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ONLINE GAMING REGIME IN INDIA: ANALYSING THE PROPOSED AMENDMENTS TO THE IT RULES, 2021 IN RELATION TO ONLINE GAMING

REPORT



Online Gaming Regime in India: Analysing the Proposed Amendments to the IT Rules, 2021 in relation to Online Gaming

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CONTENTS

I. Abbreviations	01
II. Acknowledgement	02
III. Executive Summary	03
IV. Background	05
V. Detailed Response	07
5.1. Definition	07
5.2. Due Diligence by an Intermediary	08
5.3. Insertion of Rule 4A	09
5.4. Insertion of Rule 4B	11
VI. References	15
Authors	16
More from our Research	17

I. ABBREVIATIONS

AVGC	Animation, Visual Effects, Gaming and Comic
FAQ	Frequently Asked Questions
GAC	Grievance Appellate Committee
GST	Goods and Services Tax
IP	Intellectual Property
IT Rules	Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021
KYC	Know your Customer
OGI	Online Gaming Intermediary
RBI	Reserve Bank of India
RMG	Real Money Games
RNG	Random Number Generator
SRB	Self-regulatory Body
SSMI	Significant Social Media Intermediary

Proposed Amendment - Draft amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 in relation to online gaming

II. ACKNOWLEDGEMENT

We would like to thank all the stakeholders who participated and gave their valuable inputs during our roundtable discussion on online gaming regime in India held on 12th January 2023. The roundtable saw the presence of more than 75 stakeholders from diverse backgrounds expressing their views on the latest draft notification to amend the IT Rules 2021 to include online gaming.

We thank Bhavya Birla for his insights at various stages of the research. We also acknowledge the efforts of Akriti Jayant and Diksha Kumari for assistance with communications and design.

III. EXECUTIVE SUMMARY

India has seen a massive surge in the users participation in the online gaming activities in various categories, such as arcade, casual games, real money games or esports. Given the potential of this sector, associated harms and the existing regulatory arbitrage, the government, in a welcome move, came up with a draft amendment to IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 in relation to online gaming (**Proposed Amendment**). Proposed amendments classify online gaming platforms as intermediaries (Online Gaming Intermediaries) and impose additional obligations and due diligence measures on them. The proposed amendment also defines online games which *prima facie* looks to include only Real Money Games (RMG) i.e., where stakes in the form of money are involved.

The proposed amendments define online games as games which are offered on the internet and the user makes a deposit with the expectation of winning. The definition of deposit and winning includes both *cash or in kind*. Due to the lack of clarity as to what constitutes *in kind*, definition could also cover games which award tokens that could be deposited with the expectation of unlocking new levels or new materials. Therefore, ideally, the government should look at defining 'kind' which relates to money's worth. Similarly, the definition of online gaming intermediaries also needs a careful look, as currently it covers a host of intermediaries a host of game-centric intermediaries such as marketplaces that offer games to be downloaded, such as app stores; or softwares/computer manufacturers that have pre-installed games. There is a need for clarity in the definition to ensure that it applies only to intermediaries whose primary function is to provide one or more online games to users.

Interestingly, the proposed amendments do not differentiate between games of skill and games of chance. Without any explicit mention that the proposed regulation is only applicable to the games of skill, the states may want to regulate the entire online gaming industry. However, as acknowledged by the Hon'ble Minister Mr. Ashwani Vaishnav, going forward there would be a clarity in law to differentiate between games of skill and games of chance.

Further, clause 4A of the proposed amendments prescribe additional due diligence that has to be observed by the online gaming intermediaries. These due diligence measures include publishing the mark of verification, KYC mandate, transparency, de-addiction measures, publishing Random Number Generation (RNG) certificate, appointing grievance redressal officer, chief compliance officer, and the nodal officer. While these obligations are much needed to ensure accountability, certain mandates need to be revisited. First, the KYC mandate should not be at the commencement of the user account relation, but at the withdrawal stage. Mandating KYC at the stage of commencement would create a huge amount of sensitive datasets with the companies and may also deter users from even playing the game because of the fatigue of filling KYC at the start of any game. Secondly, the obligations of appointing grievance redressal officer, chief compliance officer and the nodal officer should not be mandated on the startups. A threshold similar to the one applicable on significant social media intermediaries should be devised for the gaming startups. Thirdly, the time frame to provide information to the law enforcement agencies should be kept at par with the other intermediaries under Rule 3(1)(j) of the IT Rules 2021 i.e., 72 hours. Fourthly, the certifying bodies for issuing RNG certificates should be recognised by the government.

