

***Till such time that PSUs are considered “instrumentality of state”, they can never really operate as freely as private firms***

Finance minister [Arun Jaitley](#) did well to say, at a recent event organised by the Comptroller and Auditor General of India (CAG), that it was time the country revisited the legal regime for PSUs, to ensure they were able to perform efficiently in a competitive environment. As he put it, after the 1991 reforms, while privately-owned firms, both Indian and foreign, got a lot more freedom to operate, the conditions remained much the same for the PSUs; and nowhere was this more evident in sectors where erstwhile government monopolies had been disbanded, such as in airlines, and PSUs competed with the private sector. As a result, Jaitley said, “One’s transactions are audited by you, and the other’s are not. One has to give contract purely on tendering, others need not. One can go to the campus to do direct recruitment, others have to hold examination and settle for the next best”. All of this, the FM rightly pointed out, was due to the fact that PSUs were mostly considered as what is called “instrumentalities of the state”.

That is, since PSUs are considered to be like the state, they, too, had to offer the same choice or level playing field that the government has to offer; any item bought by a PSU, for instance, has to be tendered, so that everyone has an equal chance at winning the bid. So, while a Bharti Airtel or a Reliance Jio can negotiate with, say, an Ericsson and get it to handle their networks, a BSNL or an MTNL can only do this after a tender; and anyone that does not win the tender is free to approach the courts to get a stay or get the tender cancelled. Indeed, in the past, BSNL saw its market share fall when a few tenders got stuck in various courts. Some years ago, Air India wanted to lease out some planes, but got just one bid and didn’t know how to deal with this since it could have attracted censure from CAG or CBI. And during the UPA period, the Railways got just one bid for an electric locomotive factory, and so cancelled it...

Theoretically, the government can approach the Supreme Court to get it to rule on Article 12 that says PSUs are an instrumentality of state. But, SC’s rulings are not consistent. In *PB Ghayalod vs Maruti Udyog*, in 1991, it ruled that, since there was a substantial foreign ownership—and the partner had various rights—the company was not an arm of the state. In *Mysore Paper Mills vs Mysore Paper Mills Officers’ Association*, in 2002, it ruled the PSU was to be considered an arm of the state. But in *Pradeep Biswas vs Indian Institute of Chemical Biology*, in 2002, SC said that for an entity to be an instrumentality of state “it should have been

entrusted with such functions as are governmental...by being of public importance or being fundamental to the life of people and hence governmental". Just using the falling market shares of PSUs should make it clear they are no longer fundamental to the life of people and are therefore not governmental in nature. But since the courts can rule in various ways, it would be better if Parliament amended Article 12 to ensure that, at least in areas where there is private competition, PSUs are free to act like privately-owned companies instead of getting bogged down in what is called L1-itis.