CIRC RegTracker

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Enhancing Knowledge, Strengthening Capacity

RT.015, April-June, 2014

CIRC RegTracker is an attempt to track the creation of regulatory institutions, their capabilities, performances and the way they interact with other institutions in shaping patterns of economic governance. It is being published regularly by the CUTS Institute for Regulation & Competition, a body devoted to enhance knowledge and strengthen capacity on the interstice between law and economics.

RegTracker is a quarterly publication which has been tracking the current policy changes/policy 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.

We are pleased to share latest issue of RegTracker (RT.015, April-June 2014). It offers sector wise developments and points-to-ponder for each development. Keeping with our focus on regulatory governance in infrastructure sectors, we cover following six sectors: a) Coal; b) Petroleum and Natural Gas; c) Electricity; d) Telecom; and e) Transport.

HIGHLIGHTS

Due to national elections, the last quarter has not seen as much happening as in the past. However, we have a new government in the centre, with a clear mandate and some ambitious goals for the infrastructure sectors. The government has already taken few bold steps and we hope to see more in coming months.

A major step taken by the government is integration of cognate energy sectors, by putting, coal, power and renewables under a single ministry. While we welcome the measure, putting the petroleum & natural gas into the same ministry would have been more effective for coherent policy making and implementation in the area of Energy. The new government has also expressed its intention to review the gas pricing policy.

On a similar line, the regulations on private participation in road construction are being eased for effective private participation. DGCA has asked for easier norms for airline operators to facilitate effective competition in the sector. However, ambiguity over spectrum sharing in telecom sector still continues. There seems to be some rays of hope for consumer choice in electricity distribution, with the Supreme Court verdict allowing Tata Power to lay its network in BEST served South Mumbai. Misuse of coal mining license, by selling the coal to third party for non-permitted end use, has been questioned. All these measures demonstrate an incremental improvement in infrastructure regulation in the country. Following sections discuss the developments in greater detail, though not in depth.

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1. COAL

1.1 No right to Allottees to Sell Coal to Third Party from Captive Blocks

The Coal Ministry on the auction process initiated by it in February for putting two mines in Jharkhand and one in west Bengal (estimated of having 500 million tonnes of reserves on the block), has made itself clear that the companies allocated coal blocks for a pre specified purpose won't have the right to market, sell or export the fuel to any third party. Mining lease granted in respect of the mine that the allottees may mine, remove, treat, produce and refine coal found in the mining area solely for the purpose (permitted end use) and for no other purpose. This development follows from the complaints in this regard that have come over from the ostensible sale of coal by Jindal Steel and Power Ltd. from its captive mines in Chhattisgarh. [**FE 08.05.2014**]

Points to Ponder:

The inter-ministerial committee which is probing allegations that Jindal Steel and Power Ltd (JSPL) sold coal to third parties from its mines allocated for captive use has been asked by the Coal Ministry (MoC) to submit its report at the earliest. Meanwhile in order to render accountability and reproaching this issue MoC has issued a statement, that the mine allottees may mine, remove, treat, produce and refine coal found in the mining area solely for the purpose (permitted end use) and for no other purpose. The move came after the Centre drew flak from the Comptroller and Auditor General for delaying the auction. The national auditor had earlier alleged that allotment of 57 mines to private firms without auction resulted in a notional loss of Rs 1.8 lakh crores to the exchequer.

Therefore, this decision of MoC of restricting the allottees to sell coal is welcomed for the fact that it will certainly lead to prevent companies from using captive blocks for commercial gains. This is necessary in a country like ours, so that undue favours are not showered on individual companies and the ever blatant 'crony capitalism' is warded off.

Though there is another view that if the company is unable to use the coal from its captive mines, why should they not be allowed to sell it in the market with an extra premium or licence fee to the government. The problem will be the determination of the extra coal available for third party disposal with attendant rent seeking behaviour of the whole system.

2. PETROLEUM & NATURAL GAS

2.1 Integration of Cognate Ministries

India's exploration activity has crashed due to loss of focus after big discoveries, arbitrary policy changes, lack of respect for sanctity of contracts and deteriorating risk reward ratio, but the situation can be revived with proper measures. One such measure taken by the government is integrating energy ministries. [**BS 27.05.2014**] 70% of India's power generation is thermal or coal-based. Of the five ministries – i.e. petroleum & natural gas, coal, power, mines and renewables, three (power, coal and MNRE) have been amalgamated under Piyush Goyal who has been given an independent charge as a minister of state in Narendra Modi's new cabinet. [**ET 28.05.2014**]

Points to ponder

Consolidating power, coal and renewables under one ministry has been a step worth applauding for. This helps framing coherent policy to ensure adequate supply of consistent quality of coal for power plants. However, at the same time we need such policy surety in case of gas based power plants, and therefore, Petroleum and Natural Gas should also have been clubbed together.

