CIRC RegTracker

RT.002, June 2011

CIRC RegTracker is a bi-monthly publication which will be tracking the current policy changes and proposals on economic regulation in the country, particularly on the dynamics of the same as and when a news report appears. It does not aim to provide an in depth analysis of the happenings, but raises some points to ponder, as food for thought and deeper analysis by policy makers and researchers.

1. AERA is Empowered

On April 26, 2011 the Supreme Court of India ruled that the two consortia which manage Delhi and Mumbai airports would cease to collect airport development fee (ADF) from passengers until the Airport Economic Regulatory Authority of India (AERA) has determined the rates for the same. Currently, the two consortia only have the Civil Aviation Ministry's approval given in February 2009, which has been held invalid by the court under the AERA Act, 2008. The Supreme Court by its April 26 judgement has unambiguously underscored the supremacy of AERA on levying of ADF on the embarking passengers flying out of the cities.

The court has stated that the development fees levied and collected by Delhi International Airport Limited (DIAL) and Mumbai International Airport Limited (MIAL) shall be credited to the Airports Authority of India (AAI) and will be utilised for the specified purposes of future up-gradation, expansion and development of the airports. The court has also ruled that a proper procedure should be followed before collecting the fees and the proceeds should be used for the purposes intended by law. It can thus be concluded that it is only a matter of time before the fee is restored. A bench of Justices Ravindran and Patnaik also held that while AERA had permitted DIAL to continue to levy the ADF through a public notice in April 2010, no such notice was issued by it in respect of MIAL. Hence MIAL cannot do so in future unless AERA passes an appropriate order.

Source(s): http://www.financialexpress.com/news/dont-levy-airport-fees-until-aera-finalises-rates-sc/782025/

> "AERA should evolve a suitable and scientific basis for setting ADF so that while the progress of future development of the Airports does not suffer, the Consumers are also not unnecessarily burdened."

Points to Ponder

The Supreme Court Judgement quashing the ADF *by GVK group led* MIAL *has brought some welcome clarity on the subject which has been a contentious matter for a while. It has empowered the* AERA*.*

Regarding powers of the Government, the bench clarified that under Section 22A of the Airports Authority of India Act, 1994 the Government has only powers to grant previous approval to the levy and collection of ADF but has no power to fix the rate at which the development fee has to be levied and collected from embarking passengers. The handing over of tariff setting process and other functions to Independent Regulators is necessary to depoliticise the administration of complex sectors of economy.

Now that AERA has been given the powers to fix the rate at which the development fee can be levied, the regulator should not in a routine manner approve the fee presently charged by MIAL and which was initially fixed by the Civil Aviation Ministry on an "adhoc" basis, but should evolve a suitable and scientific basis so that while the progress of future development of the Airports does not suffer, the Consumers are also not unnecessarily burdened.

CONTENTS

The information in this newsletter has been collected through secondary research and CIRC is not responsible for any errors therein. The press clippings used here have been suitably adapted and summarised to convey their essence to the reader without any distortion of content. **Your views and comments are welcome at: circ@circ.in**

2. M&A Guidelines Issued by CCI

According to the new regulations notified under sections 5 and 6 of the Competition Act, 2002 (pertaining to mergers and acquisitions of companies), the Competition Commission of India (CCI), will have the right to assess the proposed mergers and acquisitions (M&As) in the country from June 1, 2011 for both domestic and cross border corporate M&As.

According to the new norms, M&As where all the parties to the acquisition jointly have a turnover of more than Rs.3000 crores or asset base of more than Rs.1000 crores (for merging groups, the turnover and assets thresholds are Rs.12000 crores and Rs.4000 crores respectively) in India, in other words all high value M&As from June 1 will require approval of the CCI. The objective of the CCI scrutiny shall be to safeguard interest of consumers while promoting industrial growth. The norms on minimum thresholds in the final rules address corporate India's discomfort with the earlier proposals of the Corporate Affairs ministry.

The CCI has ruled out any conflict with the Securities and Exchange Board of India (SEBI) over the recently notified M&A regulations of CCI and SEBI's existing Take Over Code. It

> CCI should include the international mergers in its ambit, as an increasingly open Indian economy could face substantial competition concerns due to merger of domestic entities with foreign affiliates abroad

has further been clarified that listed companies can hold share holders meetings and follow SEBI's listing procedure even while its proposals are being scrutinised by the CCI. The mandates of the two regulators are also different: while SEBI's responsibility is to take care of the interests of (corporate) shareholders, CCI's mandate is to safeguard the rights of consumers. Chairman, CCI has stated that M&As have potential implications for competition as they reduce the number of players in the market. According to CCI, 95 percent of the cases will be cleared within 30 days of notice given and the rest in 180 calendar days. The Commission can either approve the merger proposal or reject or modify it.

Source(s): http://www.thehindubusinessline.com/todays-paper/tp-economy/article1716289.ece

Points to Ponder

The need of scrutiny by CCI is deemed necessary for the reason that, while the sector regulators are in a better position to deal with the mergers in their domains, they often ignore the overarching market/economic impact of the merger cases for ascertaining substantial lessening of competition in the given market. Therefore a market regulator like the CCI is deemed to be in a better position to provide the big picture analysis.

