CIRC RegTracker

RT.003, August 2011

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

1. Case for Independent Environment Regulator

Stressing that India needs to move to a low carbon economy, Prime Minister Manmohan Singh has said that an independent regulator would soon revamp the process of granting environmental clearances and help protect the ecology without bringing back "the hated licence permit raj". In the recent past, the pace of investment (foreign and domestic) in the country in big ticket projects has slowed because of the delays in obtaining environmental clearances and related approvals.

When it comes into being, the independent regulator National Environment Appraisal and Monitoring Authority (NEAMA) would completely change the process of granting environmental clearances to industrial projects. Mooted by the erstwhile environment minister Jairam Ramesh, the ministry's powers to grant approvals would be transferred to the sectoral regulator, which will also monitor and enforce green standards. The proposed regulator would be staffed by dedicated professionals, and it would work to evolve better and more objective standards of scrutiny. It has been identified that a major challenge ahead is to put in place a legal and regulatory framework which is effective in protecting the environment. To be set up by amending the Environment Protection Act, 1986, NEAMA is also supposed to maintain a database of standard environmental data, like air pollution or water pollution levels at a particular place.

In the time being, an adjudicating authority, in the form of a National Green Tribunal (NGT) has already been established under the National Green Tribunal Act, 2010; the NGT is expected to effectively and expeditiously dispose cases relating to environmental protection and conservation of forests and other natural resources, including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property. The Ministry had earlier proposed to establish a National Environment Tribunal under the National Environment Tribunal, Act 1995. However, the National Environment Tribunal could not become functional and the National Environment Appellate Authority Act, 1997 was enacted to provide for the establishment of a National Environment Appellate Authority to hear appeals with respect to grievances under the Environment (Protection) Act, 1986. Upon coming into effect of the National Green Tribunal Act, 2010, the National Environment Tribunal Act, 1995 and the National Environment Appellate Authority Act, 1997 stand repealed.

Source: http://www.business-standard.com/india/news/independentenvironment-regulator-soon-says-pm/443785/

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Points to Ponder

It is proposed that the NEAMA would be responsible for appraising and evaluating the environmental impact of the industrial projects and also monitor the compliance of green norms. The main objective of setting up of the proposed authority is to curb conflict of interest and improve compliances. As of now, the environment ministry is responsible for not just evaluating the environmental impact of a project but also for granting approvals.

While a functioning NGT is a positive development, it is easy to see why the combination of NEAMA and NGT is not just important but completely essential for effective environmental governance. However, clarity in the role of the environment ministry (MoEF) is needed and any overlap in powers and functions with the proposed authority must be clearly stated in advance to avoid the proposed authority from becoming an authority merely on paper. This has been seen in many other cases of independent regulators in India, which are not really independent.

It is important to note that NEAMA would only be making recommendations, which is not a good idea at all. There needs to be a clear separation of powers and no conflict of interest. The ministry, on the other hand, having delegated most of its role to the NEAMA would need to confine itself to the business of legislation and policy-making. It is time that lessons from past experiences in structural and functional independence of regulatory authorities are put to practice.

2. Port Regulatory Bill runs into Rough Weather

It appears that the proposed maritime regulatory bill, which would regulate all the major and non-major ports in the country under one single authority, is facing opposition from various state governments. Gujarat with the highest number of non-major ports is opposing the move on fears that it will lose control over its vibrant maritime sector. It claims that the proposed Bill will take away the autonomy and freedom of the state government, consequently denting their revenue source. Tamil Nadu, Karnataka and Maharashtra have joined Gujarat in opposing the Bill.

The new regulatory structure proposed in the Bill envisages one regulator for the major ports and State regulators for the ports under the jurisdiction of the maritime states. The proposed Major Ports Regulatory Authority (MPRA) will replace the existing Tariff Authority for Major Ports (TAMP). The regulator will issue general guidelines that will be applicable to all ports. Currently, while the major ports follow the guidelines of TAMP to determine the tariffs, minor ports are not governed by any such norms.

The MPRA will have powers to fix tariffs at minor ports, transfer employees, decide on land utilisation policies and ensure that they follow a transparent bidding process. One of the most distinctive features of the new regulatory architecture is that it provides for the creation of an Appellate Tribunal to adjudicate disputes between service providers and users or between port operators. Currently, except the court, there is no mechanism to resolve such disputes.

Source:http://www.thehindubusinessline.com/industry-and-economy/logistics/article2118155.ece?homepage=true

Points to Ponder

The objective of the uniform tariff regulation is to remove the dichotomy in the sector and bring transparency in the tariff structure and pricing policy. Currently, while the major ports follow the guidelines of the Tariff Authority for Major Ports (TAMP) to determine tariff, minor ports are not governed by any such norms.