Coal and power ministries have often been at loggerheads with each other, working at cross purposes under UPA-II. They have sparred on a range of issues from coal pooling to raw material sampling on which NTPC and Coal India for instance have had a long standing dispute. A composite ministry will be able to bridge such differences quickly by initiating a joint sampling exercise both at the point of despatch and reception.

The rationale for not merging everything at one go could have stemmed from the fact that the fertiliser and heavy industry sectors also compete for gas where subsidies are a key component. These factors could have resulted in priorities getting defused as a result of which it was possibly decided that petroleum & natural gas must be kept separate. Still, the need is there to have policy coherence across all energy ministries so that better emphasis can be given to achieve India's goal of energy access and security.

2.2 UPA Government's Gas-Pricing Call to be Reviewed

Soon after forming cabinet and ministers of states, the new government put UPA government's gas pricing regime under review. The Rangarajan committee had proposed that the price should be determined by taking an average of the US, Europe and Japanese hub prices and then averaging it out with the netback price of imported liquefied natural gas (LNG) [see **RT 014, Sec 2.1**]. A new price for domestically produced natural gas was supposed to be notified by July 1. However, the Cabinet Committee on Economic Affairs (CCEA) has deferred this decision for another three months.

[**BS 22.06.2014**; **BS 25.06.2014**]

Points to ponder

Although new gas price was officially notified in the gazette by the previous government, it could not become effective because of upcoming elections. Now the new government based on recommendations of CCEA has deferred the date for such notification by another three months. Both Reliance and ONGC have termed the current price of $4.2 per mmBtu as un-remunerative. If Rangarajan committee's formula was accepted the price revision would have taken the gas price to $8.4 per mmBtu. As discussed in previous edition [**RT 014, Sec 2.1**]*, decisive data while formulating Rangarajan's formula was that the spot price of liquefied natural gas (LNG) in Japan went into calculating a well-head natural gas price in India. It is to be noted that gas price in Japan, where demand for energy is voracious, is among the highest in the world. And therefore any acceptable formula must not be guided by Japan's LNG price.*

2.3 Petroleum Minister Signals Incentive Regime for Oil Exploration

Another signal for change has been made by PNG Minister Dharmendra Pradhan in form of placing uniform license policy alongside existing NELP regime. The government's intent, aimed at reviving investor interest in the sector was articulated by the Minister at the 21st World Petroleum Congress in Moscow. [**MINT 18.06.2014**]

Points to ponder

Uniform License Policy (ULP) would allow license once awarded to be extended to all fuel resources, including oil, gas, shale and coal-bed methane. This comes in the backdrop of waning investor interest in the Indian hydrocarbon sector, with around 70% of Indian basins remaining largely underexplored. Even response to the new exploration licensing policy (NELP) has been tepid. ULP proposes to ensure uniformity in contractual provisions for exploration and production for all kinds of hydrocarbon resources by the same operator(s), which could expedite exploration in absence of hindrances due to multiple operators.

2.4 Government may Tweak Oil & Gas Production Contracts

Given that the previous nine rounds of NELP auction over the last 15 years fared far from creditability in raising India's hydrocarbon output, the government has decided not to launch the next round unless the problems that plagued the earlier editions are fixed. [**BS 16.06.2014**]

Points to ponder

With $21.3 billion investment made as opposed to much higher expectation of the Indian government, it is time to review the NELP regime, the investment incentives and provisions pertaining to credibility and penalty, as of all the blocks granted, only one- KG D6 is operative. The Minister for PNG has ordered a listing of the roadblocks for each of the 166 active production sharing contracts (PSCs) signed under various NELP rounds.

Under the NELP regime, 360 exploration blocks have been offered so far and 254 blocks have been awarded. At present, 166 of the awarded blocks are active, while 88 have been relinquished. So far, 128 hydrocarbon discoveries have been made in 42 NELP blocks. Out of these, 82 are gas discoveries and 46 are oil discoveries.

The government has found itself mired in its own bureaucratic hurdles and red tape as companies are not able to carry out exploration in blocks awarded to them. There have been cases where explorers bagged acreages under NELP but later found clearances from the defence ministry and the department of space (DoS) had to be obtained for commencing exploration.

