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Program Name: Colloquium for the serving Chairpersons & Members of the Central Sector Regulatory Member Organizations of FOIR

Program Date: 29th September 2021

Program Theme: Designing Regulatory Solutions: A Framework for Instrument Choice

Mode: Hybrid mode, i.e., online via Blackboard (LMS) and in-person at Neemrana Fort, Neemrana

No. of participants: 6

Participant Profile: Serving chairpersons/members of the Central Sector Regulatory Organizations of FOIR

PROGRAM OUTLINE:

The Forum of Indian Regulators Centre at Indian Institute of Corporate Affairs organized the colloquium for the serving chairpersons of the central sector regulatory member organizations of FOIR on the theme “**Designing Regulatory Solutions: A Framework for Instrument Choice**” on 29th of September, 2021 in hybrid mode. The session was scheduled from 4:00 PM IST onwards. The primary goal of this colloquium was to discuss on essential nuances of designing the regulatory solutions and developing lucid understanding of various instrument choices available at the disposal of a regulator to address market failure.

The panelists at the colloquium comprised of **Dr. M. S. Sahoo, Chairperson, IBBI & Hony. Chairperson, FOIR; Shri P.K. Pujari Chairperson, CERC & Hony. Vice-chairperson FOIR, Dr. P.D Vaghela, Chairperson, TRAI & Vice-Chairperson FOIR; Ms. Sangeeta Verma, Member, CCI; Shri. T. S. Balasubramanian, Chairperson in-Charge, TAMP; Shri Gajendra Singh, Member, PNGRB.** Dr. Sahoo, Shri Balasubramanian and Shri Gajendra Singh attended the colloquium virtually and rest of the dignitaries attended in-person at Neemrana Fort, Neemrana. The overarching theme of the colloquium was “**Designing Regulatory Solutions: A Framework for Instrument Choice**”. During the event the above stated panel discussed at length with the area expert, **Professor Cary Coglianese**, Edward B. Shills Professor of Law and Professor of Political Science at the University of Pennsylvania on fundamentals of regulatory design and various instrument choices. The program was convened and moderated by Dr. Abha

Yadav, Associate Professor, School of Competition Law and Market Regulation accompanied by Ms. Ritima Singh, Research Associate, FOIR Centre at IICA.

Mr. Sanoj Kumar Jha, Secretary, CERC; Dr. SK Chatterjee, Chief (RA), CERC; Ms. Rashmi Nair, Dy Chief (RA), CERC attended the program and contributed to the success of the event.

PROGRAM FLOW:

Mr. P.K Pujari opened the colloquium by highlighting the importance of effective regulatory design in regulating market functions. Mr. Pujari highlighted that the structure of every regulatory body is different and unique. However, their functions are similar to each other. The functions of the regulatory bodies are governed by their statutes. In most of the governing statutes, the ambit of the word “regulate or regulation” is not exhaustive in nature thereby giving the regulatory bodies powers with respect to designing and implementing the regulatory solutions. With these remarks, Dr. Sahoo continued the welcome remark by quoting Maslow's hammer theory, "**if all you have is a hammer, everything looks like a nail**" and variants thereof. Typically, regulators have been coming up with regulations for addressing the market failures without considering the alternatives. Considering alternatives to regulations and designing a regulation is an art to ensure that regulations are effective and efficient.

In the field of public policy, regulation refers to the promulgation of targeted rules, typically accompanied by some authoritative mechanism for monitoring and enforcing compliance. In a rapidly moving economy, regulation is needed to protect the legitimate interests of businesses and the community. A strong, responsive regulatory systems is quintessential to keep the Indian economy as efficient and flexible as possible, and they also help the domestic industries compete in the global economy. In the modern globalised world, the need for regulation arises as it aims at setting rules for businesses and the environment, stabilising markets and addressing the market failures in order to support economic growth. But these regulations, if overused, poorly designed or implemented may stifle competitiveness and growth.

The theories of public policy brings out a systematize process of regulation making by which governments define, design, implement and evaluate state activity (or inactivity). A crucial step within the policy development cycle is policy design, comprising of development of policy options

and their alternatives. Although policy design can be said to encompass a variety of elements, “including policy goals, objectives and aims, as well as policy means, tools and their calibrations”, the primary emphasis within the literature tends to focus on the question of instrument choice.