Clause 4B of the proposed amendment prescribes that a self regulatory body (SRB) has to be constituted which would determine and register online games, and evolve the framework around it. While self regulation for this sunrise industry is good, the rules should lay down principles for operation of SRBs and suggest consistent and uniform verification process, upgradation process, grievance redressal mechanisms, and adjudicatory procedures. The rules must also lay down uniform principles and code of conduct for the regulation of all OGI's governed by different SRBs. There is also a need to develop a skill model that takes into account objective tests to assess skill element and subjective tests based on legal jurisprudence that helps SRBs in ascertaining online games within the ambit of this proposed regulation.

IV. BACKGROUND

Online gaming has seen tremendous growth over the past three to four years. The fact that about 433 million of the 846 million¹ (~60%) of the Indian internet users are engaged in online games, shows a tremendous growth of the industry which parallels the rapid penetration of smartphones and internet. This rise has been positively recognised across sectors, so much so that the International Olympic Committee (IOC), addressed the calls for recognising the field of virtual sports and have come up with the concept of the Olympic Virtual Series. In fact, the Indian Team recently won the bronze medal for the DOTA tournament at the Commonwealth Games and a gold medal at the 42nd Chess Olympiad that was held online. This shows the talent pool that the country has and can help put India on the map in online gaming. The industry also presents a significant opportunity to catalyse economic growth in the country. According to a report by IAMAI², the gaming industry has a total inflow of FDI worth \$2.7 billion and contributed Rs 2,200 crore worth of GST in 2022. With an estimated market size of US\$8.6bn (by 2027)³, it has the potential to create more than 12,000⁴ job opportunities in the gaming and allied sector. The Hon'ble Prime Minister also recognised the vast potential of the Indian gaming industry, while applauding the contributions of Indian innovators and application developers.⁵

Therefore, in its first effort to regulate the sector, Animation, Visual Effects, Gaming and Comic (AVGC) Promotion Task Force was set up after the Hon'ble Finance Minister had introduced the need for the task force in her 2022-23 Union budget speech.⁶ The task force submitted its first report highlighting a roadmap for the promotion of the AVGC industry.⁷ Further, in May 2022, MeitY also constituted the Central Inter-Ministerial Task Force to understand the regulatory landscape and recommend changes towards online gaming in India.

However, as is the case with any nascent industry, the sector is currently riddled with regulatory uncertainty that would impede its growth potential and adversely affect user interests. Till date, state governments have been making individual laws on online games which involve real money under the assumption that they are games of chance. They derive this power from Entry 34, List II, Schedule VII of the Indian Constitution⁸ which makes betting and gambling as state subjects. However, the Supreme Court over the years has adjudicated that games which involve a certain degree of skill cannot be classified as games of chance. The Indian courts have developed a distinction between games of skill and games of chance over the past 70 years. Games of chance are considered to have a close association with betting and gambling and are, therefore, under the jurisdiction of the state.

In order to bring more coherency in the policy making within industry, The Dialogue has been actively working towards building academically backed policy-making in the online gaming industry over the past few years. We have published white papers and held multiple roundtables over the past three years. The Dialogue

¹ Murthy, R.M.(2022, June 09), *India - A Nation of Gamers*, The Hindu Business Line, retrieved from: <https://www.thehindubusinessline.com/data-stories/data-focus/india-proves-to-be-a-nation-of-gamers-as-numbers-spike/article65482841.ece>

² Saini, B.S.(Sept. 2021), *Building up the e-gaming ecosystem of India and the influence of smartphones*, IAMAI & One Plus, retrieved from: <https://www.thegamingreporter.com/wp-content/uploads/2021/10/IAMAI-OnePlus-India-Gaming-Reboot-V7.pdf>

