THE TRIPOD OF INDEPENDENCE, EXPERTISE AND ACCOUNTABILITY OF A REGULATOR – AN ANALYSIS OF THE INDIAN COMPETITION LAW

INTRODUCTION

There has been a significant metamorphosis in the field of economic governance in India in the last two decades. For about 4 decades since India became a free country in 1947, the role of the government was pervasive in the sense that it was the policy maker, service provider and regulator. Over the last 2 decades, the role has shrunk in that it has become less pervasive. It is in the last mentioned role, namely, regulator, that the metamorphosis is tellingly significant. Policy making is still the prerogative of the government and depends on its polity, democratic values (or lack of them), its understanding of the political-economic scenario within the country and without and its ability to lead and take decisions besides carrying the people on board. Providing services, particularly in the areas of power, water supply, railways and the like constituting essential services still rests with the government or its enterprises, albeit private providers are operating in a small way. In the area of other general services like telecommunications, civil aviation etc, increasingly private players are participating in a big way, the paradigm shifting from what was called in the 60s, 70s and 80s as attaining the 'commanding heights of the economy' to the current market economy widely popular among Industry and Business. Private investment, private service providers and suppliers form the new horizon in economic governance firmament. This has resulted in an imperative need for effective and efficient regulators. Government which was the main regulator in the four decades or more since India attained its independence in 1947, has now explicitly recognised that to regulate the markets directly would not be appropriate. Instead, the movement is to choose to regulate through independent regulators. Setting up of independent regulators has been, perhaps, the most important development in the field of economic governance in the last two decades.

This metamorphosis in the form of the movement introducing a hitherto unknown institution(s), namely, the independent regulator(s) in the fields of telecommunications, ports, power, competition etc has raised questions on their character and performance and on whether they have subserved the objectives for which they have been established. Regulator is an institution on par with other major institutions of democracy. As India marches towards market economy paradigm with the markets becoming important arbiters of economic decisions, one can prognosticate that the significance of independent regulators will enhance in the next few years or decade.

One important regulator is being ushered in by the new Indian competition law, namely, Competition Act, 2002 (Act, for brief). The regulator under the Act will be known as the Competition Commission of India (CCI, for brief).

This paper addresses the different aspects of the three dimensions that effectuate or retard the effectiveness and efficiency of regulators. The three dimensions are, as in the title of this paper, independence (autonomy), expertise and accountability of regulators and they

constitute a tripod. After a theoretical treatment of the dimensions, an analysis has been made in the paper on how the Act has incorporated them or otherwise.

RAISON De Etre FOR REGULATION

Intervention in the market process is inevitable, given the reality of market failure in many countries, particularly the developing ones. Market failures warrant that crucial economic sectors are brought under the discipline of surveillance, regulation and intervention. But intervention may be seen to assume different forms in different economic milieu and there cannot be 'one size fits all'. If the economic sectors are left to unregulated markets, it can only be at the peril of consumer interest getting severely compromised or prejudiced. The form of intervention and also its nature and character would depend on the source of failure of the market. There could be two broad types of interventions. One type seeks to restore efficiency in a particular market through the creation of a sectoral regulator. Illustration of such regulators may be seen in the areas of power, telecom, insurance and the like. The other seeks to create an entitlement for competition through a competition law. Competition law is generally designed to foster competition in the market and to promote competitive practices in markets. It is intended to prohibit, if not eliminate, anti-competitive practices and to frown upon imperfect competition and take remedial measures as may be necessary. The two types of interventions essentially differ in their nature (Anant and Sundar, 2005).

Worldwide, natural monopolies have been and are producing and supplying a few goods and delivering a few services, considered critical for the society, particularly utilities. The premise on which such an arrangement was conceived and established was the belief that monopolies foster economies of scale in production, supply and delivery of critical goods and services, though not all. The rationale centred round the economic theory that as output increases, the average cost of production of goods and delivery of services reduces. But in such a scenario, the flip side is that absence of competition would give the monopoly supplier of goods or monopoly renderer of services the opportunity to set prices, often unreasonably high, without commensurate improvement in quality or value for money. Consumer interest gets prejudiced as price setting (higher than reasonable) gets compounded by other monopoly/dominance dictated consequences like inefficient allocation of resources, poor quality of goods and services and operational inefficiencies. Recognising such a prejudice to consumer interest, many countries have reoriented or are reorienting their policies relating to economic governance. They set store on economic regulation to stimulate competitive outcomes. Some of them have also come to believe, and rightly so, that market forces and competition can improve the production of goods and delivery of services without affecting the economies of scale. The economic reforms initiated by India in 1991 constituting Liberalisation, Globalisation and Privatisation have stressed competition in the market as an important component thereof. A report of the Ministry of Finance of the Government of India has noted that introduction of privatisation and de-regulation has been impelled by pragmatic and ideology-free policies (Ministry of Finance, 1996).

The pragmatic policies were based on acknowledging government's inability to supply goods and render services efficiently in a commercially sound manner. Procedure rather than substance had primacy in the bureaucratic approach because of a preponderance of oversight committees and institutions like Parliamentary Committees, Vigilance Commission and Comptroller and Auditor General, all of whom, individually and severally, examined critically the commercial decisions of the government and the government enterprises. Furthermore, in the globalisation milieu with India having entered the WTO, it became imperative for the government to provide efficient and cost effective production and supply of goods and rendering of services by Indian enterprises, whether government owned or private owned. In the government's view, rightly, such an approach became necessary to enable India to successfully compete in the global market. Yet another dimension that necessitated a policy change was the need to attract large scale investments (in the manufacturing sector in particular) and to require the private sector to play a bigger role than hitherto. Thus the government had to re-shape its traditional policies of managing the manufacturing sector and the service rendering sector through monopolies or near monopolies by introducing competition and unbundling of services.

If the private sector was assigned a bigger role than before and the public sector a slightly smaller role (intention was not to do away with public sector but to reduce its omni presence), it became necessary to provide a level playing field and conditions for reasonable returns for the private and new investors. In a monopoly/dominant situation, government enterprises were extended a number of privileges and government subventions and even concessions like subsidized tariff, tax rebates, price preferences etc. Some of these privileges had to be disbanded or reduced to enable the lay of manufacturing and services landscape to be level for the private players *vis a vis* the government owned players.

Privatisation process is often visited with high transaction costs which need to be mitigated. The changes in the manufacturing and services environment were and are continuous and complex and consequently, a need arose to develop a workable framework for private sector players and public sector players to co-exist in a level playing field for efficient and economic supply of goods and rendering of services. Such a framework warranted the establishment of sectoral regulators, who could keep the balance even between the interests of both the public sector and the private sector players and stakeholders and, in particular, consumers. Sectoral regulators came into being, particularly in the utilities and services sector. The sectoral regulator had to be assigned the role of an outsider as he had to ensure that no special privilege was shown to the government enterprises and to ensure that there was a level playing field for all participants. For which purpose, he has been enjoined to remain equidistant from the suppliers of goods and renderers of services including the government. Sundar and Sarkar (2000) have succinctly summed up the benefits of regulation as follows:

"Several benefits are likely to accrue out of a 'rational and even-handed' regulation, which include building consumer trust and confidence; establishing better avenues for communication between the regulated utility and stakeholders (most often, it is the

regulatory agency that fosters such dialogue through technical conferences, symposia, open hearings, etc.); ensuring a fair rate of return on the utility and just and reasonable rates for the consumer; encouraging better standards for delivery of services; and letting the utility and other stakeholders assist in developing them".

The *raison de etre* for regulation and for sectoral regulators set out above leans on the appreciation of the government that there is the need to separate the role of the government as a goods manufacturer and service provider and as a policy maker. Furthermore, competition has been introduced in many sectors as is evidenced in the unbundling of the power sector, the enactment of Electricity Regulatory Commission Act, 1998 [creating the Central Electricity Regulatory Commission (CERC) and the State Electricity Regulatory Commissions (SERC)], the establishment of the Telecom Regulatory Authority of India (TRAI), the Tariff Authority for Major Ports (TAMP) and the Securities Exchange Board of India (SEBI) etc.

Well before the conception and constitution of sectoral regulators, particularly in the utilities and service sectors, the need for a Competition Law and Competition Law Authority was recognised and India legislated a law and constituted an Authority for its implementation and enforcement. In 1969, India enacted the Monopolies and Restrictive Trade Practices Act (MRTP Act, for brief). Its principal objectives were to curb monopolies and entertain complaints of anti-competitive practices and adjudicate on them. But the MRTP Act did not have teeth to effectively eliminate anti-competitive practices and behaviour on the part of enterprises and firms. Finally, the government decided to enact a new competition law called Competition Act, 2002 to replace the old and ineffective Monopolies and Restrictive Trade Practices Act, 1969. The new law has yet to be enforced (except for advocacy functions) and has the primary responsibility to not only curb anti-competitive practices but also to foster competition in the market.

Thus India has sectoral regulators and competition regulator.

TRIPOD OF REGULATORS

The thesis of this paper is that the foundation on which the edifice for regulators - both sectoral and competition - needs to stand has to bear well conceived three pillar columns, namely, Independence (autonomy), Expertise and Accountability, forming a tripod. All the three pillars have importance and therefore require treatment herein. Before addressing the various aspects of the three pillars, it needs to be noted that there is a perception that Independence and its close cousin, Autonomy (first pillar) are not exclusive and are also synonymous. But they do bear a distinction. However, despite the distinction, they need to be treated as synonymous, as will be seen in the discussion that follows in the next paragraph.