However, intervention by consumer groups, customers, and competitors who can guide the CCI at every step during the course of its functioning should be welcome. The concern that CCI's new regulations have been diluted to accommodate India Inc.'s interests, must also be addressed for the reason that government has to understand business concerns of companies as well, so as to facilitate industrial growth.

Also, the CCI should include the international mergers in its ambit, for which there is a provision in the Act, as an increasingly open Indian economy could face substantial competition concerns due to merger of domestic entities with foreign affiliates abroad or merger of two foreign companies also operating in the Indian market, but not registered in India.

3. New Telecom Policy 2011

The Government of India has unveiled the broad contours of the Telecom Policy 2011 which encompasses liberal M&A norms a policy for reduced renewal period and maintaining a reasonable number of players in each telecom circle so that competition remains intact. Furthermore, the new policy delves deeper into the proposal of a new legislation (Spectrum Act) for the purpose of spectrum allocation.

The new licensing regime and the suggested Spectrum Act are intended to govern allocation of airwaves, modify renewal period of telecom licenses from existing 20 years to 10 years and bring in a uniform fee structure that would lower the financial burden on operators. Operators currently pay between 6 percent and 10 percent of their revenues depending on the circle of operation.

Operators will be given the option of taking licenses at the national level or continue with the existing system of circle-wise licensing. Prevalent system allows circle wise licensing. Operators wanting to renew their licenses will have to apply 30 months in advance of the expiry date.

New telecom policy allows a threshold of six operators at any point in time in each circle, while under the present rules the limit is set at four operators in each circle. It is said that since there are 12-13 operators in each area, the proposed change will not have much real impact. Details regarding relaxation of M&A rules have not yet been divulged by the new policy but it has been suggested that stringent acquisition and merger rules shall be eased to bring in much

> Regulation in the country at best has been divergent. The new policy should clearly lay down the roadmap for a minimalist infrastructure and service based licensing

needed consolidation in the hyper competitive 14 player telecom market.

Insofar as the new Spectrum Act is concerned, a committee under the chairmanship of a retired Supreme Court Judge Shivraj Patil has been appointed to draft a Spectrum Act. The Act will govern the future spectrum allocation.

Another move that will benefit operators is the decision to allow spectrum sharing for which Department of Telecommunications (DoT) will stipulate conditions. Details have, however, not yet been revealed. These proposals will

be put up before the Telecom Commission for a final decision expected by the end of the year.

Source(s):http://www.thehindubusinessline.com/industry-and-economy/info-tech/article1688847.ece

Points to Ponder

At a time when Indian Telecom Industry stands scarred post one of the biggest scams ever seen by the industry, the need for a policy which can facilitate and develop a world class telecom industry seems timely.

Reducing the licence period from twenty years to ten years will mean more capital outgo for telecom companies as they will have to renew their licences every ten years and more revenues for the government at the same time. This is likely to further stretch finances of the telecom companies operating in a regime of globally the lowest cost return to services provided, and may affect the infrastructure development in the sector.

Not surprisingly, the Industry wants restrictions on M&A norms to go to allow for consolidation in the market which has a large number of players. The existing guidelines stipulate a three year lock-in period for a telecom company before they can sell out and also does not allow one service provider to hold more than 10 percent stake in another operator in the same circle.

Moreover, the move to separate spectrum from license ensures that spectrum is no longer the bottleneck for someone to enter the industry. The National Spectrum Act, however, would need to refine the entire spectrum allocation, valuation, and pricing process. Any rule or policy on consolidation also has to pass the muster of the Competition Act, 2002 to avoid future complications.

Although technology convergence has been taking place, regulation in the country at best has been divergent. The new policy should clearly lay down the roadmap for a minimalist infrastructure and service based licensing as was envisioned in the Communications Convergence Bill 2000.

4. NRAI to Subsume AERB

Under the shadow of Fukushima and the 25th anniversary of Chernobyl Nuclear disaster, India has decided to go ahead with the proposed Nuclear-Power Project at Jaitapur in Maharashtra.

The nuclear disaster at Fukushima Prefecture at Japan has enhanced the level of consciousness and focus regarding safety and security of nuclear power plants across the world, and even the developed countries have started reviewing their existing nuclear facilities. This has further heightened public awareness and the need for proper regulation and oversight of nuclear power plants in India.

The Government has promised to introduce a bill in the next session of Parliament to create an independent and autonomous Nuclear Regulatory Authority of India (NRAI) for overseeing the safety related aspects in the sector. This body is likely to subsume the existing Atomic Energy Regulatory Board (AERB). The NRAI will be an independent statutory authority like the Nuclear Safety Authorities in the west.

The proposal to create NRAI is a part of the transparency initiatives aimed at weathering the high intensity storm of anti-nuclear activism at Jaitapur, which was compounded by the Fukushima disaster earlier in the year.

