

Report of the

Regulatory Reforms in India:

Focus on Draft Regulatory Reform Bill

– A Roundtable

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Planning Commission
Government of India

1. Background

1.1 For the Indian economy to achieve and sustain an annual growth rate of 10 percent and impact poverty, the creation of quality infrastructure is critically important. It is estimated that India needs more than a trillion dollars of investment in infrastructure over the next decade. It is clear that such a large magnitude of investment cannot come from the public sector alone. The private sector, too, will have to be persuaded to invest. In order for private sector investment to be meaningfully large, two pre-conditions need to be met. First, missing markets for infrastructure services must be identified and created. Second, these markets must be regulated properly so that non-market risks are eliminated or at least minimised through a predictable legal environment.

1.2 The regulatory environment in India which has developed over a period of time does not appear to be homogeneous across sectors or states. Thus, an important step towards achieving a homogeneous approach is the drafting of the Regulatory Reform Bill by the Planning Commission of India. The Draft Bill has been placed in the public domain for eliciting views and opinions on the nature and extent of legislative action necessary for reforming the regulation of key infrastructure services.

1.3 Against this background, CUTS International and CUTS Institute for Regulation & Competition with the support of Planning Commission of India organised a meeting on implementing regulatory reforms in India with a focus on the draft regulatory bill. The aim was to promote open exchange and sharing of experiences with a view to provide valuable inputs for implementation of regulatory reforms in India.

2. Opening Session

2.1 Montek Singh Ahluwalia, Deputy Chairman, Planning Commission of India

In his opening remarks, Ahluwalia said that the approach to regulation in India is ad-hoc. Ahluwalia mentioned that there are different approaches to regulation in India, such as is evident from the discrepancy in powers allotted to the regulators. For example, the Tariff Authority for Major Ports has very limited powers in comparison to other regulators who can assert more powers. Thus, the purpose of the draft regulatory reform bill is to bring about uniformity in various approaches to regulatory reforms in India.

2.2 The issue of accountability to the consumers is extremely important. Civil society could play an important role in ensuring that regulatory capture does not occur, since it handicaps independence of regulatory agencies. He further emphasised the importance of regulators being accountable directly to the Parliament. In the present mechanism, there is an ambiguity in our system as to whether the Ministry remains accountable for everything and whether the regulator remains accountable through the Ministry or directly. Thus, if we want

the regulators to be independent, the Ministry should be in a position to approach the Parliament and clarify its position and state that the actions were performed by the regulator and not by the ministry. The regulator should be called by the Parliament and questioned directly, as it happens in the US, where members of independent regulatory bodies appear directly before a committee of the legislature.

2.3 Ahluwalia further emphasised that to ensure independence, it is important to ensure that a retiring Secretary of a relevant Ministry should not be made head of the Regulatory Commission under the same Ministry.

2.4 Reacting to the issue of interface between the Competition Commission of India (CCI) and the sectoral regulator, Ahluwalia said that there is a need to deliberate on the issue, given the stand taken in the bill and that there is a need to seek guidance from professionals. According to him, there should be no overlaps and issues pertaining to anti-competitive practices should be handled by CCI. However, there are arguments against this and lot of experts have the opinion that on the assumption of review of law every ten years, it might be useful to provide the mandate to sectoral regulators and revisit the same after ten years and till that time the CCI would have established itself and gained a lot of credibility. The issues need to be thought over before arriving at a decision so that forum shopping is avoided.

2.5 Pradeep Mehta, Secretary General, CUTS International

In his welcome remarks, Mehta emphasised that the event has been organised to brainstorm on the approach paper and the bill, which has been prepared by the Planning Commission and CUTS has also provided inputs on the paper and the bill during the formulation stage. He mentioned that the bill lays down a cohesive approach to regulation and there are several common factors such as independence, accountability, which needs to be universal. He clarified that the bill does not suggest setting up of a super regulator but aims to simplify the process of regulatory reforms in India and to make the regulatory regime more predictable and both investor and consumer friendly.

2.6 Reacting to the discussion on the issue of overlap, Mehta said that the European model is quite good and it is important to distinguish the distinction between promoting competition and regulating anti-competitive practices. He said that all government policies promote competition and a healthy market, while the competition authority keeps a check on anti-competitive practices and thus promotes competition.

2.7 E M S Natchiappan, MP, Chairman, Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice

Natchiappan responded to the debate on overlap and mentioned that owing to involvement of human ego, such conflicts cannot be avoided. Thus, it is important for the law to be transparent and unambiguous and if there is ambiguity, then the need arises to go to Court, which should be avoided. Further on the issue of independence, Natchiappan reacted by saying that because of the presence of

bureaucracy, ensuring independence to regulatory commissions is difficult. He was against the practice of sinecures completely.