States (in particular Gujarat) are concerned that the Bill will undermine the authority of their maritime boards, which control the ports in the State. Moreover, they say that in a free market economy minor ports should be given complete freedom to fix tariffs and compete with major ports. While on the former aspect there may be a case for central oversight, from the perspective of fair pricing, the proposed tariff setting role of MPRA needs to be revoked. The regulatory authority should concentrate on setting the standards for service and hardware specifications, and let the market play its role in determining the tariffs. With the new private ports and multitude of existing minor ports (Gujarat itself is home to around 40, following Maharashtra, but they account for 70 percent of all the cargo traffic handled by over 180 minor ports in India), there is enough competition in the market; the major ports should not be shielded from facing competition.

3. Regulatory Regime for Microfinance Institutions

Microfinance Institutions (MFIs) are important for providing credit in unbanked and rural areas. They are envisaged to play a big role in furthering financial inclusion. The Reserve Bank of India regulates only those Microfinance Institutions which are registered with it as non-banking finance companies. They constitute only a small percentage of total MFIs in the country. The Reserve Bank does not prescribe lending rates for these institutions. SEBI can monitor them only if they get listed and NABARD presently has no role.

The Finance Ministry has recently finalized the draft Microfinance Institutions (Development and Regulation) Bill 2011 which defines Microfinance Services broadly as financial services in small amounts including micro credit, collection of thrift, remittances, pensions, insurance and so on and brings all organizations except co-operatives only accepting deposits from their members under the purview of one regulator (the RBI).

In a recent meeting of stakeholders organised by industry body ASSOCHAM, the house agreed that the bill on MFIs is a positive development as the industry has been clamouring for a technology-backed regulatory environment over the past many years.

The Bill proposes that instead of an independent regulator for the sector, two advisory councils be created. The first is the Microfinance Development Council that will advise the Government on policies and other measures required for the

orderly growth and development of the Microfinance Sector. In addition, the bill recommends setting up of State Advisory Councils. These will monitor among other things, field level conduct of the MFIs and bring these to the attention of the Central Government.

Source:http://lite.epaper.timesofindia.com/mobile.aspx?article=yes&pageid=11&edlabel=ETBG&mydateHid=8-7-2011&pubname=Economic+Times+-+Bangalore+ Front+Page&edname=&articleid=Ar01105&format=&publabel=ET

Points to Ponder

On the whole, the industry has responded with relief, as it is felt that the bill achieves the golden mean between affordability for the borrowers and sustainability of the providers. However concerns still remain.

First, the RBI has been given sweeping powers to determine everything from formulating policy to determining the number of clients an MFI can have. Also, there is little role for state governments. The state advisory councils are expected to relay their comments directly to the Centre. This is deemed to be a problem as well. There are other issues like poor representation of borrowers in both the councils.

Industry stakeholders have also raised concerns about the minimum capital requirement of Rs 5 lakh (deemed too little), need for prudential norms for deposit and thrift collections, addressing issues of alternate funding, reduction in operating costs, restricting indebtedness and income criteria, etc.

Last, the definition of microfinance is different in the MFI Bill than is interpreted in the State laws. As per the A.P. Microfinance Law, microfinance is money lending, while the draft bill says that it is not. This needs to be resolved urgently and uniformity in definition is required, lest in future interpretation from Courts and legal jurisprudence become necessary to address this divergence.

4. Reforms in the Power Sector: Competitive Tariff Bidding and Open Access issues

With power projects increasingly facing difficulties in meeting their contractual obligations on electricity supply due to bottlenecks in key areas like fuel availability, land acquisition and environmental clearance, the power ministry has begun a process to review the existing competitive tariff-bidding guidelines.

The Maharashtra Electricity Regulatory Commission (MERC) has recently allowed the state discom MSEDCL to deviate from standard bidding guidelines and make provisions for passing through of increase in fuel cost under circumstances which could be beyond the control of electricity supplier. The power ministry is likely to take a cue from MERC's landmark order while conducting review of tariff bidding guidelines.

The Ministry is concerned over increasing incidence of private developers approaching electricity regulators for review of the key contractual terms relating to power supply committed by them while bidding for projects. With coal mining projects facing serious difficulties in getting environmental clearance, power project developers are insisting on bringing tariff under 'force majeure' provisions while bidding for power projects. Power distribution companies have no option but to agree on such deviations. What is even more frustrating for developers is that regulators cannot provide any relief in such cases as they do not have the authority to review tariff in such cases.

In related news, the power secretary has opined that while electricity shortfall continues, making open access mandatory would create a lot of uncertainty in power supply. Discoms which buy electricity under long term contracts too would face serious problems in procurement if open access is implemented as a mandatory policy. Supported with a favourable legal opinion from the Attorney General, the commission is pitching hard for implementation of open access for large consumers as was envisaged in the Electricity Act 2003 (EA 2003). The objective of open access is to create a market place where generators (including utilities and independent power producers), distribution companies and even retail customers can trade across the country.

