

AUDIT OF REGULATORY BODIES

Group V

- a. Analysis of one test case.
- b. Limitations on Audit of Regulatory Bodies

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LIMITATIONS OF THE AUDIT OF REGULATORY BODIES



Limitations of Audit of Regulatory Bodies

Recap- Role, scope, Mandate of regulatory Bodies

1. Need?

- Boost Investor confidence
- Technical Expertise
- Time Inconsistency Problem

Shapes Perception of Executive Towards Regulatory Bodies

2. How?

- By SO in Gazette ex. FSSAI
- By Act of Parliament/State Legislature ex: TRAI

Determines mandate, administrative control and scope of audit

3. Functions?

- *policy determination*
- *policy implementation*
- *compliance and enforcement*
- *the adjudication of disputes*

Determines the functions which can be audited.

4. Adjudication of disputes ?

- *Tribunal -> HC -> SC*
- *Appeals of process or substance*

Restricts the scope of Audit

A. Limitations on Mandate and scope

1. Limitations due to Perception

“The annual expenditure of the regulator must be audited by the C&AG and its report should be laid before Parliament. However, unlike the Audit Reports of Ministries and Departments, the audit of regulatory bodies should be limited to expenditure control and not policy review of regulatory decisions.”-**Planning Commission**

2. Limitations due to Provisions of Acts

Explanation inserted below Section 23(2) of the TRAI Act - that decisions taken by TRAI under Section 11(2) [as well as those taken under Sections 11(1)(b) and Section 13] “being matters appealable to the Appellate Tribunal, shall not be subject to audit under this section”- TRAI Act

- Argument of CAG - Nature of Function matters not who performs the functions – so tariff setting should be audited
- Issues with Electricity Regulatory Commissions

3. Limitations due to Nature of Activity/Appeal Mechanism

Courts can check both procedure and substance of an issue. If procedure is checked It can not be audited.

What Areas can be Audited?

- Sources: Professional Practice Group Guidance Note, INTOSAI Guidelines 2011 and CAG Guidelines 2004
- PPG group note-**progress in J&K state?**
 - *Quasi judicial functions-not to be audited*
 - *Audit around judicial functions-permission needed on case to case basis-sensitive area*
 - *Internal Administration-to be audited*
 - *Executive functions-like contract management-to be audited.*
- **Is it possible brings out a Report on Performance Audit of regulatory bodies but without looking into the orders passed by these bodies in exercise of their quasi-judicial functions?**
- Yes- some possible areas are
 - *Allocation of resources*
 - *Achievement of targets*
 - *Lack of adequate information*
 - *sufficiently competent staff and access to expert advice*
 - *consultation arrangements with interested parties*
 - *Access of service to vulnerable groups*
 - *consumers' complaints*
 - *minimum standards of service for consumers*
 - *Relationships with other regulators and international cooperation*
 - *consumers are compensated if failures of supply occur*
- **Are we auditing the core functions?**

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4. Limitations due to proposed mechanism of accountability

- *Current mechanism-limited accountability through Question Hour and Annual Reports.*
- *Proposed mechanism by 2nd ARC-*
 - a body of reputed experts should be constituted to propose guidelines for the evaluation of the regulator for the next five years
 - Based on these guidelines, the government, in consultation with the parliamentary committees and the regulator, should finalize the principles the regulator should be held accountable for, and the parameters for conducting annual evaluation.
 - Annual reports submitted by the regulators to Parliament should include the progress on pre-agreed evaluation parameters and should be discussed in the parliamentary committee.
 - The annual report and the committee's discussions with the regulator should be made widely accessible to the public.

5. In 2011, CAG proposed amendments in DPC Act to include clauses related to audit performance of the newly formed economic regulators.