2.8 Natiachappan then spoke about Right to Information Act, wherein it is specified that even academicians, scientists, journalists, etc having the required skills and experience, can be appointed as Commissioners. Further, he mentioned that with reference to delay in notification of certain provisions by the Government, it 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.

2.9 In terms of appointment, Natchiappan suggested inclusion of representatives from Chambers of Commerce in the selection committee, but care should be taken to protect the conflict of interest. Similarly, we should also avoid giving too much power to the Chief Justice of India.

2.10 Concluding his presentation, Natchiappan spoke in favour of the Bill and hoped that the Bill to be passed soon and it sees the light of the day.

3. Main presentation

3.1 Gajendra Haldea, Advisor to the Deputy Chairman of the Planning Commission While presenting the Bill through a power point, Gajendra Haldea, Advisor to the Deputy Chairman of the Planning Commission emphasised that the draft bill has been placed in the public domain for eliciting views on the nature and extent of legislative action necessary for reforming the regulation of key infrastructure sectors in India. He further shared with the participants, that as part of the Common Minimum Programme of the United Progressive Alliance (UPA) Government and as per directions of the Prime Minister's Office, the Planning Commission of India, produced an approach paper stating the overall philosophy of regulation, which was shared with a wide variety of stakeholders, including regulatory commissions. The approach paper was approved by the Prime Minister and he suggested carrying it forward in form of a Regulatory Bill, which was to be discussed in the meeting to gather views and opinions of the participants.

3.2 Haldea made it clear that the need for effective regulatory framework is the need of the hour, since we have large private investments coming in. For example, in the 10th Plan, it was 25 percent of the total investment in infrastructure and in the 11th Plan it is 36 percent and in the 12th Plan it is going to be 50 percent. Thus, the need for having independent regulators becomes important along with ensuring level playing field. There is a need for private investments on competitive terms and also protect consumer interests.

3.3 Haldea emphasised that at present we lack cogency and there is no cross fertilisation and coordination and for such a large private investment, we need a more cogent and reliable regulatory regime. Further, he said that there is lack of democratic accountability in the whole exercise of independent regulation in India,

which is a very critical issue. As mentioned by Ahluwalia, Haldea too emphasised that it is important to make regulators directly accountable to the Parliament. Talking about international experience, Haldea mentioned that in US, regulators are accountable to Congress, whereas in the UK, the regulators are accountable to the Government i.e. they serve at the pleasure of the Queen. In the US, there are overarching laws that set legislative standards and which create multi-sector regulators and there are common laws which set some broad administrative principles and which also lay down overarching principles of regulation. Therefore, the suggestion of an overarching regulatory reform bill should not be alien since it is something that has delivered results in some parts of the world.

3.4 Haldea then spoke about the issue of accountability on part of the regulators. He mentioned that it is institutionalised in the bill, where the regulator must set out the plan of action in terms of its activities at the start of the year and then the regulator would need to submit a report of its achievements towards the end of the year. In terms of financial accountability, the budgets would need to be passed by the Legislature and once the budget is passed, the Ministry would not have any authority and there should be sufficient autonomy in expenditure subject to audit by Comptroller & Auditor General (C&AG). In terms of judicial accountability, there is a need to have appellate authority so that we avoid multiple High Courts looking into individual sectors followed by a judicial review by the Supreme Court. The judicial review should be on the questions of law and process of decision making and not on the sector-specific content of regulation.

3.5 The Bill provides for multi-sector regulators, though it is not mandatory because it will take a while before Ministries decide to give up their control over regulatory domain and allow setting up of common regulators, but there is a need to avoid creation of more and more common regulators.

3.6 To the end of his presentation, Haldea emphasised that the issue of overlap is critical and it is important to be debated. It is not clear as to how forum shopping can be avoided and whether the sectoral regulator could be completely kept out of competition issues or all of these issues must go to CCI and nor would it be beneficial to leave all competition issues to the sectoral regulator alone. He emphasised that the purpose of the discussion is to garner important recommendations and take the bill forward.

4. Roundtable

4.1 Pradip Baijal, Former Chairman, Telecom Regulatory Authority of India

Baijal spoke about the issue of overlap and according to him; the entire rationale of regulation is competition. Since there are multiple players entering into a sector, the rationale of setting up a regulator is to make sure that he enforces competition. According to Baijal, in the future perhaps the sectoral regulators will vanish and the competition regulators would take over, but it is important to evaluate the relationship at present and according to him, it is important for sector regulators to

have mandatory consultation with the Competition Commission of India (CCI). Baijal also supported the idea of having multi-sector regulators. The reason for having regulators is because the polity felt that administrative ministry was not in a position to deal with issues relevant to regulation, thus there was a need to set up independent regulators. But there are situations where the regulatory commissions are influenced by the Ministry, since the Ministry finds it difficult to give up its powers. Baijal suggested that if we intend to set up multi-sector regulators, then it is important to appoint Secretaries from various Ministries on selection committee for the selection of regulators.

