

Draft Regulatory Reform Bill

August 2004 saw the Prime Minister of India speak about the need to revamp the regulatory framework and to make it more transparent, autonomous, and independent of the Government. 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), to monitor projects. Further, in August 2006, the Planning Commission of India 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." Several sectors, from energy to communications to transportation, would come under the ambit of the Draft Bill, if the proposals therein are implemented.

The Bill at a Glance

Highlights

- ◆ The bill makes a good point in identifying the need for keeping regulatory bodies distant from the use of at least one of the three powers - legislative, executive and judiciary. Thus, it suggests that adjudication of disputes might be left to an appellate tribunal [Sec 3(7)]
- ◆ The bill suggests constitution of a committee for search and selection of 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)]. This prevents them from feeling too cosy in their positions and keeps the neutrality of regulatory commissions intact.
- ◆ The Bill highlights that all regulators should make regulations, issue licenses, set performance standards, determine tariffs, have powers to enforce their regulations, lay down licensing conditions, take punitive measures including suspension or cancellation of licenses in case of violation. It lays down detailed provisions for licensing. [Sec 11(3)]. These provisions ensure that regulatory commissions have the necessary teeth and also keep government interference at bay.
- ◆ Provision to constitute a National Advisory Committee on Consumer related issues to advise the commission on quality standards and protection of consumer interest [Sec 41]

Lowlights

- ◆ Part VIII, Clause 43 & 44 (Market definition and reference to Competition Commission) comes in direct conflict with Sections 60 and 61 of the Competition Act.
- ◆ The proposed coverage of the Draft Bill is too narrow. 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 Commission with *suo moto* powers.
- ◆ The Bill has an entire chapter (Part VII) on consumer protection issues but does not provide for a Consumer Advocacy Fund supported by the Commission for awareness and capacity building among consumers. Such a consumer advocacy fund is a feature of most mature regulatory commissions.
- ◆ 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.

INSIDE

- ◆ Introduction
- ◆ Constitutional Challenge
- ◆ Separation of Powers
- ◆ Regulatory Accountability
- ◆ Selection and Appointments
- ◆ Reference to Competition Commission of India (CCI)
- ◆ National Advisory Committee
- ◆ Conclusion

Action Points

- Part VIII, Clause 43 & 44 (Market definition and reference to Competition Commission) comes in direct conflict with Sections 60 and 61 of the Competition Act, which needs to be redrafted.
- Transfer of funds and relevant approvals should be channelled through a Parliamentary Standing Committee and not through 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 linked to regulatory activities. This would ensure financial autonomy and ensure funding of consumer advocacy activities, promotion of consumer organisations, etc. by the regulatory agency itself.
- The Bill has a whole chapter (Part VII) on Consumer Protection. There is a need to create a Consumer Advocacy Fund which can support activities towards building of capacity of consumers/CSOs in raising consumer concerns.

Introduction

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 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 de-centralization, 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.

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 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, disclosing methodology for;. 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. 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.

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. 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.

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.

Further, 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.

Reference to Competition Commission of India (CCI)

One important aspect that needs to be tackled is the identification of specific and delineable roles of the regulatory authorities and competition commission. Interface among these bodies needs to be formalised in legal terms. Ideally, both bodies should come together and participate in the regulatory decision making process. 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.

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. Before the Bill is adopted, certain key steps are required:

- Appointment of members & appropriately qualified staff of the concerned authority for a minimum tenure of 2 years + regular term
- Capacity Creation (economic, financial, legal & technological)
- Awareness campaign/Advocacy of the law & its implication for various stakeholders to facilitate transition/change without undue disruption.

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

© CUTS, 2010. This document is produced by CUTS and is a brief for Parliamentarians in understanding new legislation and enhancing the quality of the debates so that better laws are enacted. Readers are encouraged to quote or reproduce material from this paper for their own use, but as copyright holder, CUTS requests due acknowledgement and a copy of the publication.

This paper has been researched and written by Vikash Batham with Udai S Mehta and for CUTS International, D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India. Ph: 91.141.228 2821, Fx: 91.141.228 2485, E-mail: cuts@cuts.org, Website: www.cuts-international.org.