INDEPENDENCE AND AUTONOMY DISTINGUISHED

Independence and autonomy are not synonymous but distinguishable. The distinction is blurred but recognizable. Institutional efficacy demands functional independence.

Functional independence carries with it an implied degree of freedom to make decisions and maintaining an arm's length relationship from interest groups. Autonomy may be regarded as a subset of independence. This requires some explanation. Independence generally comprises two elements, namely, automatic funding of the institution and fixed tenure for its head and members says a discussion paper (CUTS, 2006a). The paper notes that "[t]aken together, these two elements confer an unparalleled freedom of action on the institution". There could be some other elements but the aforesaid two are the most important. Autonomy, usually, does not need to have automatic funding as an element. If automatic funding is absent, independence is likely to be seriously undermined but autonomy may not be. Functional autonomy could exist even if there is no automatic funding. Independence is riveted to automatic funding because the institution is enjoined to perform the balancing act amongst conflicting interests and, in particular, State-owned enterprises (being one such interest group), which act cannot be performed in an entirely independent manner, were the institution be dependent on funding by someone at the latter's discretion. Suffice it to remember that independence is larger than autonomy and subsumes it.

INDEPENDENCE/AUTONOMY

This is the first pillar of the tripod. In order to effectively and efficiently discharge its duties, a regulator, perforce, needs some degree of freedom to be provided by the statute creating it. This degree of freedom or independence should not be absolute but should be circumscribed by the laws of the land and the policy of the government. Having said this, the regulator should not be dependent on the executive for survival. Its survival needs to be guaranteed by law.

As noted earlier, institutional independence has become imperative for the regulator to perform the challenging task of maintaining a judicious balance amongst conflicting interest and maintaining an arm's length relationship from interest groups. The statutes creating the institutional regulators may or may not explicitly mandate independence for them. In reality and practice, many regulators lack the requisite functional and organisational autonomy to be genuinely independent.

Independence may be viewed in terms of "negative freedom" and "positive freedom". The former is freedom from external coercion and the latter is freedom to do what one (the regulator) wants.

External coercion arises mainly from the discretion that the government has in making available to the regulator funds for its expenses. For instance, the new Indian competition law, Competition Act, 2002 states that the Central Government may "make to the Commission grants of such sums of money as the **Government may think fit** for being utilised for the purposes of this Act" (emphasis added). This discretion takes the form of external coercion and prejudice the negative freedom referred to above. In particular, government could utilise this weapon of discretion to pressurize the regulator to decide a particular case, issue or dispute in a desired manner. For obvious reasons, government may not document its pressure but in subtle ways twist the arms of the regulator to decide

a matter in a particular manner. Besides the said pressure, there could be other kinds of pressure constituting external coercion. Political pressure, 'old boy's network' pressure and the like are examples of external coercion, administered on the regulator subtly undermining negative freedom.

Positive freedom is not an unbridled freedom but is tethered to the confines of the statute creating the regulator. Within the contours of the statute, the regulator must have the freedom to adjudicate and pass orders on disputes or decide matters like tariff fixing etc. This positive freedom is imperative to the regulator, if it has to perform its assigned functions and be effective in the market. The different market players must have confidence and faith in the regulator holding the balance even and in ensuring a level playing field for them.

Governments, despite creating institutions as regulators and despite proclaiming their intention to accord them functional independence, in practice, are generally found to loathe loosening direct control over them. The Executive would like to keep the regulators in some kind of a check, be it through funding mechanisms or through arm twisting tactics of different kinds. Yet, it cannot be gainsaid that independence of regulators is the touchstone of their effectiveness, efficiency, transparency and accountability in the system. The discussion paper (CUTS, 2006a) very succinctly observes:

"Institutional independence has an inverse relationship with external influences over the authorities. The lesser the influence, the greater will be the scope for functional autonomy. There could be a host of possible external influences, including those wielded by interest groups. However, the relationships these bodies maintain with the Government have always been at the centre stage of the debate. The Government can always discover ways and means to conveniently distort the nature and extent of functional autonomy of such institutions. Therefore, in practice, the extent of the vulnerability to Government influence actually determines the degree of independence for these institutions."

Thus independence viewed in terms of negative and positive freedoms constitutes an important pillar for the regulator, both sectoral and competition.

MULTIPLE OBJECTIVES—SOCIAL AND POLITICAL

Taking the area of competition as an example, governments generally have multiple objectives. As a consequence of multiple objectives, public interest policies and intrinsic pure competition principles often are seen to be in conflict with each other. Because of this, competition law gets diluted and also suffers inconsistent application. The myriad conflicting objectives are pursued by the stakeholders concerned through political contacts and pressure groups. Unless such pressures are reined in, the independence of competition policy authorities and competition law implementing agencies get severely undermined. Compromises and political interventions prejudice the benefits of competitive process, namely, economic efficiency.

An example of this is in Box 1 below, a Pakistan experience.

COMPROMISE INIMICAL TO COMPETITION

BOX 1

The Monopoly Control Authority (MCA) in Pakistan has the responsibility, *inter alia,* to conduct enquiries into restrictive agreements and trade practices. When the cement manufacturers in Pakistan increased the sale price of a bag (50 kgs) of cement from Rs. 135 to Rs. 235 in October 1998, the MCA initiated an enquiry into the causes of the price increase after noting that the cement manufacturers were indulging in price cartelisation. The All Pakistan Cement Manufacturers Association (APCMA) informed the MCA that the reasons for the increase were increase in the cost of inputs and higher taxes. After collecting data, MCA found that the costs of inputs had not gone up except power tariff and that too only marginally. The taxation levels had actually been reduced. Cartelisation was manifest among the members of the APCMA and was against public interest, according to the MCA. MCA directed the cement manufacturers to cease cartelisation and revert to the pre-October 1998 price level. Furthermore, it imposed a fine on each manufacturer and ordered that the consumers be compensated against verifiable claims. However, the cement manufacturers refused to comply with the order of the MCA and challenged the same in the High Court and obtained stay orders. Thereafter, the Ministry of Commerce, disregarding the supposed independence of MCA, persuaded the latter to close the case. It held negotiations with APCMA, lowered excise duty on cement and fixed the price of a bag of cement at Rs. 200.

In doing so, the Ministry of Commerce had given in to the pressure of the cement manufacturers' lobby (CUTS, 2006). This compromise was clearly inimical to the independence of the competition authority and to consumer interest.

In developing countries, lack of political will has been recognised as one of the bottlenecks in adoption and effective implementation of competition and regulatory regimes. One needs to acknowledge and appreciate the fact that a democratic set up requires politicians and their parties to win elections to reach to policy-making positions. Therefore, they must satisfy aspirations of their electorates to whom they have to go back, at intervals, to seek a fresh mandate. In given contexts, one can easily comprehend, if not agree with, the reasons for politicians not allowing implementation of competition policy principles. By parting with certain hitherto enjoyed powers to the regulator, government loses the leverage it has, in satisfying sections of electorates and vested interests (vested interests are also often seen to fund the parties during elections). However, efforts are short in identifying potential gains for politicians out of promoting and implementing competition policy measures and in understanding as to how competition policy outcomes could help them retain/enhance their public image/support-base. What is required is an alignment between the 'competition policy outcomes' and the 'incentives for politicians'. Accomplishment of this would go a long way in developing countries adopting and implementing competition policy principles on a fast track. For instance, where cartelisation has taken place and members of the cartel (generally with financial muscle and big pockets) fund the politicians in power, those in

political power should be able to comprehend that cartels could devastate consumers, who really constitute the vote bank and that by proceeding against the cartel, a large number of consumers would benefit and consequently may patronize them in the long run. It is difficult to posit a strategy for this except to emphasise that by following an appropriate competition policy, the long term interests of consumers will be served and so too the interests of those in power.

In the Pakistan case, government itself had intervened much to the discomfiture of the regulator. While government should have the prerogative of making policy decisions, the field should be left free for the regulator to oversee if within the policy framework, all players have a level playing field. But this does not happen in real life, because the dividing line between policy and regulation is, more often than not, thin.

This is so, in particular, in the area of utility pricing. Utility pricing is a politically sensitive issue and government is used to taking decisions thereon guided by political exigencies. After the creation of regulators, utility pricing should be legitimately left to the regulator, who is enjoined to maintain a balance between the interests of the utilities, consumers, stakeholders and of course, the government. Unfortunately, that has not been the case in many areas and jurisdictions, as was evidenced in the Pakistan case.

This suggestion of leaving the area of pricing to the regulator brims with practical difficulties. Its feasibility could be in doubt in the milieu of politico-economic constraints. Again the argument of short term political gains against long term economic gains surfaces. In utility pricing, the party in power may like to subsidise certain sections of society (like the farmers) in supplying power. The cost of subsidy obviously has to be borne by some other consuming sector, like the manufacturing. If so, the economy will be required to bear the cross of extra cost (arising out of subsidizing the agriculture sector) suffered by the manufacturing sector. This can manifest in two ways. One, by way of enhanced price for the consumers and the other, by way of the manufactured goods getting outcompeted by goods in import. But then one has to countenance the fact that certain sections of society do require to be given certain subsidies. In that case, it will be unfair to place the burden on some other sector. A way to redress the situation is for the government to reimburse the utility to the extent it had been advised to provide subsidy to a sector so that the burden is not unreasonably placed on someone else.