B. Lack of Performance Measurement Frameworks

- Performance measurement by regulators is particularly complex-why?
 1. *Intended objectives are generally delivered by the organizations that they regulate*
 2. *external factors outside regulators' control*
 3. *outcomes often do not become evident for several years*
 4. *regulatory objectives can potentially conflict or involve trade-offs*
 5. *Detecting and quantifying emerging problems is complex -ex: jio case*
 6. *black swan event ?*
 7. *There is rarely a one-to-one relationship between regulatory actions*
 1. Outcome influenced by more than one factor
 2. external influences
 3. time gap between regulatory actions and the associated outcomes
- What to do?
 - *Develop a Performance Measurement Framework*
 - Translate higher-level objectives into lower-level, operational objectives
 - Decide how conflicts/trade offs should be resolved
 - develop the criteria that it will use to judge whether it has been successful in achieving its objectives and tolerance limit
 - Develop Framework
 - *People + Information + analysis + organization*
 - evaluate the purpose, benefits and costs of collecting such information
 - *Why?- cost*
 - decide what information to report internally or publicly
 - Performance information should provide a link between input and output such that the regulator can assess whether the original purpose of intervention is being met

Case: DTH/Cable regulations- A black box view

- What are these guidelines:
 - *Basic package*
 - *Customer can choose particular channel*
 - *Max MRP- Rs 19*
 - *HD and SD channels separate etc.*
- Court challenge: Substance was challenged
 - *Madras HC -> SC*
- High level Goal: efficient regulation of sector
- Low level Objectives: Choice + Low cost
- Developing Performance framework
 - *Possible Indicators :*
 - Bills –before and after
 - Bills for different categories- rich, vulnerable, middle class
 - Impact on competition-popular vs normal channels
 - Impact on financial position of operators
 - **Ease of selecting channels**
 - *Challenges*
 - Shift in cultural epicenter-TV to online stream
 - How to measure impact on fixed budget customers
 - **Possible use of AI ?**

Almost official: New TRAI rules are going to increase your DTH TV monthly bill

Rating agency CRISIL states the new regulations to increase monthly TV bills by some margin. Popular channels are likely to benefit the most with the new regulations.

TRAI Expects Channel Prices to Reduce, as it Refutes Report Which Confirms Cable And DTH Bills Have Gone up

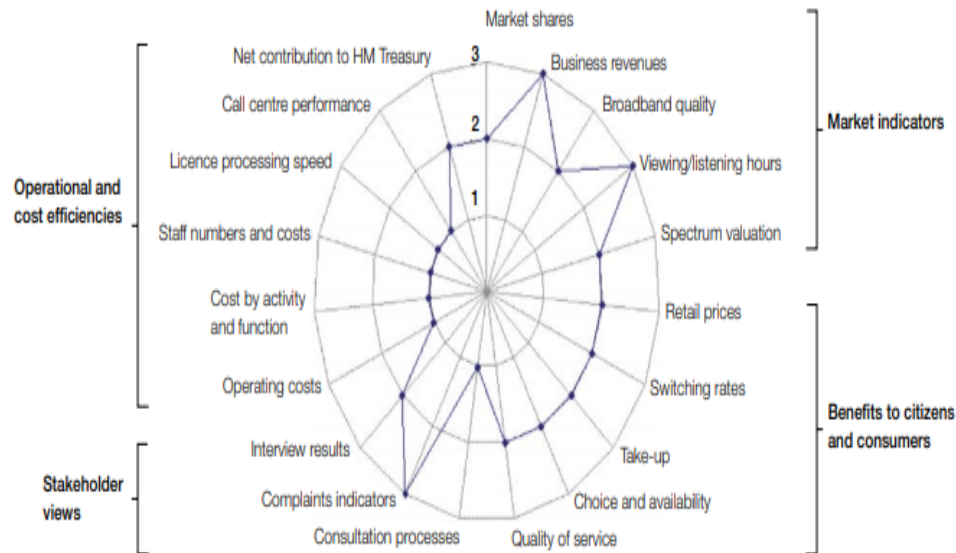
"In three months, we expect prices of various channels to go down," says TRAI.

Performance Measurement Framework- Mitigating risks

Ofcom

Assessing the regulator's relative influence over different measures of performance

In 2010, we worked with Ofcom to assess the relative level of influence that Ofcom has over its different activities



Reverence: <https://www.nao.org.uk/wp-content/uploads/2016/11/Performance-measurement-by-regulators.pdf>

TRAI- outsider view

■ Indian context

- License processing speed ?
- Call Center Performance ?
- Switching Rates?- In telecom and in TV
- Spectrum valuation?