Sources: http://www.financialexpress.com/news/Power-ministry-begins-reviewing-competitive-tariff-bidding-norms/821883/; http://www.financialexpress.com/news/power-ministry-plan-panel-differ-over-open-access/818004/

Points to Ponder

With the power sector facing severe crisis of critical fuel availability due to factors which are beyond the control of electricity suppliers, power project developers are increasingly approaching electricity regulators for review of key contractual terms, including bringing tariff under 'force majeure provisions'.

The existing norms were formulated by the ministry in 2005 when fuel availability from domestic sources was comfortable and prices in the international coal market affordable. But since then, the scenario has changed dramatically, with domestic coal demand-supply widening sharply in recent years due to tightening environmental regulations for the mining sector. In the above scenario, the expectation for revisions in the contracts is natural, and power distribution companies often have no option but to agree to such deviations. The Power Ministry should consider devising a mechanism to assess impact of all these factors while reviewing tariff to provide relief to power project developers facing severe crisis. For unless companies are allowed to make normal profits, the already low investment in the sector will further peter out.

With respect to Open Access, although the EA 2003 had provided for it, it has not yet taken off due largely to the reluctance by State Electricity Regulatory Commissions (SERCs) to price electricity at market rates, and also the very high cost of external power that make open access prices unviable even in those (albeit few) states where cross-subsidy charges are zero. According to the power ministry, however, the high cross-subsidy surcharge levied by various SERCs is a major deterrent for the operationalization of open access in the country.

Thus, reduction of the cross-subsidy surcharges and regulatory interventions to encourage/ mandate discoms to share distribution lines (by means of a proper interpretation of Article 42 of EA 2003) are necessary in order to encourage free and open flow of electricity.

5. Real Estate Regulation Bill Deferred

It appears that the proposed Real Estate Regulation Bill may be delayed. The Ministry of Housing and Poverty Alleviation, which was set to table the draft bill during the monsoon session of Parliament, is yet to get the law ministry's opinion on it. The draft Bill was sent to the law ministry for vetting nearly two months ago.

Once the law ministry gives its opinion on the matter, a draft Cabinet note on the subject will be circulated among Ministries of Finance, Home, Urban Development, Consumer Affairs and the Planning Commission. It will then seek a Cabinet clearance before introducing it in Parliament. In view of the elaborate procedure, it would be difficult for the proposed Bill to make it to the monsoon session, beginning August 1.

According to the Real Estate Draft Regulation Bill, developers will need to make public disclosures related to land title, project completion date and other relevant scheme details on the website of the proposed regulatory authority. The disclosures must be made before launching a project so that consumers are not taken for a ride at a later stage. Developers will also have to register themselves with the regulatory authority. The focus of the revised bill is on consumer protection and contractual obligations of developers.

Although the Reserve Bank of India (RBI) had recently issued a warning to developers over inflated valuations of property, the proposed Bill will not cover the valuation aspects in the current draft, leaving it to market forces.

The content of the draft Bill was changed before sending it to the law ministry, to make it a central legislation. Earlier, it was a state matter. The thrust of the revised Bill is now on consumer protection against fraud, timely completion of projects by developers and contractual obligations of the builder/developer.

State-centric issues, such as building bye-laws and municipalities, have been removed from the new draft to make it a central legislation. The thrust now is on consumer protection against fraud, timely completion of projects by developers and contractual obligations of the builder/developer.

Sources: http://www.business-standard.com/india/news/real-estate-regulation-bill-may-be-delayed/440701/

Points to Ponder

The objective of the proposed legislation is to establish a regulatory authority to regulate, control and promote planned and healthy development and construction, sale, transfer and management of colonies, residential buildings, apartments and other similar properties, and to host and maintain a website containing all project details.

Appointment of the regulator is expected to improve reliability and reduce the present awning gap between what is promised and what is delivered. Greater accountability of the real estate developers will also ensure greater confidence of the investors. In the present scenario all regulations and controls apply up to the stage where the developer gets the license. Thereafter there is no system of monitoring the implementation of projects or for taking action in case the final product does not match the promised standards.

As we have argued in the previous issue, the strict obligations on the promoters are a much needed change from the perspective of the long suffering consumer (property buyer). Although the Consumer Act and penal provisions exist for grievance redressal, these come into the picture only after a commitment is made by developers to property buyers, so an ex ante monitoring and protection mechanism is necessary.

It is because of the above that the news of deferment of introducing the Bill to the parliament comes as an unpleasant surprise. It is hoped that the law ministry comes forward with its opinion quickly so that the subsequent procedures and formalities are completed and the Bill can be introduced in the Parliament in the coming winter season. For India to shed its tag of 'functioning anarchy', the bureaucracy needs to focus on expediting governance and not unduly delay processes.