³ India Brand Equity Foundation (2022, Nov. 18), *India's Booming Gaming Industry*, retrieved from: <https://www.ibef.org/blogs/india-s-booming-gaming-industry>

⁴ India Brand Equity Foundation (2022, Nov. 18), *India's Nascent Gaming Industry*, retrieved from: <https://www.ibef.org/blogs/india-s-nascent-gaming-industry-on-the-rise>

⁵ NITI Aayog(2020 December) *Guiding Principles for the Uniform National-Level Regulation of Online Fantasy Sports Platforms in India*, retrieved from https://www.niti.gov.in/sites/default/files/2020-12/FantasySports_DraftForComments.pdf

⁶ Ministry of Information & Broadcasting (2022 April 8) *Ministry of I&B Constitutes Animation, Visual Effects, Gaming and Comics (AVGC) Promotion Task Force*, Press Information Bureau, retrieved from <https://pib.gov.in/PressReleasePage.aspx?PRID=1814698>

⁷ Ministry of Information & Broadcasting (2022 December 26) *AVGC Task Force Report calls for National AVGC-XR Mission with budgetary outlay*, Press Information Bureau, retrieved from <https://pib.gov.in/PressReleasePage.aspx?PRID=1886679>

⁸ Entry 34, List II, Schedule VII of the Constitution of India retrieved from https://legislative.gov.in/sites/default/files/COI_English.pdf

published a white paper on regulation of fantasy sports in India, which identifies challenges in the regulatory regime, and examines consumer challenges and potential for self-regulation. The report also analyses global practices and makes recommendations for a more enabling regulatory ecosystem in India. The Dialogue has also been engaging at the central and the state government levels to suggest best practices for the regulation of the industry. At the state government level, The Dialogue submitted its representation to the governments of Rajasthan and Tamil Nadu.

In the latest development, after being appointed as the nodal ministry for online gaming, the Ministry of Electronics and Information Technology (MeitY) proposed amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.¹⁰ It was a welcome move as it provided much-needed legislative legitimacy for online games of skill to operate in the country. Throughout the consultative comments process, MeitY held multiple roundtables and discussions to understand key issues and stakeholders' proposed changes throughout January 2023. Towards this, The Dialogue conducted a round table with more than 75 participants from diverse backgrounds and on the basis of the inputs received, desk research submitted its detailed comments on the proposed amendment.

⁹ Kathuria G, Vaidya E(2021), *The Regulation of Fantasy Sports Platforms in India*, The Dialogue, Retrieved from: https://thedialogue.co/wp-content/uploads/2021/08/Report_Fantasy-Sports-Final.pdf

¹⁰ Ministry of Electronics and Information Technology (2023 January 3) *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules 2023*, retrieved from <https://www.meitv.gov.in/writereaddata/files/Draft%20notification%20for%20amendment%20to%20IT%20Rules%202021%20for%20Online%20Gaming.pdf>

V. DETAILED RESPONSE

5.1. DEFINITION

Clause 2(qa) of the Draft Amendments to Information Technology (Intermediary Guidelines and Digital Media Ethics Code) 2022 defines an online game as “a game that is offered on the Internet and is accessible by a user through a computer resource if he makes a deposit with the expectation of earning winnings”. From the plain reading of the text, there are three elements that need to be fulfilled in order for a game to be qualified as an online game under this category. *First*, the game should be offered on the internet, *secondly*, there has to be a deposit, and *thirdly*, the deposit should be made with the expectation to earn winnings. It seems that the objective of the proposed amendment is only to cover Real Money Games (RMG).

The definition of deposit and winnings under the explanation to clause 2(qa) in the proposed amendments includes both *cash* or *in kind*, which might pose an issue for online games while getting registered with the Self Regulatory Body (SRB). Through plain reading, it seems that the definition of online game only includes Real Money Games (RMG), the inclusion of *in kind* without explicit definition suggests otherwise. **In the absence of any definition of *in kind*, the ambit of what it would constitute would be very broad.** For instance, in game coins that a user collects while unlocking various levels and deposits to win upgraded weapons could come under the ambit of *in kind*. Similarly, games award tokens, which could then unlock new levels or materials.