■ Specific to DTH Case study

- Bills?- moderately influence. Other factors?
- Impact on Competition-moderate
- Ease of selecting channels- moderate to high?
- Financial position- low

Difference in Approach?

Regulatory Sandbox

■ What's a regulatory sandbox?

- *regulatory approach which creates contained space to test innovations.*
- *businesses can test new products or services in a supervised, regulatory environment.*
- *allow policy-makers to test the implications that changes in policy will have for businesses and consumers, while also limiting potential damages*
- *regulator provides “the appropriate regulatory support by relaxing specific legal and regulatory requirements” for the duration of the sandbox.*
- *Fin Tech revolution*
- *Why This Sector?*

Filling the Competency Gaps

The AsG Conference of 2001 had identified 'Competency Gap' as key issue in the audit of regulatory bodies.

RTI, Chennai developed a very basic structured training module on audit of regulatory bodies. Currently, a course on Audit of regulatory bodies is under preparation in RTI, Jammu

■ INTOSAI Guidelines on Skill Development

- SAI should identify its audit responsibilities in relation to the economic regulator
- SAI should identify and secure the core in-house skills it needs to enable it to carry out authoritative performance appraisals of economic regulation
- SAI needs to have a clear understanding of the context in which the economic regulator is operating

■ Possible Solutions:

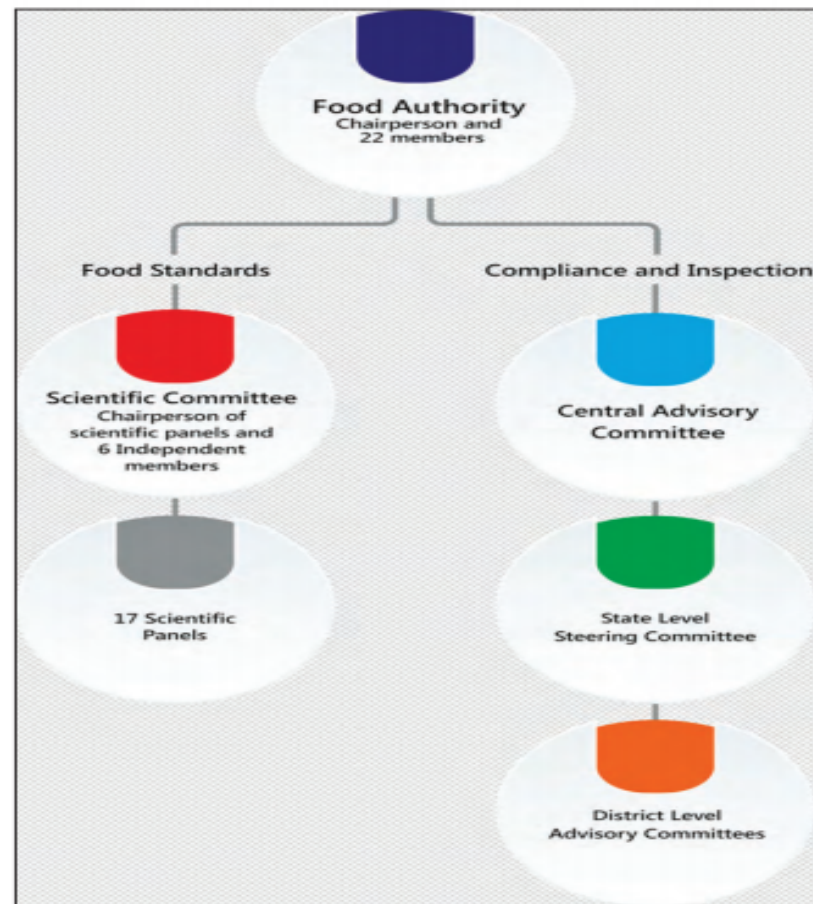
- building teams specializing in the audit of economic regulation
- seek deputation of members of its staff to regulatory bodies to obtain a better understanding
- Use services of professionals- *European countries' way? Audit regulation rule 10.* In Hungarian SAO, Bulgarian NAO, Maltese SAI, UK NAO this solution is used.