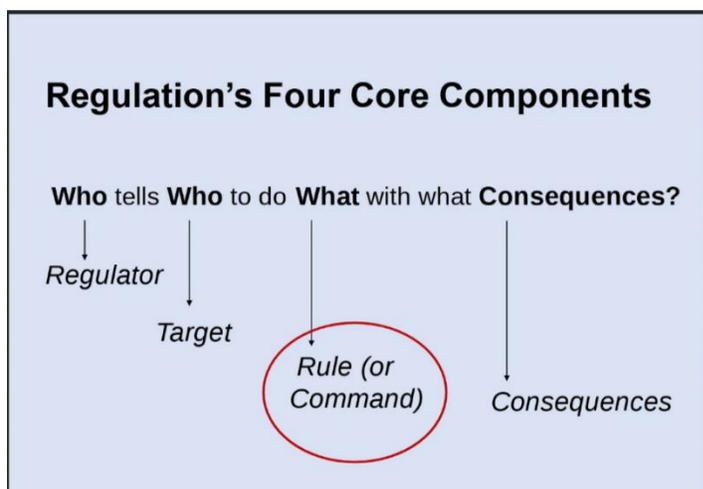
The first response by governments to a perceived policy issue is often to regulate, but it may be appropriate to ask whether traditional regulation is the best possible course of action. The traditional regulation devises a “command and control” mechanism, which often specifies in detail how the objective is to be achieved. Thus, many theorists encourage consideration of alternatives to regulation, while devising the rule-based approach as a last resort. The alternatives to regulation include information and education, market-based structures, management-based regulation, self-regulation and co-regulation. In addition, existing policies can be improved, without further regulation, using techniques such as behavioural insight or changing enforcement practices to improve compliance. In other words, the instrument or approach chosen to address a policy issue should be ‘effective’ in terms of addressing the identified problem and ‘efficient’ in terms of minimising costs.

Presenting the above backdrop and highlighting the mandate of the colloquium, Dr. Abha welcomed the panelists and the guest speaker, Prof. Cary Coglianese. The panel discussion began with the introduction & opening points on the theme by Prof. Cary, moderator for the panel discussion.

Prof. Cary’s presentation was interspersed with the challenges the regulators face while designing the regulation and suggested a framework to address the challenge.

As a regulator, while designing the regulation following four key questions need to be answered while designing the regulation:

- 1) Who should design the regulation, answer being regulator?
- 2) Who should the regulation be targeted to?
- 3) What form of rule/regulation should be designed?



- 3.1) How should it be designed
- 3.2) How should it be structured?
- 4) What are the consequences of the regulatory intervention?

There are different ways a rule can be designed or structured

- 1) It can effect degree of flexibility afforded to regulated firms

- 2) It can effect the ways in which the regulated entities respond to regulations, based on their capacity.
- 3) It can require different capabilities from a regulator to monitor and enforce.
- 4) The anticipated outcomes different designs and structure can yield.

It is very essential for regulators to hold clear concept of regulatory designs. Different nomenclatures for same concepts creates confusion and disparity information asymmetry amidst the mind of the regulators and those regulated.

Prof. Cary explained two dimensions of Rule design. The same is presented in the below chart:

Means versus Ends

Means: “command that the regulated entity take or avoid an action”

Ends: “mandate the achievement or avoidance of certain ends”