There is a need to provide a definition of what constitutes *in kind*. Additionally, while the objective of the proposed amendments might not be to cover casual games, we, however, believe that certain due diligence requirements, such as de-addiction measures, etc., should also be imposed on casual games to protect and promote child safety.

Clause 2(qb) defines an online gaming intermediary (OGI) as an intermediary that offers one or more than one online games. **The challenge lies in defining ‘offer’ here, and it could cover a host of intermediaries,** i.e., marketplaces that offer games to be downloaded, such as app stores, or software/computer manufacturers that have pre-installed games since they also ‘offer’ games; as well as social media intermediaries that may host online games.

SUGGESTED LANGUAGE CHANGES

A. Clause 2(qa): Online Games mean a game that is offered and accessed on the internet, where a service fee is charged by the online gaming intermediary, and a deposit is made towards the prize pool with the expectation of earning winnings;

Explanation: (ii) 'Deposit' means the deposit made or committed to, ***in the form of money or money's worth, or any other form of purchase or consideration made in the form of valuable assets, which are in conformity with any law for the time being in force in India.***

(iii) 'Winnings' means any prize in ***the form of money or money's worth in excess of the deposit*** that is distributed or intended to be...

B. Clause 2(qb): Online Game Intermediary means any person who owns, establishes and provides a digital platform that facilitates, enables and provisions the access and conduct of one or more than one online game.

Provided that, marketplaces, third-party app stores, cloud service providers, and other intermediaries whose primary function is not to enable online gaming, will not be covered under the definition of Online Gaming Intermediary.

5.2. DUE DILIGENCE BY AN INTERMEDIARY

Clause 3(1)(b)(ix) mandates that only those games will be considered legitimate that are not in conflict with betting and gambling laws. Due to the absence of any particular definition of games of skill, the state governments might still have the prerogative to prohibit online games of skill where they believe that such a game is a game of chance, even if it is recognised by SRBs. Therefore, it is necessary to bring some safeguards for the games recognised by the SROs. For effective implementation of this regulation, the only way forward is to differentiate between games of skill and games of chance, and regulate only games of skill which involves money under the proposed amendments.

Additionally, it is important to highlight here that betting and gambling are state subjects under entry 34 of List II of Schedule 7 of the Constitution of India, the central government cannot make any law which prohibits the state's authority to regulate the space. Therefore, for effective implementation of this regulation, the way forward is to differentiate between games of skill and games of chance, and regulate only games of skill under the proposed amendments. ***The government should provide an express definition of the game of skill to remove any ambiguity between game of skill and chance.*** The government could suggest measures for consumer protection for games of chance through the Public Gambling Act, and the states could also bring their perspective. Through this method, the government will be able to regulate online games of skill and will not encroach on the state jurisdiction, and conversely, the state governments will not have jurisdiction over the games of skill.

Further, Under clause 3(1)(ma), the regulation imposes the obligation on intermediaries to verify the registration of online games. In order to reduce the compliance burden on intermediaries, the onus to provide disclosure of membership and registration certificates may be given to the OGI. Further, OGI should be required to display the registration mark on advertisements, instead of mandating it on the platform itself.

Another issue with this provision is that it also creates age-gating criteria, where only those who are competent to enter into a contract i.e., 18 years and above, will be able to play an "online game". While this is a

natural provision for Real Money Games, the current definition of online games covers a broad range of online games, including casual games with in-game purchase options. This would prevent the children from playing such games available on the internet.

SUGGESTED LANGUAGE CHANGES

A. Delete Clause 3(1)(b)(ix)

B. Clause 3(1)(ma): the intermediary shall, before hosting or publishing or advertising an online game for a consideration, provide *a mechanism to the online gaming intermediary to disclose their membership and registration certificate.*

5.3. INSERTION OF RULE 4A - ADDITIONAL DUE DILIGENCE TO BE OBSERVED BY ONLINE GAMING INTERMEDIARY

With the current definitions being broad and ambiguous, as expressed above, the additional due diligence accorded to online gaming intermediaries under *Clause 4* may be implemented obscurely. Since any platform offering one or more online games will be considered an OGI, it will effectively mean that all intermediaries, irrespective of the formats they offer, including free-to-play (if offering tokens/in-game currency) and pay-to-play, will have to undertake additional due diligence that would impose a significant burden on free-to-play games.