■ Conclusion:

In pressing for extended mandates, SAI should recognize that such rights can, in time, become duties. In seeking out and undertaking such audits the SAI needs to ensure that it has the necessary skills and competencies.

Case Study-FSSAI

Pictorial representation of structure of FSSAI



Performance Audit of Implementation of Food Safety and Standards Act, 2006

Food Safety and Standards Authority of India (FSSAI) enforces various provisions of the Act.

Objective 1: Regulatory and Administrative Framework

- Findings:

- regulations not framed on several issues ex: guidelines on organic foods
- Failed to devise action plans to identify areas on which standards are to be formulated/revised
- Notified regulations and standards without considering the comments of stakeholders.
- Possibility that unsafe/declared unsafe food articles continued to be manufactured and sold
- No budget for information and education

- Reply/Action Taken:

- robust system comprising of 17 Scientific Panels and a Scientific Committee for review and establishment of science-based standards
- a risk assessment had been duly carried out as per usual practice.

Objective 2: Licensing, Registration, Inspection and Sampling

- Findings:

- Conducted no survey for enforcement and administration of the Act
- Licenses were issued on the basis of incomplete documents
- No documented policies and procedures on risk based inspections
- failed to ensure that the Customs authorities follow up the Non-Conformance Reports issued by the FSSAI

- Reply/Action Taken:

- developed a web-based Inspection System FoSCoRIS (Food Safety and Compliance through Regular Inspections and Sampling)
- Has conducted surveys of food business activities but some states have not been able to do so due to acute shortage of manpower.
- FSSAI has developed mechanisms for risk based inspections. Manpower shortage is the issue

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Objective 3: Analysis of Food and Prosecution

- Findings:

- 65 out of the 72 food laboratories do not possess National Accreditation Board for Testing and Calibration Laboratories (NABL) accreditation.
- Has no data on whether all the notified empanelled food laboratories have qualified food analysts.
- Shortage of qualified manpower and functional food testing equipment in state food laboratories

- Reply/Action Taken:

- Investment of Rs.480 crore for strengthening of the state food laboratories and referral laboratories.
- 24 training programs have been conducted in the year 2017
- Handholding support is being given to states to support them in getting NABL accreditation

■ Objective 4: Human Resources

- Findings:

- Failure of the Ministry and the FSSAI to frame the recruitment regulations
- Acute shortage of licensing and enforcement officers

- Reply/Action Taken:

- FSSAI has finalized the Recruitment Regulations and asked for creations of about 600 new posts

■ FSSAI Note:

- *FSSAI appreciated the inputs from CAG to improve performance of food safety*
- *CAG should have noted the useful work done by the body*

■ Questions:

- *Independence vs. accountability*
- *Financial aspect of CERC*
- *Web portal- SAUDAMINI*

Questions?

■ Appeal of Process and Substance

- *Examples- Scope of appeal depends on historical development of jurisdiction of courts and approach of courts and attitude of parties involved in dispute*
- *India vs Ireland vs USA*
 - In India Hon'ble SC has been assertive and has seen Tribunals as an other way of dispute resolution and not as alternate mechanism.
 - In Ireland it is difficult to get judicial review
 - The emergence of independent regulatory institutions in the USA has been attributed more generally to deficiencies in judicial and legislative processes for the purposes of economic regulation; the judicial process being deficient in terms of timing and in its ability to handle complex economic relationships, the legislature too inflexible.
 - The first federal regulator, the ICC, regarded itself as an administrative tribunal to adjudicate disputes among parties, and modelled itself closely on the judiciary in an attempt to acquire the respectability and acceptability of the Courts. Consequently, the pattern of ICC operations came to closely resemble those of a court, despite the fact that the new form of administrative regulation was designed to overcome some of the disadvantages of judicial processes.
 - Poland- very few cases get appealed (Around 200 out of nearly 6000-EUROSAI Study)

■ Grey Rhino Effect

- highly probable, high impact yet neglected threat: kin to both the elephant in the room and the improbable and unforeseeable black swan.
- The bursting of the housing bubble in 2008, the devastating aftermath of Hurricane Katrina and other natural disasters, the new digital technologies that upended the media world, the fall of the Soviet Union...all were evident well in advance.
- India-pollution, impact of green revolution, AI, NPA etc