This raises the larger issue of governmental policies constituting a boundary for the regulator. By and large, it is axiomatic that government has the prerogative to lay down policies and policy framework. Particularly in democratic polities, people's will usually stands reflected in governmental policies. For instance, in the State of Andhra Pradesh, the Congress party promised before the elections in 1994 that free power would be made available for farmers. Notwithstanding the cost to the exchequer, government after coming to power had to provide free power and it is continuing to do so even today. People's will cannot be easily brushed aside. Regulators are bound by policies laid down by the government. Given the sovereign authority for the government to lay down policies and express them, it is imperative that they are conveyed to the regulators in a transparent manner. The statutes creating the regulators need to specify the power of the

government to lay down policies and specify the obligation of the regulators to be bound by them. Oftentimes, there is seen the ambiguity relating to the role and responsibilities of a regulator. Consequently, it would be eminently desirable to specify the regulator's mandate in the statute itself. When as suggested above, the role and responsibilities of the government are specified in the statute, the distinct turfs for the government and the regulator will be clearly understood by both. In the event there is any confusion between policy making and regulatory role, it should be resolved by the government issuing specific clarifications to avoid conflict-raising overlaps.

In this context, a question is likely to arise as to what constitutes 'policy'. Most, if not all statutes creating regulators in India, omit to define 'policy'. It becomes subject to interpretation with the attendant arbitrariness in so doing, be it the government itself, the regulator or the courts assuming the task of interpretation. The lack of clarity in this regard could undermine the independence of the regulator. The Chairperson of a regulator, if weak or if appointed on patronage by the government would, likely seek the interpretation of the government rather than attempt to interpret. Likewise, if he is a strong personality, he might tilt the balance in his favour, namely, that of the regulator. The Discussion Paper (CUTS, 2006a) suggests a solution, as follows, though government may be loathe in accepting it, as it would like to hold the strings vis-à-vis the regulator.

"An independent authority law should clearly demarcate the respective domains of their functional responsibilities with the State policy. The possibility of Government interference in the functional domain of the authority, in the name of policy directives, needs to be eliminated. Even when issuing so-called 'policy directives', the law should make it mandatory for the Government to consult the authority concerned and it be given an opportunity to express views, prior to issuing such directives."

AUTOMATIC FUNDING

Independence, as noted above, requires in the first place, automatic funding. Government functions through Ministries and Departments, who prepare their annual budgets not only for themselves but also for the institutions within their ambit. It is customary for the Ministries to consult with the institutions within their purview in preparing and providing for a budget for them. But there are variations in this regard in the statutes creating regulators.

For instance, the sectoral regulator for electricity, the Central Electricity Regulatory Commission in India under the Electricity Regulatory Commissions Act, 1998 enjoins the Commission to prepare its budget for each financial year showing its estimated receipts and expenditure and forward the same to the Central Government (s.31). It is the Central Government that approves the budget. Furthermore, the expenses of the Central Commission including all salaries and allowances payable to, or in respect of, the Chairperson and the Members thereof are mandated to be charged to the Consolidated Fund of India (s.11). Likewise, the State Electricity Regulatory Commission established under the same statute is enjoined to prepare for each financial year its budget, showing

its estimated receipts and expenditure and forward the same to the State Government (s.33).

In the case of competition regulator under the Competition Act, 2002, there is no provision for preparing a budget for the Competition Commission of India. The statute provides for the constitution of a "Competition Fund" into which will be credited government grants, costs and fees received from litigating parties etc (s.51). As mentioned above, government has the discretion of making to the Commission grants as it thinks fit (s.50). Obviously, the grant will have to be budgeted for by the government but the statute does not make it obligatory for the government to consult the Commission before preparing the grant budget. But in actual practice, government consults the Commission.

The illustrations above have been provided to stress the argument that most regulators are dependent on government making available funds for their functioning and for carrying out their responsibilities. It therefore cannot be gainsaid that there is the potential for abuse of the discretion in the hands of the government in funding the regulator's expenses and also that there is the possibility of prejudice to its independence.

Oftentimes, what is provided in the budget falls considerably short of the needs of the institutions, in terms of the objectives set for them. Short-funding of the budgetary needs of the regulatory institutions besides limiting the activities of the regulators render them to beseech the Ministries for additional allocations. This gets manifested in terms of the functionaries of the regulators frequenting the corridors of the Ministerial secretariat. Naturally the fall-out is the undermining of their independence. Atleast the potential for such undermining surfaces.

Most, if not all, regulators do not get the funds they need or the funds they seek in their proposals forwarded to the government. Categorical evidence is not forthcoming but this is what the author was given to understand when he spoke to some regulators. Tellingly, a report of CUTS (2002) observes that the budget of the MRTP Commission "is a negligible percentage of the Union Budget and the GDP". The report has provided a Table (see next page) in support, which is self-explanatory.

An interesting aspect thrown up by the Table is that notwithstanding the order of resources made available to the Commission by the government, the Commission itself did not expend the same fully. This is because the government did not sanction certain expenditures in time before the year was out with the result the Commission could not spend the monies allotted relating to the sanction. As CUTS (2002) has pointed out, "[T]he Commission manages the budget but has to seek permission from the Ministry to incur expenditure beyond a certain limit". This is what constitutes lack of functional autonomy. It impacts the independence of the regulator. This is dealt with a little later in this paper.

ANNUAL BUDGET OF THE MRTP COMMISSION

TABLE

Year	Actual Expenditure (Rs. in billions)	Budget (Rs. in billions)	Budget of Central Govt. (Rs. in billions)	(3) as % 0f (4)	GDP (Rs. in billions)	(3) as % of (6)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1996	10.48	11.08	2010.07	0.0005	13682.08	0.00008
1997	14.363	14.399	2320.68	0.0006	15224.41	0.00009
1998	16.724	17.728	2793.60	0.0006	17582.76	0.00010
1999	-	17.605	2980.84	0.00059	19569.97	0.00009

Reference: CUTS (2002)

Funding mechanism of a regulator could be in terms of two distinct methods. The first is earmarked funding. The other is empowering the regulated utilities to levy fees from the consumers. The first method guarantees a stable funding source for the regulator. In the second method, government sometimes sets a cap on the levy of fees. In Argentina, the cap on the levy of fees is 0.5% on sales tax on the telecommunication segment and 2.67% of the consumer bill in the case of the water regulator (Sundar and Sarkar, 2000).

While budgetary constraints and financial crunch are often contributory factors for under-allocations in the budget for the institutional regulator, the problem could be resolved, if the expenses of the regulators, for instance in India, are approved by the Parliament and charged to the Consolidated Fund. In India, the Consolidated Fund is voted by the Parliament after a discussion of the draft budget. In other words, independence of the institutional regulator could be protected and subserved by the Parliament voting its requirements and directly charging the same to the Consolidated Fund.

The line Ministry's role would be confined to making an exercise on the required budgetary allocation in consultation with the institutional regulator and placing the matter before the Parliament to vote. The exercise to be done by the Ministry needs to be linked to the objectives and activities set for the regulator on a realistic basis and whatever is decided after the exercise in consultation with the regulator must be placed before the Parliament for approval without any reduction or unilateral chopping. In a democratic polity, automatic funding needs to be understood as approval by the elected representatives of the people, namely, the Parliament with the government's role in carrying out the budgetary exercise being somewhat limited in the interests of the independence of the institutional regulator. Put in another way, government will not be allowed to veto the regulator's demand for budgetary allocation arbitrarily, for which purpose, the mechanism of effective consultation between the Ministry and the regulator should be in place.

The line Ministry or Department of the government controls the budget and other financial sanctions of the regulator in most countries. Regulator's dependence on the line Ministry to get its budget approved is likely to limit its independence indirectly. In this context, it is desirable that the regulator is allowed to generate resources on its own through a fee, cess etc wherever possible and is also allowed to spend it. For instance, in India, the Insurance Regulatory and Development Authority (IRDA) and Securities and

Exchange Board of India (SEBI) have been allowed to raise resources on their own.TRAI and CCI have been allowed to levy fees and charges and to set up their own fund. On the other hand, TAMP and CERC are wholly dependent upon the government for funding (CERC funds are charged to the Consolidated Fund of India). Even where a regulator is allowed to raise resources on its own, government may not permit it the freedom to spend the amount it raises, as is the case with IRDA (IRDA is currently having a dispute with the Ministry of Finance on this issue).

Staying with the issue of setting up of a fund for a regulator, some of the Members of Parliament, during the discussions[1] on the Electricity Bill, 2001 observed that a separate fund may result in lack of transparency and create doubts of financial probity or conduct of the regulator "leading to lack of confidence and inviting public criticism". They queried as to what was special about the electricity regulator that a separate fund should be created, when the Supreme Court and High Courts were functioning with their expenses being met out of the Consolidated Fund of India.

The TRAI Act, 2000 provides for crediting all the receipts, fees, interest and government grants to the 'TRAI General Fund'. In practice, however, the amounts are deposited in the Consolidated Fund of India, as government revenue. TRAI gets allocations of monies as government deems fit from time to time. This detracts from the independence of TRAI. The Competition Act, 2002 provides for the setting up of the Competition Fund into which will be credited government grants, fees levied by the CCI, costs etc. There is no uniformity in India regarding setting up of funds for regulators but there appears no harm to set up such funds in the interests of financial stability for the regulators, subject to taking care of the concern expressed in the ensuing paragraph.