In case of a few other blocks, the price of hydrocarbon is not remunerative to commercially exploit them, while many others have faced rigidity of the PSCs. The disputes over PSCs between the government and the companies have also come in the way of exploration and production. The petroleum ministry now feels that these contracts should have been revised based on experience derived from efforts to operationalise them.

[**ET 29.05.2014**; **ET 16.05.2014**]

3. ELECTRICITY

3.1 South Mumbai power supply: SC nod for Tata Power to lay network

The Supreme Court on Thursday dismissed an appeal filed by Brihanmumbai Electric Supply and Transport (BEST), which sought to restrain Tata Power from laying its network to supply power in BEST's area in South Mumbai.

The apex court ruled there was no provision in the statute according BEST a privileged position of being the sole distribution licensee in the area. This comes as a relief for consumers in South Mumbai - between Colaba and Sion - as they will now get to choose their power supplier. Instead of simply relying on BEST, an arm of Mumbai's local civic authority, Brihanmumbai Municipal Corporation, for power supply, they can now approach Tata Power. [**BS 09.05.2014**]

Points to Ponder:

Navi Mumbai is the only place in India, where the consumers have choice of electricity service providers, though only two companies, RInfra and Tata Power, are in the market. Both the service providers are allowed to compete for expanding their consumer base, which has been effective to a certain extent by bringing down the cost and improving service quality. This clearly emerges as a model that could be scaled up, at least in densely populated urban areas.

Given the success, Tata Power now seeks to expand its network to Southern Mumbai that is currently being served by BEST. However, BEST has been opposed to this move of Tata Power and has challenged it in MERC and Appellate Tribunal for Electricity. Both the quasi-judicial institutions have already rejected BEST's objection, which made them approach the judiciary.

BEST's contention at the Supreme Court was that if a local authority (Brihanmumbai Municipal Corporation) is a distribution licensee in a particular area, there could not be any other licensee in that area, without permission of the authority. The Supreme Court has again rejected BEST's petition on the grounds that it would negate the universal supply obligation under the Electricity Act, 2003, and has allowed Tata Power to lay its network in South Mumbai. There is no harm in duplication of distribution network; it already exists in case of telecom service, at least in some urban pockets.

This is certainly a welcome move that will foster real competition in distribution segment and thus, enhance consumer welfare. Given the positive outcomes in Navi Mumbai, it now time to scale up model in other cities. The state electricity regulators must take up the cause. They could look into feasibility of real competition in distribution within their jurisdiction and seek participation of new licensees. With a presence of two competitive companies, though in different territories, Delhi would be a good case to start with.

3.2 Discoms not cooperating with CAG Audit

The Comptroller and Auditor General (CAG) on Monday once again informed the Delhi High Court that the three electricity distribution companies (discoms) operating in Delhi were not cooperating with the CAG auditors.

"None of the discoms has so far given all the requisite information/data sought by the CAG… Today, the position is not different from what it was three months ago," Additional Solicitor General Siddharth Luthra, appearing for Delhi government, informed the court of Chief Justice G Rohini and Justice R S Endlaw. [**IE, 13.05.2014**]

On the other hand, the Reliance Infrastructure-owned BSES Yamuna and BSES Rajdhani and Tata Power Delhi Distribution (TPDDL) on Monday disputed the claim made by CAG in the Delhi High Court that the power companies have not cooperated with the audit currently underway against them. [**FE 13.05.2014**]

Points to Ponder

Some consumers may have got respite during the brief stint of Arvind Kejriwal as Chief Minister of Delhi, but his arbitrary price reduction is highly questionable. However, his intent of auditing the accounts of discoms is well taken by many. His allegation that the discoms had in the past manipulated accounts with an intention to hike power tariff may not hold in due course, but regular audit of discoms would help the sector to improve governance in many ways.

We would like to remind the readers that privatisation of the discoms in Delhi has been an issue of contention from the beginning. Several petitions were moved in the Delhi High Court against the Delhi government for the privatisation of DVB. One of them, moved by Mr Gajender Haldea, claimed that the government, with the assistance of the DVB, has created private monopolies (See ***Frontline, July 06 - 19, 2002****). The matter is still pending in the Supreme Court. An earlier CAG report had pointed out the procedural irregularities in the privatisation process and loss of revenue for the state (See* ***Hindu, 20.06.2004****). All these seem to have adversely affected the cost and pricing of power in the state.*

Independent audit of discoms' (or any other public service providers') account would help to bring in much needed transparency. While it would help to evade the prevailing suspicion and build consumers' trust in the discoms, it would also offer justification for any needed price rationalisation.

