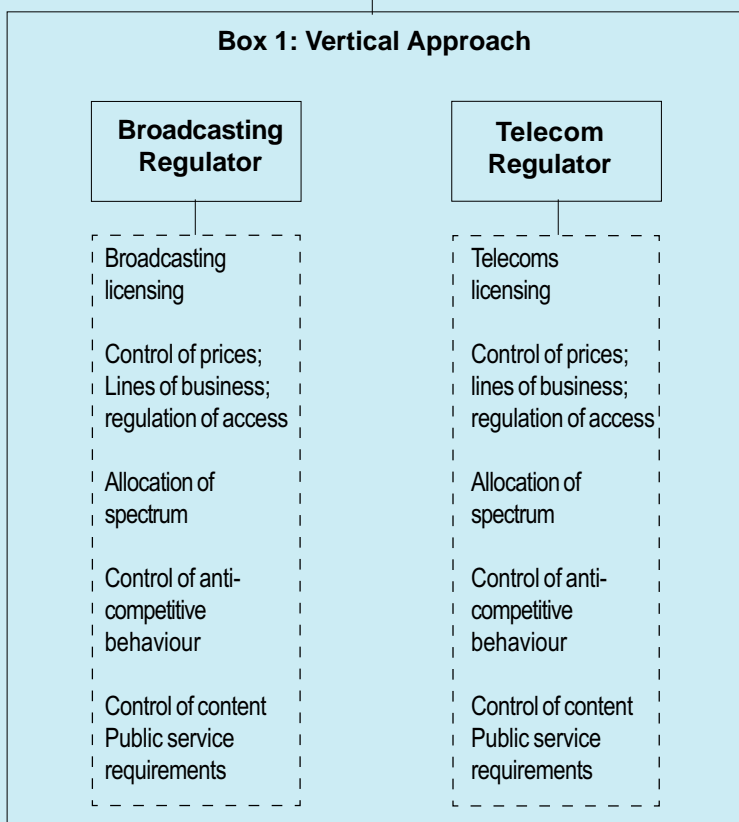
benefit consumers by leading to more competitive markets.

With this in mind it is also important that Clause 22 is changed. This Section provides that the Commission must follow any policy directives communicated to it in writing by the Central Government. This in itself does not remove the Commission’s independence in specific cases. However, Clause 22 (3) states that the decision about whether a question is one of policy or not rests with the Central Government. This effectively negates the insertion of the word ‘policy’ as the border of government interference.

**Regulatory structure**

The CCB 2001 proposes to replace the existing regulatory regimes with the Communications Commission of India (Clause 6(1)) There are two prevalent approaches to regulation:

- A ‘vertical’ approach (see Box 1) in which separate regulators deal with



each sector and cover all functions under that sector.

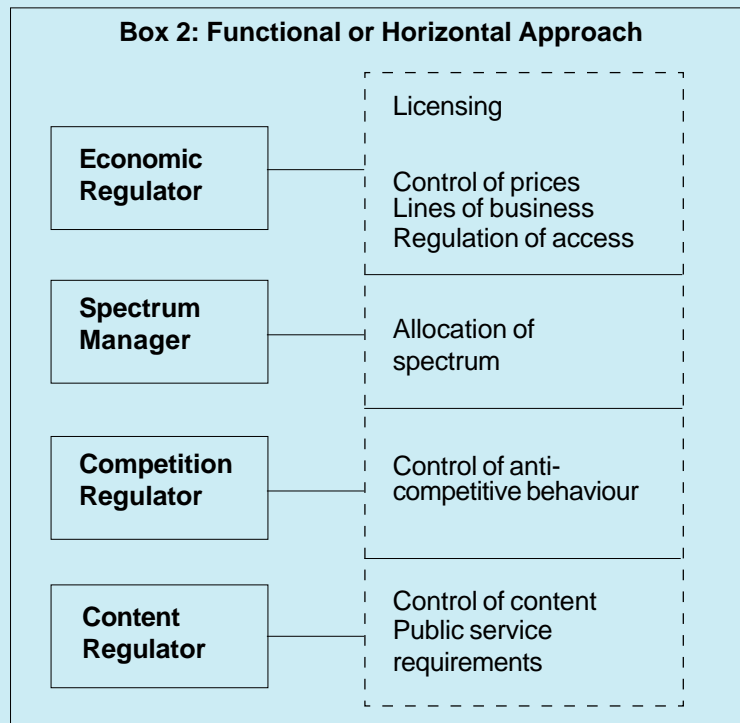
- A 'functional' or 'horizontal' approach (see Box 2) in which different regulators deal with specific functions across all sectors.

The existing regulatory structures could be seen as a 'vertical' approach to regulation. Two separate regulators are responsible for the regulation of the broadcasting and telecommunications sectors. This approach leads to gaps and overlaps in regulating the communications sectors, which are converging rapidly. The institution of the Communications Commission of India is a step in the right direction since it takes away the borders between two separate regulators and replaces them with one vertical regulator.

This, however, only solves one of the problems of the 'vertical' approach to regulation. The new regulator is still multifunctional. This means it will have a problem with the large number of functions it must perform. A pre-occupation with 'content' regulation might result in neglect of competition issues. To ensure enough attention to all the issues involved, it would be better to separate the functions.

These functions should be carried out by the institution that is best equipped to deal with them.

The introduction of the proposed Bill would also be an excellent opportunity to introduce a 'functional' approach to regulation (see Box 2).



A functional approach would help to achieve all objectives of regulating communications. It could also be easily accomplished. The Communications Convergence Bill already calls for the introduction of a spectrum manager.

The new Competition Commission of India would be the obvious and natural choice as the regulator that controls anti-competitive behaviour.

The Communications Commission of India would act as economic regulator until technological development ensured that a once scarce good (bandwidth and frequencies) is available in great quantity. The function of content regulation could be carried out by the Prasar Bharati Board.

Alternatively both functions could fall under the same authority, provided

they were clearly separated. The professional specialities of the Commission members that the Bill specifies ensure that this could easily be done.

### Conclusion

The CCB 2001 is a step in the right direction in the sense that it is in line with changes in the communications sector brought by technological advances. However, in order to achieve its objectives some changes are vital. A competitive market in communications is to the benefit and in the best interests of the consumer. Such a competitive market is best served by a transparent and predictable regulatory regime that strengthens market forces, and by keeping entry barriers as low as possible. A regulatory framework in which each function is performed by the institution that is best equipped to deal with them, is the best way to ensure such a result.