One should be mindful of the possibility of a risk with the regulator using the said tool of raising resources and maximising the fees/cess as a part of fund-raising. A further risk lies in the regulator passing on the costs to the consumers, if it is allowed to charge fees for self-financing. One way out of this concern is for the government to set caps, as in Argentina, in the statute itself so that the regulator is under some check in raising resources to the detriment of the consumer. Subject to the cap, creation of separate funds for regulators is advisable.

In this paper, emphasis has already been laid on the need for "automatic funding" in the interests of the independence of the regulator. The essence of "automatic funding" is the absence of dependence of the regulator on the Ministry and Department of the government for securing its budget and subvention of funds to it. Besides "automatic funding", the more crucial requirement for the regulator is the financial autonomy to meet its expenditure. While funding needs to be insulated from government interference through the route of "automatic funding", the regulator should have the power to apply

[1] Please see http://164.100.24.208/debate/debtext.asp?slno=3221
http://164.100.24.208/debate/debtext.asp?slno=5604
http://164.100.24.208/debate/debtext.asp?slno=5625```

the funds, as it deems fit in the discharge of its duties and responsibilities. Governments, true to their general predilections for control and oversight of the functioning of the regulators, retain the power to sanction expenditures for the latter. Sometimes such powers of sanction are for expenditures beyond a threshold limit or for capital expenditure. The illustration of the MRTP Commission in India not being able to spend even the monies allotted to it for want of sanction from the Ministry of certain expenditures bears testimony to the lack of functional autonomy of the competition regulator. Even in simple matters like participation in conferences, lack of functional autonomy rears its head for the MRTP Commission. Box 2 elaborates this.

PROCEDURE NOT SUBSTANCE

BOX 2

MRTP Commission, the competition regulator under the MRTP Act, 1969 may like to participate in conferences within the country and abroad in order to update knowledge and skills for its Chairman and Members in the relevant technical area and also in regulation For this purpose, the regulator has to seek government approval prior to its participation in the conferences. In many instances in the past, delays in according approval and last minute clearances had occurred with the result that the regulator found it difficult to meaningfully participate in the conferences. It is the regulator, who can analytically assess the scope, importance and usefulness of conferences for participation but, the government is likely to view participation in the conferences on the limited perspective of expenditure involved, the number of times the regulator has participated in the past etc. Though such considerations do have force, it should be left to the regulator to arrive at decisions to participate in conferences having regard to its professional requirements and to its needs for interaction with sister regulators of other countries. While procedure and its cousin control are important, they cannot be at the cost of substance and objectives in participation at conferences.

Independence is often regarded as freedom from any supervision or control by any authority. In many countries, particularly the developing ones, democracy may not be fully mature nor do their economies have the ability to adjust to the pulls and pressures of market economics. The regulatory authorities are independent only in name and to a limited extent, as their ability to balance the conflicting interests of the players in the market, the consumers and government gets circumscribed, if their directions or adjudicatory decisions have an adverse impact on the electoral fortunes of incumbent governments. Independence and autonomy constitute the cornerstone of an effective and efficient regulator. At the same time, one should not obfuscate the possibility of the regulator having unbridled power to question and annul government policies and objectives thus diluting the sovereignty of the Executive. There should be a balance. Care should therefore be taken to ensure that the regulator while being invested with adequate independence is not invested with excessive independence. There is the need for a balance between independence and larger public interest dimensions. Unbridled independence for the regulator is as undesirable as lack of independence.

To sum up, independent regulation implies that the regulator should be independent of the stakeholders and enjoined to discharge its responsibilities in the best interests of all,

without any prejudice or leaning towards any particular stakeholder. In other words, the regulator is required to ensure a level playing field for different operators in the market and also a fair deal to both the consumers and the service providers including the government. Statutorily, the independence of the regulator must be guaranteed. Without independence, the credibility of the regulator will suffer and will not be effective. An important issue in this respect is the independence of the regulator in its relationship with the government. It is advisable to demarcate the turf between the government and the regulator in the statute itself. While the government should have the authority to make policy decisions, which will be binding on the regulator, the regulator should be allowed adequate degree of the freedom to effectively discharge its duties within the policy framework. The regulator's survival should not be dependent upon the pleasure of the government and its independence should be guaranteed by law and respected by everyone. This independence should not be absolute but subject to the laws of the land and policy of the government. A regulator should have the understanding that it is not a substitute for the government but has been established to perform a set of functions under the statute creating it.

TWO POWERS OF THE GOVERNMENT

There are two powers of the government which could prejudice the independence and autonomy of the regulator. One is the power to issue policy directives to the regulator. This power, in some cases, is incorporated in the statute creating the regulator. For instance, the Competition Act, 2002, the Electricity Regulatory Commission Act, 1998, the Telecom Regulatory Authority of India (TRAI) and the Tariff Authority for Major Ports (TAMP) in India incorporate such provisions. The policy directives are usually binding on the regulator even though as in the Competition Act, 2002, a mechanism is laid down for consultations, with the Competition Commission being given an opportunity to express its views before any directive is issued by the government. Notwithstanding the possibility of this power to give directives to the regulator prejudicing the independence of the regulator, one has to contend with the axiom that the government should have the prerogative to make policy decisions of a binding nature on the regulator. The policy decisions should be confined to non-technical and non-administrative areas and not to individual cases that may come up before the regulator.

The Standing Committee of the Parliament in India, after examining the Electricity Bill, 2001 recommended[2] that the Central Government or the State Government as the case may be, should have the power to give policy directives to the regulator. While cautioning the government that this power should be sparingly used, it suggested that all policy directives should be laid on the table of the House.

The second power relates to the power of superseding the regulator by the government. Any power of supersession severely undermines the independence of the regulator. This kind of a power could be capable of being abused, if the government finds that some incumbent regulator is inconvenient or that he is not willing to get pressurized in an

[2] See http://164.100.24.208/debate/debtext.asp

individual case or cases. Supersession power is very pernicious in character and has no justification. The TRAI supersession described in Box 3 below page is an illustration.

SUPERSESSION OF TRAI

Box 3

Telecom Regulatory Authority of India (TRAI) was established under the TRAI Act, 1997. The Act protected the Members of the Authority, as their removal was subject to proven guilt in a judicial probe. In September 1999, TRAI said that the pricing of cellular phone calls should shift to a "calling party pays" regime which meant that calls from fixed phones to mobile phones would be charged at slightly more than the prevailing rates and that mobile subscribers would stop paying for incoming calls. This is a standard practice in most countries. A turf war broke up between the Government-owned Department of Telecommunications and TRAI. The Department of Telecommunications was the biggest service provider followed by Mahanagar Telecom Nigam Limited (MTNL), a government enterprise. MTNL argued that higher call rates were anti-people and proceeded to challenge TRAI's jurisdiction. The Court, which adjudicated on the issue of jurisdiction, found TRAI's powers limited and insufficient to ask for a shift in pricing regimes. The Court also observed that TRAI could only make recommendations to the government, which would then decide what was to be done.

The position therefore was that the TRAI could only set caps in a given pricing structure and determine as to how the various operators would share revenues and that it had no say in disputes between operators. The upshot of this was that the government scrapped the TRAI Act and sacked the incumbent Chairperson and the Members and decided to rewrite the TRAI law to create a pliant well-behaved TRAI. In the newly written law, TRAI Act, 2000 government empowered itself with the power of superseding the Authority in certain situations and of terminating the tenure of the Chairperson and the Members. The Damocles' sword of supersession raises the concern that the regulator may not behave independently of the government and may be tempted to toe its line in the interest of its own survival.

FIXED TENURE

The second element in institutional independence is the fixed tenure of the head of the institution and its members. The factor "fixed tenure" needs to be viewed as a larger factor including the various parameters that govern the selection, appointment and removal of the head and members of the institutional regulator. Such parameters include

1. transparent selection process,
2. clearly stipulated qualifying and disqualifying criteria for selection,
3. prescribed tenure,
4. removal from office of the head and the members of the regulator on specific grounds.

For the institutional regulator to be independent, effective and efficient there is an unalloyed need to have a transparent selection procedure for selecting the people who will man the regulator as its head and members. Furthermore, the qualifications, experience and knowledge that should inform the selection will have to be clearly spelt out and the net cast wide to secure the right type of persons to constitute the regulator. If favouritism and patronage could be minimised, if not eliminated, in the selection, that itself would be a step forward in not only ensuring that merit would have the final say in the selection but also in ensuring independence of the institutional regulator. If those manning the institution are selected purely on merit considerations and suitability, they would not feel beholden to the Minister or the Executive for their appointment with the corollary that they would discharge their duties independently, independent of the pressures that may be brought on them by government functionaries.

There are different selection processes in different countries. By and large, the appointments of regulators are made by the government. In the US and Argentina, the Executive and the legislator jointly decide the appointment of regulators. The Executive selects the regulator in UK. In some countries, a collegium selection process is provided in the statutes creating the regulator. Here again, there could be differences on whether the collegium selection is binding on the Executive or otherwise.

In order to get the right persons to man the regulator and to minimise favouritism, patronage and politicisation of appointments, the collegium selection process is desirable. The collegium itself needs to be constituted rationally with experts in the relevant field and with men of eminence and integrity. The collegium should be enjoined to make its recommendations to the government (Executive), which desirably should be binding on the latter. For attracting the best available talent in the field (of the institutional regulator) the selection process should be transparent. This could be achieved through open advertisements, scrutiny of the applications and preparation of a panel of names by the collegium and finally, appointment by the Executive.