Clause 4A(1) states, “*In addition to the due diligence observed under rule 3 and, where applicable, rule 4... namely.*” Rule 4 in IT Rules specifically deals with Significant Social Media Intermediaries which is defined as intermediaries with over 50 lakh Indian registered users.¹¹ So the phrase “where applicable, rule 4” in Clause 4A(1) needs clarity if it is to be interpreted as that online gaming intermediaries with a threshold of more than 50 lakh Indian registered have to do due diligence under both rule 4 (Additional due diligence to be observed by significant social media intermediary) and rule 4A (Additional due diligence to be observed by online gaming intermediary). If so, this would categorise online gaming intermediaries on similar lines as social media intermediaries under the IT Rules.

To address the growing concerns around financial risk, privacy harms and addiction, the rules specify the gaming intermediaries to inform the user of its policies related to the calculation of winnings, privacy, and the risk of financial loss and addiction involved, among others. These measures are laudable as they will enable transparency and accountability on online gaming intermediaries, which was much needed.

The draft rules are predominantly user-centric. The requirement to publish a Random Number Generator (RNG) certificate and a no bot certificate from a reputed certifying body for each online game offered by OGI, along with relevant details of the same, will aid in extending legitimacy to platforms already following this practice, and weed out online games promoting illegal activities. However, this should be limited to OGI

¹¹ Ministry of Electronics and Information Technology (2021 February 25) *Notification defining ‘Significant Social Media Intermediary’ threshold*, retrieved from <https://www.meitv.gov.in/writereaddata/files/Gazette%20Significant%20social%20media%20threshold.pdf>

deploying RNG, as not all formats use them, for instance, fantasy sports.¹² **Moreover, to increase user trust and consistency, it would be helpful if a few certifying bodies were recognised by the central government and/or if the government can prescribe a minimum standard which is in line with the global technical standards.**

The proposed amendments bring in a number of compliance obligations that have to be observed by the OGI ranging from publishing mark of verification to KYC mandate, transparency, and de-addiction measures. While these obligations are very important to ensure accountability, **there is a need to revisit the requirements of KYC.** Clause 4(A) (d) states, *“the online gaming intermediary shall, at the time of commencement of a user account based relationship for an online game, identify the user and verify his identity:”*

Mandating the RBI level of KYC for gaming is not proportionate or even ideal, as most gaming platforms already do SMS-based KYC. Users, before choosing any particular platform to play or deposit money, check out multiple games in order to ensure that they are playing on the right platforms. If the obligation of KYC is at the stage of commencement of user account relationship, it would first create a huge amount of datasets with the companies with sensitive information, and second, deter users from even playing the game because of the fatigue of filling KYC at the start of any game.¹³ Most of the platforms already verify their users from their mobile numbers, which is also a mandate under clause 4A(1)(e).¹⁴ **Since the purpose of the draft rules is to promote the growth and innovation of the sunrise industry, it is suggested to have a KYC procedure at the time of withdrawal of winnings.** This would help balance the user interest and not impact the growth of the platforms. Thus, it is recommended that minimum KYC should be required for withdrawals below INR 10,000, and KYC akin to RBI’s Master Directions for Small PPI should be required for a deposit or withdrawals above INR 10,000 in a month.

Further, early-stage startups should be excluded from the compliance of appointing Grievance Redressal Officer, Compliance Officer, and the Nodal Officer. This will be an additional cost compliance for them and deter innovation. **This provision should be applicable to OGI with a specified threshold, similar to significant social media intermediaries (50 lakh active users) as defined under IT Rules.**

Clause 4(A) (l) states, *“notwithstanding anything contained in clause (j) of sub-rule (1) of rule 3, the online gaming intermediary shall provide the information referred to in the said clause within twenty-four hours of receipt of the order referred to therein.”* This clause prescribes the timeline of 24 hours for the OGIs to provide information to law enforcement agencies. The time frame should be kept at par with the other intermediaries under Rule 3(1)(j) of the IT Rules 2021, i.e., 72 hours.