Source(s):http://news.in.msn.com/business/article.aspx?cp-documentid=5141145

Points to Ponder

Transparency in the Department of Atomic Energy (DAE) remains a major concern coupled with actual autonomy that the AERB enjoys with many critics describing it as a mere rubber stamp. This raises questions with respect to establishment, independence and autonomy of the proposed NRAI.

India needs to learn lessons from the nuclear disaster at Fukushima Daiichi, Japan. Extension for the oldest of Daiichi reactors beyond statutory limit suggests that the regulatory system in Japan was not transparent and attentive as expected. This despite the fact that Japan has two nuclear regulators, the Nuclear and Industrial Safety Agency (NISA) and the independent Nuclear Safety Commission (NSC). Government of India has taken a number of safety measures including inspection of its plants by UN Safety Inspectors and involving Operational Safety and Review Team (OSART) of the International Atomic Energy Agency in India's own safety review and audit.

> Disaster management in case of nuclear accidents etc must also be brought within the purview of NRAI and reliance solely on the NDMA must not be placed

In the Indian context NRAI needs to be not only distanced from Department of Atomic Energy but also must not be caught in the web of multiple regulatory structures. NRAI must focus on issues regarding safety and security of nuclear power plants. It has been suggested that the parameters of safety including congregation or segregation of nuclear power plants, selection of geographical location and capacity of nuclear power plants may be brought within the purview of NRAI. Similarly disaster management in case of nuclear accidents etc must also be brought within the purview of NRAI and reliance solely on the National Disaster Management Authority (NDMA) must not be placed, so that timely monitoring and action can be expeditiously taken in case of nuclear disaster.

The control of fissile material and its strategic relevance and use may be left with the government in consideration of sovereign authority; however the advisory role of NRAI may not be dispensed with even in such cases.

5. The Model Real Estate Act

Despite the myriad regulatory requirements from the developers, the real estate sector in India has been highly unregulated when viewed from the perspective of the consumer. There have been complaints of malpractices by builders and brokers in the sector. It has been recently reported that property developers in Gurgaon are cheating the buyers of apartments by selling the terrace portion of

second floor. As per the information received under RTI Act, the Town Planning Office has said that terrace is a common property, it is an undivided portion, and consequently the developers cannot sell it. If they sell it, the Town Planning Office can cancel the licence, impose penalty or even register a criminal case.

Taking note of such complaints, the Ministry of Housing and Urban Poverty Alleviation has redrafted the Model Real Estate (Regulation of Development) Bill, 2009 to add more teeth to it. It has been decided to make it a central Act under the concurrent list.

The model bill proposes to establish a regulatory authority, to control and promote the construction, sale, transfer and management of colonies, residential buildings, apartments and other properties. It also provides for the establishment of a 'Real Estate Appellate Tribunal', to adjudicate any dispute against any direction of the regulatory authority.

Under the proposed Act, States will also have to set up their own regulatory authorities. Among the major changes that the Model Act proposes to implement, include the provision for compulsory registration of the project. Further,

> The revised Model Act is a welcome step as it seeks to bring in the much–needed transparency and consumer grievance redressal in the real estate sector in India

the builders are required to furnish complete project details on the website maintained by the regulatory authority to enable informed decisions by the buyers.

Source(s):http://www.business-standard.com/india/news/real-estate-draft-bill-revised-to-make-itcentral-legislation/435162/

Points to Ponder

This revision to the Model Act is a welcome step as it seeks to bring in the much–needed transparency and consumer grievance redressal in the real estate sector in India. By imposing strict obligations on the promoters, it seeks to ensure that construction is completed in time and the buyer gets the property as per the specifications that he had been promised. Further, by seeking to establish the Regulatory Authority and Appellate Tribunal, the Model Act provides for a forum where disputes could be heard by an expert body, which would result in expeditious dispensation of justice.

The regulation of activities of property developers in India is a State subject. This has led to inconsistencies vis-à-vis inter -state rules. The Model Act aims to amend these inconsistencies.

Though the Model Act is a boon for buyers, it has received much criticism from developers. They are apprehensive of it ending up as yet another consumer protection law leading to delays and increase in transaction costs. It is feared that with several States already having their own real estate regulatory mechanisms, the proposed body will only create more confusion.

Builders opine that the Model Act does not provide relief to them in getting approvals expeditiously for constructions from government agencies and the need for single window approvals. It also does not take into account the key players - approving authorities, brokers and service providers in the sector. The draft bill makes it mandatory for all promoters to submit the details of the approved plans of projects along with a bank guarantee equal to 5 percent of the estimated cost of the development to the regulatory authority. Developers feel this will only push up the cost of the project.

Thus, given the urgent need for a credible and expeditious consumer grievance mechanism for real estate matters, the proposed regulation whose adoption is expected to resolve extant Real Estate dilemmas of the Indian home buyers, it appears that a real estate regulator is going to be a reality soon. However, the Model Act should strike a balance between protection of consumer interests while addressing the legitimate concerns of developers, especially the call for a single window approval mechanism.