As indicated earlier, government would generally be not inclined to loosen its control over appointments of the Chairperson and Members of the regulator. The High level Committee (2000) appointed by the Department of Company Affairs to suggest a new competition law for India had advised the collegium selection approach and indeed, the Draft Bill of the law provided for the collegium. But when the Bill was taken up for discussion in the Parliament, government chose to delete the collegium provision and ultimately when Competition Act, 2002 was passed by the Parliament, it was sans the collegium provision. Political considerations and the penchant for the government to keep the reins in its hand for the appointment of the persons constituting the regulator are likely to have impelled the deletion of the said provision from the Bill.

CUTS (2006a) in its Discussion Paper, has suggested, *inter alia,* that

- A Panel should be constituted to recruit capable personnel for manning independent institutions. Such a Panel should be comprised of renowned and

undisputed personalities with diverse expertise. One-third members of this Panel should be replaced every alternate year.

- The extension of the tenure should also be decided by the same Panel.

There are practical difficulties in adopting the collegium approach because of political reasons and bureaucratic constraints but India is progressing towards accepting this approach as is evidenced in the statute establishing the National Human Rights Commission. In the area of competition law, Competition Act, 2002 is likely to be amended with one of the amendments suggested being inclusion of the collegium selection procedure (the amending Bill is pending consideration by the Parliament).

Most statutes relating to institutional regulators stipulate fixed tenures for the head and members thereof. In India, the tenure is 5 years for the regulatory authorities in the power and port sectors. In the telecom sector, the tenure is 3 years. The Chairman and Members of the Monopolies and Restrictive Trade Practices Commission have five year tenure, which is renewable with an age cap of 65 years. The renewability clause is not in all statutes in India but is in some countries like Canada, Argentina and Israel. A rational approach to this issue of renewability is that the statutes would do well to have a provision for re-appointment of the head and the members through the prescribed selection process along with other candidates. The logic in support of this approach is that the expertise gained during the tenure of an incumbent head or member could be effectively utilised further. This should be, of course, subject to the age cap prescribed. It is suggested that there should be a uniform age cap for the head and members of the institutional regulator and that there should be no difference in the age caps between them.

REMOVAL

Removal of a regulator incumbent should not be arbitrary. Legislation in several countries provides an authority with powers to remove from office a member of the regulator that has engaged in certain actions or has become unfit for the post. In Mexico, a regulator incumbent can be removed on charges of and sentencing for severe misdemeanor under criminal or labour legislation (Mexico, 1992). For abusing one's position and acquiring other interests, a member of the Tribunal could be removed in India (India, 1969). Imprisonment is a cause for removal in Thailand (Thailand, 1979).

The commonly noted grounds for removal of an incumbent Chairperson or Member of a regulator are that he/she:

1. is adjudged as an insolvent
2. has engaged during his/her term of office, in any paid employment
3. has been convicted of an offence involving moral turpitude
4. has acquired such financial or other interest that is likely to prejudice his/her functions
5. has abused his/her position as to render his/her continuance in office prejudicial to public interest, or

6. has become physically or mentally incapable of functioning in office.

The TRAI Act, 2000 provides for the removal of the Chairperson or Members on account of their being prejudicial to public interest but before their removal, they would be given a reasonable opportunity to be heard. However, the Members of the Appellate Tribunal can be removed only in case of proven guilt by a Supreme Court enquiry. The removal of Commissioners under the Electricity Regulatory Commission Act, 1998 is allowed on the usual grounds listed above but it is subject to proven guilt after proper enquiry. The Chairperson and Members under the Securities and Exchange Board of India, Act, 1992 can face termination of their services after being served with a 3 months notice or after being paid the salary for the same period. Under the Competition Act, 2002, the Chairperson and Members could be removed in case of proven guilt in an enquiry conducted by the Supreme Court, where the incumbent has abused his position as to render his continuance in office prejudicial to the public interest or has become physically or mentally incapable of functioning in the office. In respect of other grounds like, insolvency etc, no enquiry by the Supreme Court is mandated in the said Act.

The process of removal should be transparent and action of removal should be on specific grounds like moral turpitude or abuse by an incumbent of his position as to render continuance in office prejudicial to public interest etc. While the government should have the authority to remove a regulatory incumbent, it should do so on advice from an independent authority such as the Supreme Court (Sundar and Sarkar, 2000), particularly in respect of grounds at items 5 and 6 above. Protection of this kind will engender a measure of independence for the regulator.

BAR ON EMPLOYMENT

Independence of institutional regulators may be strengthened, if the incumbents thereof are debarred from seeking and accepting appointments in the enterprises that fall within the ambit of the statutes creating them. The bar could be for atleast one year and not more than 2 years. The period of the bar is rather subjective, but for practical purposes, the bar should operate for atleast one year, so as to obviate the possibility of the incumbent functionary from passing an order in favour of a party to a case and from getting rewarded with an employment on a good remuneration on demitting office. Optimally a 2 year ban may be in order, as the heat of adjudicating in favour of a party in order to reap a benefit would likely evaporate in the 2 year cooling off period. Indeed, the Indian Competition Act, 2002 is sought to be amended in respect of the provision relating to bar on employment on demitting office from 1 year to 2 years. The regulators should not also seek or accept employment even directly in the government in the interest of functional independence of the regulators. It has been noted earlier that regulators have the responsibility to ensure a balance between the interests of different players in the market, stakeholders and enterprises including government. The bar on employment in enterprises falling within the pale of the statutes concerned would go a long way in subserving and ensuring the independence of the regulator.

In some countries, legislation requires that the members of a regulator should not have interests which would conflict with the functions to be performed. For example in Hungary, the members of the competition council cannot pursue activities for profits other than those dedicated to scientific, educational, artistic, authorial and inventive pursuits as well as activities arising out of legal relationships (Hungary, 1996). A similar provision is available in the Mexican legislation (Mexico, 1993).

EXPERTISE

The second leg of the tripod is **Expertise**. No regulator worth the name can afford to be a 'generalist' in the negative sense of the term. Generalists are sometimes appointed as regulators, as in India. All India Service officers are known to be of the genre of generalists. Despite the high quality of competitive examinations used for recruitment of such officers, they do not possess any specialism except in the field of their educational degree at the time of recruitment. Even in the field of their educational degree, it would be improper to describe their knowledge as specialism, as they wouldn't generally have had an opportunity to practise their knowledge. After recruitment and some years of service, some of them may develop some specialism because of a series of postings and assignments in the same or related fields. But most of them are rotated between disparate Departments and Ministries (like Irrigation, Education , Social Welfare and so on) with the result that, however competent they may be, the system does not let them acquire any specialisation in a field.

In India, as mentioned above, such generalists are sometimes chosen to man the regulator. It is not argued that they are unfit to be in regulatory posts but in the event they had no exposure to the field of regulation, they would need to educate themselves on information and knowledge in the field and also acquire the wisdom to deal with matters that come up for decision or adjudication before them. There have been exceptions where such generalists have proved themselves on the job. But one cannot push under the carpet the risk of non-specialisation (or to use a strong expression 'ignorance') in the regulator's job except on the peril of stakeholders' and consumers' interest.

Regulators require expertise in the relevant area and related areas. The statutes governing the regulator itself should specify the qualifications, experience and knowledge required for appointments on the Tribunal. The fields to qualify for selection should be wide enough to provide for a multi-member and multi-disciplinary Tribunal. The basket of experience and knowledge in different but allied fields (allied to the main field of the regulator) would then constitute a pool of wisdom which would enable the regulator to address the relevant but varied aspects and issues that may govern the cases coming up before it. In the same breath, it needs to be mentioned that criteria for disqualification also would merit stipulation in the statute itself. This would include an existing interest in the regulated sectors, which will avoid a conflict of interest between the regulator and the stakeholders.

Regulation demands that the incumbents have exposure and knowledge in the area of regulation and also in the areas associated with decision-making. For instance,

knowledge in the areas of economics and accountancy is likely to be highly relevant to and beneficial to the competition regulator. In the field of energy regulation, while knowledge in the area of electricity and energy would be germane, knowledge in industrial operations and finance would be of vital importance in regulatory efforts. This is the reason why the suggestion has been made above of providing for a basket of knowledge and experience at the very top level, namely, at the level of the regulator. As a single incumbent regulator cannot be expected to possess knowledge in the main field and related assisting fields, the regulator needs to be a multi-member and multi-disciplinary panel. The composition of the basket will naturally vary between regulators and will depend on the needs.

Another requisite for the regulator is integrity. It should be made imperative that only persons of proven and unimpeachable integrity and character are selected for which a vigilance clearance should be taken. If capable and efficient regulators are to be in place, it is imperative that there is political will to follow this suggestion. There is therefore, a strong need to educate the politicians and those who wield power on the desirability to have regulators with merit and probity. The responsibility of non-government organisations in this respect cannot be over-emphasised.

In these days of specialization, it is not only the regulator that should be a multi-disciplinary body with its members drawn from relevant but different disciplines but that the organisation (of the regulator) should have experts to assist the regulator. A regulator needs inputs covering different disciplines like economics, accountancy, business, commerce, finance etc. This implies that the regulator should have necessary and relevant experts to assist it in its adjudicatory responsibilities. Analyses of various issues in the relevant disciplines are important inputs for the regulator to arrive at just and logical conclusions.