Further, Clause 4A(1)(g) should be revisited to exclude any criminal liability on the chief compliance officer. Subjecting an employee to personal liability is both disproportionate and unnecessary.¹⁵

¹² Mitaksh (2023 January 20) *Gaming Rules: What Will Be Their Impact On The Industry?*, Medianama, retrieved from <https://www.medianama.com/2023/01/223-draft-online-gaming-rules-impact-on-industry-nama/>

¹³ Agrawal, A. (2023 January 19) *10 key takeaways from IT ministry’s consultation with the online gaming industry*, News Laundry, retrieved from <https://www.newslaundry.com/2023/01/19/10-key-takeaways-from-it-ministrys-consultation-with-the-online-gaming-industry>

¹⁴ Bhargava, A. (2022 October 30) *How Indian Gaming Startups Can Detect and Prevent Frauds*, Inc42, retrieved from <https://inc42.com/resources/how-indian-gaming-startups-can-detect-and-prevent-frauds/>

¹⁵ Prabhu, A. & Mohapatra, A. (2023 January 6) *Online gaming rules bring regulatory certainty but need refinement*, Moneycontrol, retrieved from <https://www.moneycontrol.com/news/opinion/online-gaming-rules-brings-regulatory-certainty-but-needs-refinement-9820091.html>

SUGGESTED LANGUAGE CHANGES

A. Clause 4A(1)(c): the online gaming intermediary shall prominently publish on its website, mobile-based application or both, a random number generator certificate, ***wherever applicable***, and a no bot certificate, from a certifying body, ***as may be notified by the Central Government from time to time***, for each online game offered by it, along with relevant details of the same.

B. Clause 4A(1)(d): the online gaming intermediary shall, at the time of ***withdrawal of money if more than INR 10,000***, identify the user and verify his identity ***through an appropriate mechanism***.

Proviso to this clause should be deleted.

C. Addition to clause 4A(1)(f), 4A(1)(g), 4A(1)(h): ***Provided that obligations under this rule shall not be applicable to companies having less than 5 million (50 lakh) active users.***

D. Clause 4A(1)(l) should be deleted or redrafted, similar to the obligations applicable to other intermediaries.

E. Clause 4A(2): The requirements under sub-rule (1) shall be applicable upon expiry of a period of ***twelve*** months from the commencement.

5.4. INSERTION OF RULE 4B- SAFEGUARDS FOR ONLINE GAMING INTERMEDIARIES IN RELATION TO THE ISSUE OF DIRECTIONS UNDER SECTION 69A¹⁶ OF THE ACT

This rule broadly lays down the mechanism to be followed by the Central Government while considering the necessity or expediency of issuing a direction under Section 69A of the principal Act in respect of an online game that is registered with a self-regulatory body (SRB). In paving this direction, the rules specify that the Central Government may make a reference to the report submitted by the SRB, with respect to the recognition of a specific game registered with the body, along with the grounds on which it has been so recognised. Sub-rule (2) specifies that an online gaming intermediary (OGI) can be registered if it adheres to the requirements of sub-rule (3) for the purpose of devising a framework so as to secure interests referred to in section 69A of the IT Act while offering online games. To qualify for registration as an SRB, the online gaming intermediary must either be a company incorporated under section 8 of the Companies Act 2013 (18 of 2013) or a society registered under the Societies Registration Act, 1860 (21 of 1860) (*Sub-rule (3)*). **While the intent of policymakers behind this mandatory requirement of OGIs, either being a company or a registered society, remains unknown, the idea of being self-regulated is a welcome move. For clarity purposes, the government, however, should publish FAQs on the procedure and timeline of registration of SRBs.**

Proviso to sub-rule (2) states that several SRBs can be registered with the Ministry. In such a case, their frameworks to secure interests might differ, creating confusion and disparity in regulating OGIs. **The rules must lay down uniform principles and a code of conduct to regulate all OGIs governed by different SRBs.** There

¹⁶ Section 69A of the Information Technology Act, 2000 talks about the power to issue directions for blocking public access of any information through any computer resource.

should be consistency in verification and upgradation processes undertaken by them. This will help maintain uniformity and curtail the arbitrary use of power by the SRBs. In addition, in the absence of any penalty for non-compliance, the rules should also state that any deviation from the said principles should be reasoned, and not be based on mere whims and fancies.