4.2 Concluding his presentation, Baijal emphasised that in terms of tariff setting, it is important for the regulator to keep in mind the prevailing trends in the market. The tariff setting clause should be mentioned clearly in the Act, ruling out the possibilities of regulators taking the role of tariff setters in perpetuity.

4.3 Shirish Deshpande, Chairman, Mumbai Grahak Panchayat

Deshpande raised an important question about the necessity of the bill. It is important to look into the papers as published by the Planning Commission and find out if there is a need to adopt regulatory reforms bill. Deshpande said that there are existing regulatory laws in place and it is important to have clarity behind the purpose of adoption of the Bill. Deshpande emphasised on two points i.e. Competition and Consumer Protection.

4.4 He emphasised that the need for regulatory reforms is to promote competition but at times, regulatory reforms lead to promotion of the competitors. What is important is the promotion of competition which is pro-consumer. Deshpande referred to Section 9(6) of the Bill regarding the appointment of an advocate by a regulatory commission who would be a representative of the consumer interests. He said there is a need to go a step further i.e. there is a need to empower the consumer bodies technically and financially for them to be self equipped to represent their interests and make themselves heard. Thus, there is a need to create a level playing field as far as representation is concerned. Section 9(6), should be amended to empower consumer organisations to represent their cases and be financially supported.

4.5 On the issue of regulatory capture, Deshpande said that regulatory capture basically means capturing/limiting the regulatory body from one side by the Government and from the other side by the industry. Thus, in such cases the consumer representatives in the regulatory commissions will act as a restraint in allowing regulatory capture. Regarding Section 13(9) on Tariff, Deshpande mentioned that cross subsidisation is quite an explosive issue and there is a need to mention affordable tariff rather than equitable tariff – Section 39 (1 E & F). Mehta, reacted to the points raised by Deshpande and said that there is a need to have a suitable consumer empowerment mechanism with funding in each of the laws, which can support independent and credible consumer organisations.

4.6 Dhanendra Kumar, Chairman, Competition Commission of India

Kumar said that there are reservations on the Bill, as it does not reflect some of the principles enunciated in the approach paper. Given that the Regulatory Reform Bill's basic focus is on reforms, it is important to identify the drawbacks that are experienced in implementation of the existing regulations, so that they can be addressed.

4.7 On the issue of overlap, Kumar said that competition is not regulation, competition starts from the point where regulation stops. As per the Competition Act, the CCI is mandated to eliminate anti-competitive practices and protect the interest of consumers.

4.8 Few key observations made by Kumar on certain provisions of the Bill, are mentioned below:

- Section 61 of the Bill has a clause, which articulates that anything contrary or in variance with the provisions of the draft bill will be void. This is quite a sweeping statement. Thus, there is a need to have a structured consultation with the agencies, etc whose legislations or activities are going to be impacted.
- Sections relating to mergers are also included in the Bill (Section 43). Competition being a highly specialised and complex subject, CCI should be mandated to handle approval of mergers. The same was also suggested by the Parliamentary Standing Committee on Finance that CCI is an expert body to deal with complex competition issues.
- Section 44: There is a need to provide for mandatory consultation between CCI and sectoral regulators.

4.9 L Mansingh, Chairperson, Petroleum and Natural Gas Regulatory Board

Mansingh emphasised that the objective of the regulatory reform bill is to bring about uniformity among key aspects such as independence and accountability of the regulators. According to Mansingh, the bill is an attempt to set up an independent regulator and if the bill is adopted by the Parliament, then it will lead to further confusion and thus, there is a need to debate on the approach to regulatory reforms in India.

4.10 Section 1 of the Bill lays down that the Central Government shall notify when the Act is brought into force. In the Petroleum and Natural Gas Regulatory Board (PNGRB) Act, out of 62 sections, the Ministry decided not to adopt Section 16 (Power to provide for License) and limit the powers of PNGRB, which affected the independent functioning of the regulator. Thus, Mansingh suggested that Section 1 should be amended suitably.

4.11 In terms of appointment of Chairperson and members, the Law Ministry had moved a Cabinet Note some time ago, with the idea of adopting a Bill to bring in uniformity in terms and conditions regarding appointments and it would be appropriate to look into the suggestions made by the Law Ministry.

4.12 S L Rao, Former Chairman, Central Electricity Regulatory Commission

Reacting to the issue of independent regulatory commission, as raised by Ahluwalia, Rao said that independence is important not only to regulate the private sector but also to cover the state-owned enterprises and the need to bring in discipline. Rao supported the initiative taken by Planning Commission and said that such a Bill should have been adopted a long time ago, as we were aware of the problems. Rao too supported that regulators should be accountable directly to the Parliament and the role of the Ministry should be avoided.