But, as experience demonstrates, the regulator is generally not empowered to employ or hire experts on a permanent basis or even on an *ad hoc* basis (for a limited period) without seeking the prior approval of the government. Approval, oftentimes, is not for merely hiring or employing experts but also for their selection and appointment. This hamstrings the regulator in its smooth functioning as government, because of financial constraints, may not allow the posts of experts to be created and, even if created, with the remuneration that prevails in the market. Government pay scales and remuneration are way below the level prevalent in the market and consequently suitable persons with knowledge and ability will not get attracted or be available at government scales.

Another constraint faced often, particularly in India, is that the government foists on the regulator, officials from its various Departments, by sending them on what is known as 'deputation'. In other words, attracting outside talent (outside government) is conspicuous by its absence. This kind of an entry barrier shuts out available and good talent to be of assistance to the regulator. A post or assignment in the regulator's organisation is a kind of a quasi-government job and has its own attraction but government pay scales and remuneration are a stumbling block for would-be aspirants assuming that there is no entry barrier. Another problem is that a deputationist is unlikely

to have his heart on the job, as he knows very well that his tenure is for a short period (on deputation) and that his parent Department has always a job for him, if he chooses to get back or is sent back from the regulator. Thus, in order to provide for outside talent to flow and be available, the policy of the government should be to do away with the mindset of having entry barriers. Furthermore, those who are drawn from outside as specialists should be allowed a salary structure that would be attractive to them. But this is easier said than done as government is generally loathe to give market remuneration, when most of its staff and employees are allowed much less. There is no easy solution but a way out is that 'good specialists' and 'good talent' are differently treated by the government on the ground that their inputs for the regulator are needed to administer justice to stakeholders and consumers and that they would not be interested were they offered government scales and remuneration. This is equally germane for the Chairperson and Members of the regulator. Good talent is required to compose the regulator. Selection and appointment of persons with inadequate merit and ability may hardly help the regulator in its effort at adjudicating disputes and cases that come up before it.

In the interest of independence of the regulators, they should be constraints-free in hiring the best experts of their choice and also be free of government's approval. Furthermore, as noted earlier, the salary structure and remuneration (including perquisites) of such experts should be left to and be determined by the regulators in order to attract the best expertise. The salary structure should not be subject to government control either.

The same is the case with the powers of the regulator to appoint the supporting staff in the organisation. Control exercised by the government in the area of sanction of the posts relating to the supporting staff and selection of personnel to man the posts has the consequence of the regulator suffering from inadequate and inefficient management to the detriment of its effectiveness and enforcement of its decisions. This observation is made in the context of Tribunals like the MRTP Commission in India suffering from inadequate staff and personnel with inadequate abilities. Subject to certain broad framework of staffing structure (framework should be decided by the government in consultation with the regulator having regard to the objectives set for the regulator), the regulator should have enough freedom and flexibility to hire and appoint the required staff and experts. To sum up, the regulator should have sufficient organisational autonomy to achieve and subserve the objectives set for it by the statute creating it.

Having dealt with the need for independence/autonomy and expertise for the regulator, it is proposed to deal with another important dimension for the regulator, namely, **Accountability** in the following section. The regulator should be held accountable and answerable for its actions in implementing the statute creating the regulator and in expending the monies allotted to it and also the monies received by way of fees, cess etc.

ACCOUNTABILITY

This constitutes the third leg of the tripod. Autonomy and accountability go hand in hand. Entrusting the regulator with sufficient autonomy has the objective of allowing it to take

judicious decisions in a competent manner without any interference or pressure from the government - direct or indirect. There is enough evidence that in many competition law jurisdictions, governments are loathe to providing adequate autonomy to regulators. This reluctance is to an extent anti-thetical to the regulator's accountability. In other words, the government itself assumes accountability, as it is answerable to the elected representatives, namely, the Parliament or to the Head of the State like, the President. The line Ministry or Department keeps the reins to determine the budget, to sanction funds out of the budget from time to time and to approve expenditures for the regulator beyond a threshold limit on a case-by-case basis. With such controls, the government keeps the regulator fastened to its control and oversight decisions. Consequently, accountability is assumed by the government and not the regulator for such expenditures.

Taking this argument a little further, the line Ministry or Department is generally answerable to the legislature (Parliament) even in regard to functions that have been transferred to the regulator. This results in the Ministry or Department to continue to perform the transferred functions, not directly but through the stratagem of oversight. An adverse consequence of this is for the Ministry or Department to interfere with the regulator's functioning. The statutes creating the regulators sometimes specify the functions, hitherto within the power domain of the government, transferred to them. Since the legislation establishing the regulator is passed by the legislature and the legislature is committed to it, the functioning of the regulator should be, by and large, outside the pale of government oversight. Specification unambiguously of the powers of the regulator and those of the government in the statute itself should set the problem at rest. The concomitant corollary is that the Parliament needs to shy away from debating the functioning of the regulator in the latter's central task of adjudication and decision making on issues between parties. Once there is clear separation of functions between the government and the regulator in the statute itself, accountability transfers from the government to the regulator. This principle has to be reckoned even by the Parliament. But then the key issue is how to make the legislature realise this separation of functions and not question the line Ministry on functions that have been transferred to the regulator.

Debates in the Parliament reveal the intensity of this problem. In India, during the passage of the Electricity Bill, 2001, some of the Members of Parliament queried the government as to how it proposed to provide electricity to the rural areas and as to how the poor people including those belonging to backward classes and tribes would get relief from the government, if decisions on these matters were left to the regulatory authority.[3] A suggestion was made during the debate that the statute itself should spell out the separation of functions between the government and the regulator. The Standing Committee of the Parliament after examining the Electricity Bill, 2001 recommended that 'since the Commission will perform crucial functions relating to the development and regulation of power sector that affects the common man, they should be made accountable to the Parliament and State Legislatures' (see footnote below). The Parliament/Legislature, therefore, is anxious to have oversight of the performance and functions of the regulator, even if it is aware that there has been separation of functions.

[3] See http://164.100.24.208/debate/debtext.asp.

During a meeting[4] organised by CUTS on regulatory issues, Mr S C Mahalik, former Chairman of the Orissa Electricity Regulatory Commission shared his own experience. He observed that some Members of the Orissa Legislative Assembly were not happy with some of his decisions and wanted the government to take action. But the government refused saying that the very Assembly had passed the Act empowering the regulator to take the said action and that it would not be prudent to demand action against the regulator, if its decisions were not acceptable.

Having said this, the only way out is to get the separation of functions categorically spelt out in the statute and continuously bring it to the attention of the Members of the Parliament/Legislature, hoping that over a period of time, the factum of separation of functions would be accepted and come to stay.

This paper has stressed the need and desirability of independence and autonomy to the regulator in the interests of consumers and stakeholders including the government. It goes without saying that if the independence and autonomy paradigm should inform the regulatory institutions, they should also assume full accountability in operating the given independence and autonomy. If the Chairperson and Members of the regulator are selected by a high level collegium and if the selected persons consequently have merit, knowledge and wisdom and have high integrity, there is no reason while they should not be conferred with independence and autonomy. Naturally, upon such conferment, the regulator should be made accountable for using and exploiting the conferred freedom.

Maintaining accountability is imperative in the area of incurring expenditures as public money is involved. In most statutes creating regulators in India, there are provisions providing for an external scrutiny by a specialised agency like the Comptroller and Auditor General of the regulator's accounts and expenses. The scrutiny of the Comptroller and Auditor General is, by and large, confined to the accounts and expenses only and does not constitute an audit of the decisions and judgments of the regulator.

But maintaining accountability is more important is in the area of adjudicating cases and making decisions. While it is not the case of the author to make the regulator accountable for its adjudicatory decisions in terms of defending them in other fora, the regulator owes it to the country to ensure that it balances the interests of stakeholders in a fair manner and does not protect the interests of certain groups to the detriment of others, particularly, the consumers (Sundar and Sarkar, 2000). Decisions and judgments of the regulator need to be reasoned and preceded by observance of rules, regulations and laid down procedures. All interested parties must be given a reasonable opportunity to present and articulate their stand and arguments in writing and orally (procedures must specify the right of contending parties) before the regulator arrives at its finding. Most important, the judgments and decisions should be covered by logic and reasons supporting them and should be published.

Regulatory regimes either adjudicate like courts or adopt what is known as consultative process. It is felt that sometimes, consultative process is preferable to regular formal

[4] CUTS (2005): Retreat meeting in Delhi on 7 May 2005 on 'Regulatory Autonomy and Accountability'.

hearings as in courts, as it has the advantage for a comprehensive discussion of issues with different stakeholders, is less expensive and less time-consuming (Sundar and Sarkar, 2000). The regulators in cases of telecommunications and power (electricity) in India have the responsibility of fixing tariffs and have an eminently regulatory role and adopt the consultative process. MRTP Commission has essentially an adjudicatory role and does not adopt the consultative process. Consultative process does enhance accountability.

Needless to add that that the decisions of the regulator should be appealable (Smith, 1997). The statute creating the regulator should categorically specify the appellate authority and revisional authority. Appeals should be preferably on questions of law and lie to an independent body or a court of law. The regulator being a body comprising eminent persons of ability and integrity, the court of law to which the appeal would lie should be the Apex Court or the one next to it in the hierarchy. This incidentally would ensure an appropriate status to the regulator. Normally the appellate court should not be required to deal with questions of fact unless any serious miscarriage of justice had taken place in assessing facts by the regulator or if new evidence surfaces (which could not be available or introduced at the trial stage for justifiable reasons) at the appellate stage. Appealability by itself contributes to accountability on the part of the regulator.