In a recent move, the discoms have approached the High Court questioning the legal sanctity of proposed CAG audit. The fact that discoms are opposed to an independent audit by CAG has driven further public distrust on discoms' intentions. Given the current appalling governance scenario in the sector, it is time to build people's trust in the system to gain their cooperation.

4. TELECOM

4.1 Spectrum Sharing Ambiguity Continues

The draft guidelines prepared by the Department of Telecommunications (DoT) on spectrum sharing provided that telecom operators, having third-generation (3G) spectrum licences, will not be permitted to share spectrum among themselves. Policies on M&A apart from those on sharing and trading of airwaves are being keenly awaited by the telecom industry. The top players want clarity on the options available before them for acquiring the scarce resource, while the weaker players would look upon them as a means to monetize the bandwidth they hold but are not utilizing optimally.

On February 15, 2012, the DoT had decided that "spectrum sharing will not be permitted among licensees having 3G spectrum." The Department of Telecom (DoT) may reconsider its decision to bar spectrum sharing for 3G services following changes that have come into effect under the new licensing regime. Lately the telecom minister Ravi Shankar Prasad has said that the government has been working on the crucial spectrum sharing, trading and allocation rules and would soon come up with directions for the same.

[**BS 15.05.2014**; **ET 29.05.2014**; **ToI 06.06.2014**; **ET 17.06.2014**; **ET 20.06.2014**]

Points to Ponder

Spectrum is a scarce and valuable resource. It is becoming increasingly difficult to accommodate new services in the dedicated spectrum bands, as the demand for spectrum has grown due to expanding range of wireless services. Spectrum accessed on a shared basis can provide a complementary approach to the use of dedicated spectrum bands.

Sharing allows operators pool in their spectrum and use it, thereby resulting in optimum use of the most important asset for a telecom company. Sharing can occur geographically, or on a temporal basis and can result in number of benefits including increase access to spectrum for use by new services and reduction in barriers to spectrum access, acting as enabler for growth and innovation in new wireless services. For consumers, this could mean better quality of voice services, fewer calls dropping and faster data speeds.

*Economic Survey 2014 also echoed the need to devise policy for better spectrum management through trading and sharing of spectrum so as to bring down the cost of spectrum. Recently TRAI also recommended (**ET 22.07.2014**) allowing two telcos to share any category of similar spectrum in a circle, including airwaves allotted at administrative prices, and liberalised a cap on bandwidth that can be pooled in. The DoT will place the recommendations of TRAI before inter-ministerial Telecom Commission to take a final call on spectrum sharing guidelines. Comprehensive policy guidance setting clarity on spectrum sharing will be beneficial not only for the industry but also will benefit consumers.*

4.2 Mobile Apps and Telcos: Policy Discussions for Regulation

A discussion paper is likely to be issued by the Telecom Regulatory Authority of India (TRAI) relating to Over The Top (OTT) services such as such as WhatsApp and Viber. OTT communications services are those that offer competing or substitutive products to users of telecom operators reducing profit and involvement of the operator while using their infrastructure. Next generation OTT services have generated significant media attention given the recent spate of acquisitions and venture capital funding. WhatsApp, Viber and Line are a few of the specialized OTT IP messengers that have disrupted the market. Through this paper the plan is to gain a holistic view regarding the app providers including concerns of telecom operators, concerns for consumers, net neutrality and possible security threats.

The explosion of e-commerce, advertising, and digital media content that now travels over the networks of telecom players has created significant new value, but telecom companies themselves have been unable to benefit. Earlier, the government had said that it wasn't looking at regulating these internet based services, though mobile phone operators have been pressing for that. OTT providers are becoming increasingly popular by running on telecom bandwidth but are not connected to the telecom industry, which TRAI regulates. [**ET 15.04.2014**; **ET 09.06.2014**]

Points to Ponder

Over-the-top content refers to the delivery of content over the operator network through internet service provided by the operator where the operator has no control over the type of data and the content that flies over the network. Several types of OTT players exist in the market place including VoIP and Messaging Players like Skype, Line, WhatsApp, etc, content streaming players like YouTube, Netflix etc) and contextual players like Facebook. A major concern is that OTT services are bypassing the regulatory restrictions because content over internet is difficult for regulation.

OTT apps and services can have major implications on the business models of mobile network operators. The Cellular Operators Association of India (COAI) has produced a white paper on this issue highlighting the operator's perspective. Interestingly it has been seen that operators have had to make considerable investments in upgrading their networks to handle the ever-increasing flood of data created by the OTT players.

The regulation of OTT services raises important concerns not only from the perspective of telecom services providers but also from the concern of consumer's security. It is apparent that OTT players will affect the data revenues of the telecom operators and the regulatory intervention has to play a guiding role in maintaining the ecosystem that is favourable for the market players and consumers.