On the point of criterion for registration, the rules talk about various aspects that the Ministry will consider before granting registration. **While the overall intent is right, the government should remove track records as consideration for the registration of SROs and publish FAQs that further lay down the parameters of what constitutes “general repute” and “relevance and suitability of the individuals”** as specified under clause (b) and clause (c) of sub-rule (3) to establish clarity and counter discrepancies in the registration process.

Under sub-rule (3)(d), which talks about the presence of certain members on the Board of Directors/governing body as a criterion to qualify for registration for an SRB, the rules should, in addition to the members already mentioned, incorporate at least one member who is either a retired judge or possesses all requisite professional qualifications along with substantial experience to be appointed as a judge of HC or district judge. This is essential since the SRB will be vested with adjudicatory powers and functions. The self-regulating mechanism under Part III of the IT Rules, 2021 also provides the option to appoint a retired judge of the Supreme Court/High Court as the person heading the SRB. **In addition, it is crucial that the board consists of at least one woman representative. This is especially significant given that the board would regulate issues of safety of the online gaming ecosystem, and as emphasised by the Minister, since 40-45% of on-line gamers are women, it is imperative to have their voices on the regulating panel.** It must be noted here that as per the proviso to clause (d) of sub-rule (3), the composition of the governing body/Board of directors cannot be the sole reason to declare any decision invalid by the self-regulatory body.

Sub-rules (4) & (5) talk about the criterion for the grant of membership to OGLs by the SRB (*sub-rule (4)*) and the criterion for registration of online games by it (*sub-rule (5)*). Under clause (c) of sub-rule (5), the rules specify the requirement of an online game to be “*in conformity with laws for the time being in force in India, including any such law that relates to gambling or betting or the age at which an individual is competent to enter into a contract*” to qualify for registration with the SRB.

The directive under Clause 4B(5)(c) to SRBs to check for compliance by OGLs with laws pertaining to betting and gambling before granting registration continues to subject the latter to arbitrary action by states since different states will continue to make different laws on what constitutes gambling and betting, leaving no regulatory certainty, which is required for the sector to grow responsibly. The idea of a central regulation around online gaming is to give a sense of security to this sector to foster growth and innovation. If the state laws continue to overrule this central regulation, then the whole purpose of these rules gets defeated. In order to avoid such conflicts, the rules should provide regulatory certainty to ensure that online games registered by SRBs in consonance with the provisions of these rules should be protected from counteractions of the states.

In addition, sub-rule (5) states how registered online games offered by different OGLs will have to mandatorily display a demonstrable and visible registration mark stating that the online game is registered with the self-regulatory body. **This is a welcome move since it will instil credibility in the minds of the users and will help them differentiate between secure online games and games which leave you vulnerable to all risks and threats online.**

While clause 4B(6) directs SRBs to undertake testing and verification of online games, it does not specify the parameters of such testing/verification. Such a broad directive can pose a threat to the Intellectual Property (IP) rights of gaming companies, as these companies might be required to share confidential codes or

information pertaining to their games with the board in order to conduct such verification/testing.¹⁷ Although the Minister has clarified that the “SRO is going to seek some sort of certification, indemnity or broad-level information about how the specific game functions” and not the code per se, however, **there is a need for more clarity on the process of such verification/testing to avoid IP issues in the future. Specific guidelines should be laid out.**