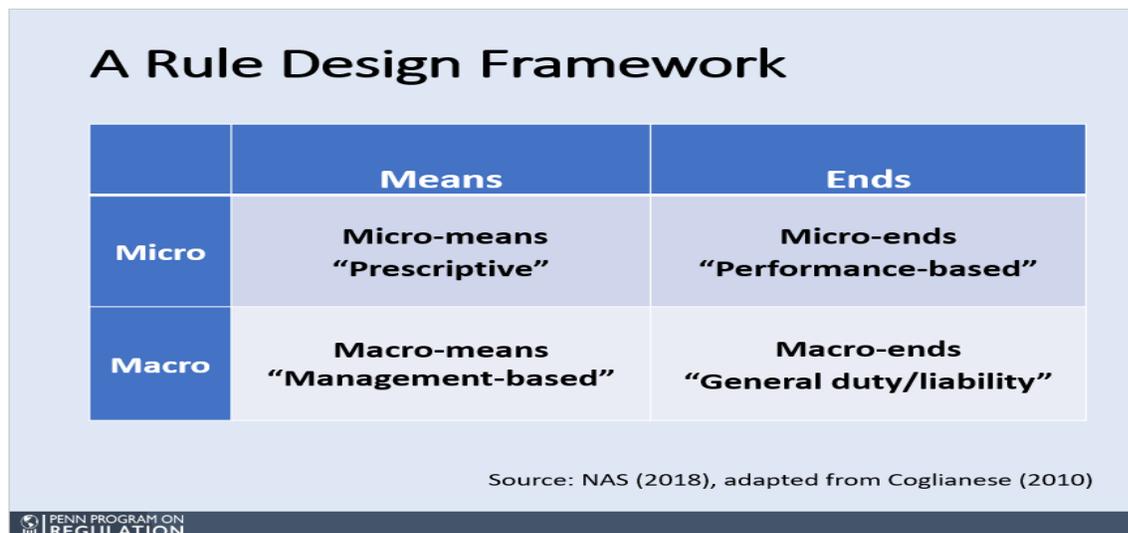
Micro versus Macro

Micro: “targeted to a specific contributor or causal pathway to the ultimate problem”

Macro: “focus is widened to the ultimate problem itself”

Means states what kind of action to be taken, for instance, a descriptive regulation. The second dimension is Micro v. Macro is market-based regulation. The means in Micro based rule design is “prescriptive and the end is “performance based” regulation. Whereas, in Macro, the means is

“management-based regulation” and the end is “general duty/liability”.



Micro Means regulation in detail:

- This is based on mandated actions aimed at points on a causal pathway to the ultimate problem. For instance, “Install a hazard warning sign having a certain color scheme”; “Install a particular type of valve”. This is easier for regulators to enforce and ensure compliance. However, such means may result in less effective or less cost-effective methods of addressing risk because one size does not always fit all.

Micro Ends in Detail:

- Mandated outputs at points on a causal pathway leading to the ultimate problem. For Instance, ensure that an electrical component of a product passes a test for shock resistance”; “Limit sulfur dioxide emissions to certain levels”. The merit to such “performance-based regulations” is that it may allow more flexibility by different firms and can allow greater opportunities for firms to innovate. However, it may be difficult for the regulator to monitor and may foster a ‘teaching to the test’ effect or encourage gaming.

Macro Means In detail:

- Also known as “Management Based regulations”, includes mandated actions aimed to induce managers to focus on the ultimate problem. For Instance, engage in threat and risk analysis, Establish and execute a safety management program. These measures

may allow for flexibility and opportunities for innovation and may be used when outcomes are difficult to measure. It also can help in infusing a sense of responsibility, accountability, or safety culture. However, both the firm and the regulator may need to develop new skills to implement the regulation effectively and regulator may have difficulty in monitoring and in maintaining motivation for continuous improvement.

Macro Ends in Detail:

- Mandated outcomes that avoid the ultimate problem. For instance, “Keep workplace free from recognized hazards”, “Design and maintain a facility to prevent releases of hazardous substances”. Such “general duty/liability” may provide flexibility and opportunities for innovation may reinforce other types of regulatory designs as a backstop. However, it may not adequately prevent harms since regulatory consequences are only imposed after an event and may not provide adequate direction to firms that lack knowledge of what to do or lack the incentives to find out.

Prof. Cary in his closing remarks highlighted following points:

- 1) Advantages and disadvantages of regulatory designs will be **context-specific**.
- 2) The challenge for the regulator will be to choose a **design** and **structure** it in a way that is suited to the **nature of the problem, the characteristics of the regulated industry, and the regulator’s capacity** to promote and enforce compliance.
- 3) The best way to achieve regulatory goals may be to **combine** various regulatory approaches.
- 4) Conditions change, **regulatory vigilance** will be essential.