5. TRANSPORT

5.1 Easier exit norms from road projects- coming soon

In the year ended 31 March 2014, private sector participation in road projects remained low and the ministry awarded just 3,169km of road projects. Taking note of difficulties faced by road projects, the new Road Transport Minister Nitin Gadkari has revised the proposal for exit from road projects given in June 2013.

In view of the prevailing lack of interest among prospective bidders for highway projects under the PPP mode and difficulties faced in achieving financial closure for such projects awarded in the recent past in an already subdued investment climate, the road ministry has been considering for allowing developers who have completed their projects to sell their stakes without forming a new Special Purpose Vehicle (SPV). In case of under construction projects, ministry has proposed to terminate the projects where the projects have not been completed and call for re-bids.

[**MINT 17.06.2014**]

Points to Ponder

In June 2013, exit norms were relaxed by allowing concessionaires to exit both ongoing and completed highway projects, by substitution of the existing SPV by a new SPV formed by substituting developers. However, the condition of forming a new SPV acted as a deterrent because it would mean getting fresh approvals and clearances for the project and going through a time consuming processes.

Thus, in a move to allow road developers to free up capital and speed up execution of delayed projects, the road ministry has proposed to modify its exit policy and make it easier for new investors to enter and replace existing ones. Doing away with the requirement of forming a new SPV would mean that lenders of the project will not have to carry out fresh due diligence and that the project will not need fresh clearances like environment and forest clearances. In addition, the substituting developer will also be entitled to the same tax exemptions. In addition, as with these procedural simplicity, real investors — both domestic and international— would be encouraged and greater amount of investment from private players could be attracted, which will help in boosting up of Public Private Partnerships (PPP) in the road projects.

Thus, whether relaxation of exit norms for road projects will be a game-changer or not, will purely depend on how and when it is implemented and put in place.

5.2 Cabinet Committee on Transport

Based on the recommendations of the National Transport Development Policy Committee to increase the level of investment for revival of transport sector and to be on the lines of Cabinet Committee on Investments for speedy decision making, the last governments' Planning Commission firmed up a proposal for setting up a Cabinet committee on transport, a move that could lead to speedy decision making in the sector.

[**ET 02.04.2014**]

However, the decision on forming such a committee for transport sector is still to be taken by the new planning commission, formed under Modi led BJP Government.

Points to Ponder

India's transport sector is large and diverse; contributes about 5.5 percent to the nation's GDP, with road transportation contributing the lion's share. However, the sector has not been able to keep pace with rising demand and is proving to be a drag on the economy.

Given the level of inconsistencies in the policies across the sector, leading to low level of investment from private players; infrastructure

development in the country has failed to cope with demand. Thus, better coordination among multiple authorities will certainly deliver better quality of services and boost the confidence among private players to invest their funds in building/strengthening up of the transport sector.

The current rigid Model Concession Agreements also need to be revised and made flexible but amendments should only be made for sovereign risks and not commercial risks. Except in South America PPP projects have not been revised anywhere.

Through this step, the government is hoping to see some movement in infra projects, industry looks forward to strong action on all these aspects to provide an impetus to growth.

5.3 DGCA asks for easier norms for Operators

In early this year, fingers were pointed out towards DGCA for being unusually harsh on Air Asia India in terms of slow regulatory approvals, whereas in contrast providing fast-track treatment to Tata-SIA.

In this light, to cut the approval process from the current six months to three months, the Directorate-General of Civil Aviation (DGCA) has asked the civil aviation ministry to remove the 'public notice' clause under Schedule XI of the Aircraft Rules, 1937 from the rules. According to DGCA, the clause is outdated and was put many years ago to protect Air India from competition.

[**FE 04.06.2014**]

Points to Ponder

As in the case of Tata-SIA after getting NOC from Civil Aviation Ministry, it applied to DGCA for the grant of the AOP. It took around another 20 days to issue public notice to get clearance for AOP on the specific grounds on which the representation is made. Thus, it being over two months since TATA-SIA has applied for AOP and is yet to complete paperwork with the regulator and the process for approval has been more delayed for Air Asia India.

The public notice clause under Schedule XI mandates the DGCA to seek any possible objections from the public through an official communication. However, as claimed by DGCA, there is a need to do away with this clause in order to promote competition.

Given today's environment it creates unnecessary delays in the approval process. Doing away with this clause would promote competition, good for both the passengers and industry, making the system more efficient and fair, and also attracting the new investments in airline industry. On the other side increased competition will benefit consumers in form of lower prices and better facilities.