Further, the rules lay out certain safeguards that “*may*” be incorporated under the framework. These include safeguards against harm, including self-harm, measures to safeguard children, measures to safeguard users against the risk of gaming addiction and financial loss, and safeguards against the risk of financial fraud. ***The rules are currently silent on what constitutes “harm” and further clarity on this would help make the regulating framework more robust. Furthermore, it is advisable to mandatorily have these safeguards under the framework under a “shall” provision instead of the current “may” provision to ensure that the online gaming ecosystem is safe and secure for all its users.***

Sub-rule (7) makes a mandatory obligation on registered SRBs to communicate to the Central Government about all online games registered with it, as well as to report the basis/grounds of such registration. However, **the rule is silent on the mode of such communication as well as the timeline for communication of new online games added by the SRB over the course of time.**

Sub-rule (8) talks about establishing a mechanism by SRBs for time-bound resolution of user complaints that have not been resolved by the grievance redressal mechanism of its member OGI under sub-rule (2) of rule 3. It lays down a 3-tier mechanism for resolving complaints in a timely manner. After exhausting the option of reaching out to the grievance officer of the concerned OGI, any aggrieved user may reach out to the SRB by way of a complaint. After exhausting these options, if the complaint remains unresolved, provisions of rule 3A can be resorted to, and the matter is escalated to the Grievance Appellate Committee (GAC) as provided under Part II.

Sub-rule (9) vests the ministry with the power to notify the SRB, in writing, about its non-compliance and direct measures for its rectification, while sub-rule (10) gives the Ministry the power to suspend or revoke the registration of SRB when it is of the view that the body hasn’t complied with the rules as laid out in sub-rules (2) to (9). This suspension/revocation can only be done after notifying the SRB by giving reasons in writing along with a reasonable opportunity to be heard. In order to protect users who might be affected by this suspension/revocation, the ministry can give interim directions or other directions either at the time of making such notice or at any time subsequent thereto. While it is laudable that the due process of law and principles of natural justice are adhered to under sub-rule (9) of 4B(1), the draft rules currently do not specify the nature of the directions to be issued by the Ministry for protection of user interests or what these directions might entail. More clarity on this would be advisable to protect user rights adequately.

The government should also **constitute an appellate committee under rule 3A** to hear the users where their complaints have not been resolved and also hear the OGIs of the dispute emanating from both administrative and adjudicatory decisions of the SRB. A skill model should be developed that considers objective tests to assess skill element and subjective tests based on legal jurisprudence that helps SRBs in ascertaining online games of skill within the ambit of this proposed regulation.

¹⁷ Mukul, P. (2023 January 28) *Gaming companies seek tweaks in draft rules in submissions*, Economic Times, retrieved from <https://economictimes.com/tech/technology/gaming-companies-seek-tweaks-in-draft-rules-in-submissions/articleshow/97382925.cms>

SUGGESTED LANGUAGE CHANGES

A. Clause 4B(3): ...(d) the presence of the following in the Board of Directors or governing body of such self-regulatory body, namely:—

(i) retired judge of the Supreme Court or a High Court;

(ii) an independent eminent person from the field of online gaming, sports or entertainment, or such other relevant field;

Provided that a female representative should always be a part of the board of directors or governing body of the Self Regulatory Body.

B. Clause 4B(5): Add Proviso: Provided that a provisional registration may be granted on the prima facie assessment of the online game.

C. Clause 4B(6): ...Proviso to sub-rule (6) - Provided that such framework shall, among other things, also include suitable criteria regarding—

(e) qualitative tests based on applicable judicial principles and quantitative tests in the form of simulated testing protocols of online games with these rules

D. Add a proviso to Clause 4(B)(7): ...which it has recognised as such.

Provided that the Central Government may, from time to time, upon receiving such communication, notify such games that have been registered by Self Regulatory Bodies

E. Clause 4B(8): Every self-regulatory body registered under this rule ***shall, in a time-bound manner, address such complaints of users that have not been resolved by the grievance redressal officer of its member online gaming intermediary within fifteen days of the receipt of a complaint*** under sub-rule (2) of rule 3, and the provisions of rule 3A shall apply...such a user has exhausted the opportunity to resolve it ***from both grievance redressal officer and self-regulatory body.***

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