4.13 In view of the delay in notification of a key section in the PNGRB Act, Rao said that there is a need for a provision in the Bill, to lay down that the Government must issue notification giving authority to the regulatory commissions within a specified period. Such inactions on part of the Government should attract a penalty, which must be incorporated within the Act itself.

4.14 Few key observations reflected by Rao on certain provision of the Bill, are mentioned below:

- Selection Committee (Clause 4) is heavily weighted in favour of bureaucracy and it should include external non-bureaucrat members
- 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 inaction on part of the Ministry.
- The Bill should provide for some limit on appointment of civil servants and judges in the regulatory commissions so that competent people from the non-government sector could also be appointed.
- Clause 5 of the Bill: Restrictions on regulators on the kind of jobs held after retirement, is not desirable. There is a need for the regulators to make use of the experience that they have gained.
- Clause 6 (Tenure of the Chairperson): There is a need to incorporate the age limit for the selection of the Chairperson in the Bill.
- Clause 7 (Removal): There is a need to add allegations of corruption, conflict of interests and also provide for details regarding who will undertake the investigation of such allegations.
- Clause 13: Need to include a provision on Contempt, which is missing at present.
- Clause 16 (Reporting): There is a need to provide for delays on part of the regulatory commissions, which is bound to happen. Further, it would also

be useful to articulate what the report should contain, apart from plan of work.

- Section 38 (Consumer Representation): There is a need to provide funds to consumer organisations for them to be self-dependent, as articulated earlier.
- Clause 40 (National Advisory Committee): There is a need to provide in the Bill, that the minutes of the Committee meeting shall be made public.
- Clause 43 (Competition Commission): Rao was of the opinion that the Clause should stay as is, but mandatory consultation should be introduced in the Bill not only between regulatory commission and CCI but also between various regulatory commissions. Further, he suggested involvement of an arbitrator in case of any dispute rather than going to the Courts.
- Clause 43 (Penalties): The bill should provide for discretionary powers to the regulatory commissions to penalise the principal office bearer of the utility. It is important to make the Chairperson and executives of the utility responsible for the actions.
- Clause 44: The provision provides for “reference of relevant matters to CCI”. There is a need to define what is relevant in the Act.
- Clause 56 (Powers to make Rules): There is a need to provide freedom to the Commission to decide on recruitment of the staff, salary/allowance, etc.

4.15 T C A Srinivasa Raghavan, Associate Editor, The Hindu Business Line

According to Raghavan, the Bill is in form of directive principles in the Constitution. It is essentially a set of guidelines on how regulators should conduct themselves and whether the Bill needs to be sent to the Parliament, needs to be debated, as Parliament in India is not known for passing Bills. Raghavan focussed his presentation on issue of licensing and suggested removal of chapter on licensing. He referred to the Telecom sector, where because of licensing, there is corruption. Raghavan said, while concluding his presentation, that it is important to keep the regulators away from the Ministry and one way to do so, is to physically place the regulatory commissions outside Delhi.

4.16 Few key observations reflected by Raghavan on certain provisions of the Bill, are mentioned below:

- Section 4(6), which talks about financial or other interests which are likely to prejudice his functions as chairperson or member, would be difficult to prove and should be deleted from the Bill.
- Section 11 (E): The provision is contrary to the entire spirit of market liberal economics. There is no need to have such provisions in directive principles.

- Section 15, “provided further that no such direction shall be issued unless it has been approved in writing by the concerned Minister and the Prime Minister”. Raghavan said that it might be better to obtain Cabinet Approval, rather than seek approval from the concerned Minister or the Prime Minister.
- Section 24 (2), “A regulatory commission may, by order, grant exemption to a local authority”. This power to exempt is always subject to misuse. In other countries, once the laws are passed, exemptions are not granted by administrative procedures.

4.17 In his closing remarks, **Arun Maira, Member, Planning Commission of India** suggested that it might not be useful to have more laws or regulations in place, till the time the previous/existing laws have been clarified since it will only lead to further confusion. According to Maira, we are not yet ready to adopt the draft Bill. There is a need to undertake further debate and discourse to understand the need of the Bill. He also felt that the principles of the draft bill can also be adopted as a policy statement for being followed by various ministries.

4.18 Haldea requested all the participants to send in their detailed comments and congratulated CUTS for a successful meeting. He clarified that the meeting was a consensus-building exercise and it will take time and effort. Mehta thanked all the participants and the distinguished guests for their active participation. He stressed that the meeting was useful, as we were able to discuss a lot of conceptual issues, which was important.

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