Accountability of the regulator to the Parliament/Legislature has a strong logic in democratic polities. The Parliament/Legislature has a legitimate right to directly review the functioning of regulators that are constituted by a statute of the Legislature and function independently of the line Department. Regulatory statutes generally provide for the approval of the regulator's budget by the Parliament as part of the line Ministry's budget, for the annual report of the regulator to be tabled in the Parliament and for select committees of the Parliament to perform a role on overseeing regulatory performance.

The discussions at the Retreat meeting organised by CUTS (2005) on 'Regulatory Autonomy and Accountability' noted that the system of accountability to the Legislature was not effective, that Legislative oversight was ex-post and that there was lack of adequate knowledge and expertise in the Parliament and its various committees. The reports placed on the table of the Parliament do not engage the attention of the Parliament, as is necessary. But there have been many occasions when the Minister became a target of the Legislature and was made to answer even on implementation issues, which were discharged by the regulator. An unfortunate fall-out of this was that the Minister tried to interfere in the functioning of the regulator and impair its independence (participants at the Retreat meeting referred to in footnote 6 articulated such occasions and interference).

The Standing Committee of the Parliament in India after examining the Electricity Bill, 2001 recommended that the regulator having been enjoined to perform crucial functions relating to the development and regulation of power sector that affects the common man should be made accountable to the Parliament and State Legislatures. It further recommended that their annual reports and programme of action should be placed before the respective House (see footnote 5).

CUTS (2005) noted that the regulator having been created by a statute of the Legislature and its accountability having been defined therein, the Minister should not be held responsible for the functioning of the regulator. The meeting suggested that the Legislature should make the regulator directly accountable to it. A further suggestion made by the meeting was that in order to oversee the functioning of the regulator, a Parliamentary Standing Committee on regulation is desirable to be established. The Committee's oversight responsibilities should be only on systemic and procedural issues. Care should be taken to ensure that the Committee does not oversee or even discuss individual cases. By and large, the regulator's decisions should be appealable to the higher Judiciary like the High Courts and the Supreme Court. The Parliamentary Standing Committee may also assume the responsibility of evaluating as to whether the regulator has been able to achieve the objectives set for it under the statutes creating it. The same Committee could discuss the annual reports submitted to the regulator and its performance.

INDIAN COMPETITION ACT, 2002 – AN ANALYSIS

The new Indian competition law, namely, Competition Act, 2002 (Act, for brief) is yet to be enforced in its entirety, and in particular, on its major provisions. The Act itself is being amended after certain provisions in the Act were challenged in the Supreme Court. But for the purposes of this paper, the Act as it stands has been examined in the narrative to follow, on the touchstone of Independence (Autonomy), Expertise and Accountability.

INDEPENDENCE (AUTONOMY)

Section 50 of the Act empowers the Central Government to make to the Competition Commission of India (CCI) "grants of such sums of money as the Government may think fit for being utilised for the purposes" of the Act. The said section mentions that making the grant will be "after due appropriation made by Parliament by law in this behalf". This implies that even after appropriation by Parliament, the government has the discretion to grant monies as it thinks fit. This certainly undermines the independence of the CCI. The stand taken in this paper is that subject to Parliamentary approval, the CCI should receive the grants from the government without any discretion for making any cut or modification by the government. Once the appropriation is made by the Parliament, the CCI should get the entire money so cleared by the Parliament. If the Government has the power to hold back a part of the money cleared by the Parliament, it can leverage the situation to its advantage. CCI should not be made to frequent the corridors of the Ministry to get subvention of grants already voted by the Parliament. Section 50 of the Act needs modification by dropping the words 'as the Government may think fit'.

Hopefully, when the Act is amended, this aspect of doing away with the discretion of the government will be taken care of.

Section 51 of the Act provides for the constitution of a "Competition Fund" into which the government grants would be credited in addition to fees, monies received as costs and

the interest accrued thereon. This is a welcome situation but care should be taken by the CCI not to impose fees and to levy costs beyond what is justifiable merely to enhance income for itself.

There is explicit mention in section 51 of the Act that the "Competition Fund" should be administered by a committee of such Members of the Commission as may be determined by the Chairperson. The fund is supposed to be utilised for meeting the salaries and allowance payable to the Chairperson and Members, administrative expenses including the salary allowance etc of the officers and employees of the Commission and for meeting the expenses of the Commission in connection with the discharge of its functions and for the purposes of the Act. From a reading of the said section 51, it appears that the government will not control the manner in which expenditure is incurred. But the practice in reality in the Commission today (there is only one full time Member of the Commission), is that government approval for defraying expenses for certain purposes is sought by the Commission. For instance, prior approval of the government is insisted upon for the Member and the officials of the government to participate in conferences and seminars outside India. Likewise, for capital expenditure, the Commission seeks Government approval.

Rightly, it is the government which has the powers to appoint the Chairperson and the Members of the Commission. Section 9 of the Act stipulates that they would be selected "in the manner as may be prescribed". The expression "prescribed" means prescribed by the rules made under the Act. Government has adopted the procedure of selection by a selection committee but this procedure is set by the government itself and not by the statute. The High Level Committee on Competition Policy and Law (2000) appointed by the government had recommended the collegium selection process with the collegium consisting of the Chief Justice of India (or his nominee), Finance Minister, Minister in charge of competition law, Governor of Reserve Bank of India and the Cabinet Secretary. But the recommendation was disregarded and government constituted the selection committee as it desired. The only reason that could be inferred for this is that government desired to keep the rein in its hands for the selection and appointment of the Chairperson and Members of the CCI. This deviation does have the potential of politicisation of selection and appointment of the posts of Chairperson and members of the CCI.

The High Level Committee recommended that the Chairperson of the Commission should hold the rank and be entitled to the pay and perquisites of a Judge of the Supreme Court. Similarly, the Members of the Commission should hold the rank and be entitled to the pay and perquisites of a Judge of the High Court. It further recommended that the term of the Chairperson and Members of CCI should be five years at a time with the maximum age limit for the Chairperson at 70 years and for the Members, at 65 years. An important observation of the Committee was that the Chairperson of the CCI can be from any of the fields/disciplines, as the competition law is a socio-economic legislation and is not just a judicial body to try and adjudicate on civil and criminal cases. In other words, it is not mandatory that the Chairperson should be only from the judiciary. As the Chairperson should be one who has considerable exposure and knowledge in

International Trade, Commerce and complicated issues relating to Trade, the net needs to be cast very wide in order that an appropriate person is selected for this post (High Level Committee, 2000).

The Act inheres some of the above mentioned observations of the Committee and provides for the Chairperson and Members to be chosen in the areas specified in the Act and also, *inter alia*, from those, who have been, or are qualified to be judges of High Courts. In other words, they need not be only from the judiciary. As stated, they could be from one of the disciplines listed for eligibility. But this approach was questioned in the Supreme Court. The casting of the net wide was the major challenge to the Act in the Apex Court. It was contended by the petitioner before the Apex Court that the Chairperson should be only from the Judiciary. As it was submitted by the counsel for the government that steps would be taken to amend the Act, the Apex Court disposed of the petition without deciding the various issues raised therein.

The status of the Chairperson and Members of the CCI has been left to the government for specification by statutory rules. It is understood that the government has prescribed the status of the Chairperson to be equal to that of a Judge of the High Court and that of the Members to be equal to that of a Secretary to the Central Government. Furthermore, according to the Act, the age cap for the Chairperson is 67 years and that for the Members is 65 years. These are significant departures from the recommendations of the High Level Committee. One is unable to find reasons or logic for the departures listed in this paragraph, but it may be trite to hold that they would likely undermine the independence of the CCI.

The Central Government has the power under the Act, to remove the Chairperson or Member of the CCI from office only after an inquiry by the Supreme Court, on the ground that the incumbent has acquired such financial or other interest as is likely to affect prejudicially his functions or has so abused his position as to render his continuance in office prejudicial to public interest. The Act further empowers the Central government to remove the Chairperson or Member on the ground that the incumbent has been adjudged as insolvent, has engaged at any time, during his term of office, in any paid employment, has been convicted of an offence involving moral turpitude or has become physically or mentally incapable of discharging his functions (without the need for an inquiry by the Supreme Court). Once again, these provisions may not adversely affect the independence of the Commission.

The Act has created a bar for the Chairperson and Members for a period of one year from the date on which they cease to hold office, to accept any employment in, or connected with the management or administration of any enterprise which has been a party to a proceeding before the Commission under the Act. This is a salutary provision protecting the independence of the Commission. This bar period is sought be increased to 2 years in the Amendment Bill pending in the Parliament (please see discussions on this aspect, supra).

The proviso to section 23(3) of the Act is a restrictive provision in that it makes it necessary for the Chairperson to seek prior approval of the government to transfer a Member from one bench situated in one city to another bench situated in another city. If the Chairperson is selected by a high powered collegium [recommended by the High level Committee (2000)], such matters of transfer of a Member from one Bench to another should be left to him/her. There is no justification whatsoever to hamstring the Chairperson's power of administration and constitution of Benches. This has an adverse impact on the independence of the Commission. The Amendment Bill before the Parliament seeks to redress this.