Post completion of the presentation, the moderator, Dr. Abha Yadav kept some relevant points of discussion across the table and opened the floor for discussion. All the panelists shared their views on the regulatory design framework illuminated by Prof. Cary and the challenges prevailing in Indian framework. TRAI chairperson Dr Vaghela brought forth the practice being undertaken by TRAI, wherein the regulatory body governs the telecom sector using all 4 kind of regulatory tools highlighted by Prof. Cary, however, while using micro-means regulations, there is huge technological disruptions which requires the targets have to be changed rampantly. The

technological intervention requires frequent revision in regulation. The question posed by Dr. Vaghela highlighted how to build capacity in order to attend to these technological disruptions and how to analyze the data when the stakeholders are large in number. Prof, Cary answering to the question stated that, in US changing the rule is a laborious process, therefore guidelines are formulated to address market failures as they are easy to change or modify overtime. Dr. pujari in the end made an observation that often it is not just one framework that works, it is mostly the combination of framework that is essential in practice to address a market failure.

Mr. Sanoj Kumar Jha, Secretary, CERC gave the closing remarks wherein he appreciated the essential nuances of designing a regulatory solution brought forth by the guest speaker, Prof. Cary. The diverse and dynamic group of speaker and panelists provided in-depth insight, as well as, actionable and practical tools of regulation. The panelist appreciated the efforts put together by the IICA team. The guest speaker in his concluding remarks expressed his observations on the practice being followed by regulators across globe and expressed his willingness for further collaboration.

The FOIR Center duly acknowledges the coordination and support received from FOIR Secretariat and CERC officials in successfully convening the program.

Further Readings:

Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, “Unrules,” *Stanford Law Review* (2021)

Cary Coglianese, “The Limits of Performance-Based Regulation,” *University of Michigan Journal of Law Reform* 50:525-563 (2017)

Cary Coglianese, *Listening, Learning & Leading: A Framework of Regulatory Excellence* (2015)

Cary Coglianese & Lori Benneer, “Flexible Approaches to Environmental Regulation,” in Michael Kraft and Sheldon Kamieniecki, eds., *The Oxford Handbook of U.S. Environmental Policy* (2012)

Cary Coglianese, “Management-Based Regulation: Implications for Public Policy,” in Gregory Bounds and Nikolai Malyshev, eds., *Risk and Regulatory Policy: Improving the Governance of Risk* (OECD Publishing, 2010)

Cary Coglianese & Jennifer Nash, eds., *Leveraging the Private Sector: Management-Based Strategies for Improving Environmental Performance* (Johns Hopkins University Press/Resources for the Future Press, 2006)

Cary Coglianese, Jennifer Nash, & Todd Olmstead, “Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Regulation,” *Administrative Law Review* 55: 705-729 (2003)

Cary Coglianese & David Lazer, “Management-Based Regulation: Prescribing Private Management to Achieve Public Goals,” *Law & Society Review* 37: 691-730 (2003)

Kenneth Richards, “Framing Environmental Policy Instrument Choice,” *Duke Environmental Law and Policy Forum*, 10: 221-285 (2000)

National Academies of Sciences, *Designing Safety Regulations for High-Hazard Industries* (2018)

Images of the participants and speakers during the online program:





COLLOQUIUM



For Hon'ble Chairpersons of Central Sector Regulatory Member organizations of FOIR
"Designing Regulatory Solutions: A Framework for Instrument Choice"

29th September, 2021

at Hotel Neemarana Fort Palace & Virtual



Dr. M. S. Sahoo, Chairperson, IBBI



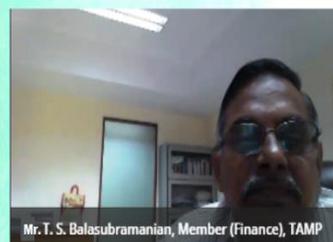
Mr. P.K. Pujari, Chairperson, CERC, Dr. P.D. Vaghela, Chairperson, TRAI & Ms. Sangeeta Verma, Member, CCI with Officials of FOIR Sectt (CERC) and IICA



Prof. Cary Coglianese
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