Independence and autonomy for the Commission are imperative, if they should be effective and should promote a competition driven market. Section 56 of the Act provides for the supersession of the Commission. This will undermine the independence and pressure-free functioning of the Commission. Already section 11 of the Act provides for the removal and suspension of Chairperson and Members of the Commission on specific grounds. Why is it necessary to clothe the Government with further powers of supersession of the entire Commission? Government enterprises have been brought within the ambit of the law. Commission needs to be just in dealing with such enterprises, if they trench competition law. With the Damocles' sword hanging on them in terms of section 56, Commission may be under pressure to listen to the Government and even toe its line.

Section 56 of the Act needs to be deleted in the interests of effectiveness and independence of the Commission.

A provision is incorporated in the Act, that the Commission would be bound by government's direction on questions of policy. Section 55 of the Act deals with this. The proviso to this section gives an opportunity to the Commission to express its views before any direction is given by the government on questions of policy. Normally, this section should be regarded as coming in the way of independence of the Commission. But, there is a qualification to the areas of policy, on which government is empowered to give directions to the Commission. The qualification is that the government can give directions only in areas other than those relating to technical and administrative matters. Though not explicit, the qualification apparently means that in individual cases and administrative matters, no direction can be given by the government. In all other matters, directions can be given which will be binding on the Commission. While in principle government policies should be beyond challenge under the Act, the risk in the way in which section 55 is worded is that government may be able to give a direction on how certain types of mergers should be viewed or what should constitute unfair or discriminatory conditions in purchase or sale of goods to fall under "abuse of dominant position" under section 4 of the Act. Arguably, one could perhaps take a view that such a direction will fall under technical matters in which case, government will not have the power to issue it. One possible solution to the said ambiguity is that the government and the regulator should sit together and decide the turf and document the same for future.

EXPERTISE

Regulators, it has been stressed earlier, require expertise in the relevant area and related areas. CCI needs expertise in the field of competition. It needs inputs in areas, *inter alia*, of economics, accountancy, trade etc.The Act creating the CCI itself specifies the qualifications, experience and knowledge required for appointments on the Tribunal. The fields to qualify for selection are wide enough to provide for a multi-member and multi-disciplinary Tribunal. The basket of experience and knowledge in different but allied fields (allied to the main field of competition) constitutes a pool of wisdom which would enable the CCI to address the relevant but varied aspects and issues that may govern the cases coming up before it.

What is perhaps totally absent is the autonomy of the Commission to appoint officials at different levels and experts. The Commission has to seek the approval of the government for creating posts and for appointing officers and experts.

Though section 36(4) of the Act provides for the CCI to call upon such experts to assist it in the conduct of an enquiry or proceeding before it, as it deems necessary, but it does not empower the regulator to employ or hire experts on a permanent basis or even on an *ad hoc* basis (for a limited period). This implies that the CCI has to seek the prior approval of the government for such hiring. Approval, oftentimes, is not for merely hiring or employing experts but also for their selection and appointment. CCI may not be allowed to hire experts on other than government salaries. Government pay scales and remuneration are way below the level prevalent in the market and consequently suitable persons with knowledge and ability will not get attracted or be available at government scales. The Act is not categorical in these aspects and if past experience with the outgoing MRTP Commission is any guide, government will be calling the shots! So appears to be the case of selection and appointments of the supporting staff (like house keeping, administrative etc).

ACCOUNTABILITY

Accountability in terms of regulatory process and procedure is built into the Act itself by making the Commission bound by the procedure laid down by the Code of Civil Procedure, 1908. While stating this, section 36 of the Act enjoins the Commission to be guided by principles of natural justice and to regulate its own procedure. Perhaps, as the Commission commences its regulatory and adjudicatory functions, the detailed procedure and process will be laid down for observance. Such process, it may be expected, will incorporate steps to ensure accountability like opportunities to stakeholders to present their views, publication of the decisions of the Commission, requirement that the Commission should state clearly the reasons for its decisions and stipulation of the authority to whom appeals against the Commission's order will lie etc. Hopefully, the process will guarantee transparency in the Commission's working.

The Act requires the Commission to prepare an annual report giving a true and full account of its activities during the year and forward it to the Central Government. It also enjoins that a copy of the report should be laid before each house of Parliament. While

this partly meets the accountability of the Commission in regard to its functioning and activities, what is more important is that the Parliament should consider the desirability of discussing the report after it is laid in both the Houses. Parliament needs to attach importance to the role and functions of the CCI and in that context discuss the report every year after it is tabled. Needless to add, that any discussion on the report of the Commission should not relate to individual cases but should relate to systemic issues, procedures and the extent to which the objectives of the Act have been attained or met. Any oversight on the CCI's working and functioning of the Commission should be preferably by a Parliamentary Committee, so that focused discussion would be possible. The Parliamentary Committee's view should be communicated to the CCI for such corrective action as may be needed.

A salutary provision is incorporated in section 52 of the Act, in terms of which the Commission is require to maintain proper accounts and prepare annual statements of accounts. The accounts of the Commission will be audited by the Comptroller and Auditor General of India and his report needs to be forwarded to the Government and also laid before each House of Parliament. It has been clarified in the section itself that the orders of the Commission in individual cases appealable to the Supreme Court would not be subject to audit by the Comptroller and Auditor General of India. This entire section 52 assists in taking forward the accountability of the Commission.

FINALE

Having discussed the various aspects of the tripod dimensions, Independence (Autonomy), Expertise and Accountability, a sum up is attempted below:

1. Regulatory independence is important as regulatory decisions have a major impact on economic policy and on growth. Independence is the means that government generally employs to achieve the objectives of the regulation.

2. Regulator needs to be independent, as the objectives of regulation are to protect consumers from abuse by firms with significant market power, to protect investors from arbitrary action by government, to improve economic efficiencies, etc.

3. Regulatory independence can be secured by having a clear legal mandate in the statute creating the regulator. The functions and responsibilities of the regulator and of the Government need to be specified in the statute itself.

4. The grant of funds to the regulator and also its budget should be approved by the Parliament after the line Ministry and regulator discuss and arrive at the figures. After this stage, they should no discretion with the Ministry for reducing the budget or funds for the regulator.

5. Financial autonomy should be given to the regulator to incur expenditure for discharging its responsibilities enjoined by the statute. The statue should

prescribe the criteria for appointment of the Chairperson and Members constituting the Tribunal. These would include qualifications, experience and fields of relevance for the regulator.

6. The selection procedure should be through a collegium of eminent persons to be specified in the statute itself and be transparent. Outside talent should be attracted and made available to man the regulator.

7. Fixed tenure for the regulator and protection against arbitrary removal need to be a part of the statute.

8. Regulator should have the power to select and appoint experts and supporting staff with flexibility on remuneration levels particularly for experts.

9. The regulator should be accountable for the expenditure of monies granted to it by the government. The oversight by an external agency like Comptroller and Auditor General needs to be made a part of the statute.

10. Accountability of the regulator for its judgments and decisions can be ensured by mandating the regulator to record the same with adequate reasoning and arguments and causing them to be published and to be made accessible to the public.

11. The regulator should be required to prepare an annual report and place the same on the table of the Parliament/Legislature.

12. It is desirable for the Parliament to discuss the annual report particularly with a view to evaluating whether the regulator has subserved the objectives set by the statute. The Parliament should be able to address the systemic issues relating to regulator's performance with a view to redressing the problems.

It cannot be gainsaid that the tripod of Independence (Autonomy), Expertise and Accountability is a *sine qua non* for the effectiveness and efficiency of the regulator in the larger interest of the consumer and the public.

REFERENCES

Anant, T C A and Sundar S (2005) "Interface between Regulation and Competition Law", in "Towards a Functional Competition Policy for India", CUTS Centre for Competition, Investment and Economic

Regulation, Jaipur, 2005.

CUTS (2002) — "Reorienting Competition Policy and Law in India", CUTS Centre for International Trade, Economics and Environment, Jaipur, 2002.

CUTS (2005) — Report on "Regulatory Autonomy and Accountability", Retreat Meeting on 7 May 2005 in Delhi, CUTS, Jaipur, 2005.

CUTS (2006) — "Competition Regimes in the World – A Civil Society Report", CUTS Centre for Competition, Investment and Economic Regulation, Jaipur, 2006.

CUTS (2006a) — "Institutional Independence in India", Discussion paper, CUTS Centre for Competition, Investment and Economic Regulation, Jaipur, 2006.

High Level Committee (2000): — "Report of the High Level Committee on Competition Policy and Law" – Dept. of Company Affairs, Govt. of India, New Delhi, 2000

Hungary, 1996 — Act No. LVII on the "Prohibition of Unfair and Restrictive Market Practices", Government of Hungary, Budapest, 1996.

India, 1969 — "Monopolies and Restrictive Trade Practices Act", Government of India, New Delhi, 1969.

Mexico, 1992 — "Federal Law on Economic Competition, 1992", Government of Mexico, Mexico City, 1992

Mexico, 1993 — "Internal Rules of the Federation Competition Commission" under 'Federal Law on Economic Competition, 1992', Government of Mexico, Mexico City, 1993.

Ministry of Finance, 1996 — "The India Infrastructure Report: Policy

Imperatives for growth and welfare", Ministry of Finance, Government of India, New Delhi, 1996

Smith, 1997 — "Utility Regulators: the Independence Debate", World Bank, Washington DC, 1997.

Sundar S and Sarkar S K 2000 — "Framework for Infrastructure Regulation", Tata Energy Research Institute, New Delhi, 2000

Thailand, 1979 — "Price Fixing and Anti-Monopoly Act", B.E. 2522, Government of Thailand, Bangkok, 1979.