

New regulations for online gaming in India – an early milestone in a long journey

By: Akil Hirani, Ravi Raghavan and Yashaswee Sarkhel, Majmudar & Partners, International Lawyers, India

Background

On January 2, 2023, India's Ministry of Electronics and Information Technology ("MeitY") had invited comments from the public on a host of proposed amendments to the IT (Intermediary Guidelines & Digital Media Ethics Code) Rules, 2021 (the "Draft Amendments"). Our detailed analysis of the Draft Amendments can be read [here](#). After multiple rounds of consultations with various stakeholders and the public on the Draft Amendments, on April 6, 2023, MeitY notified the final set of amendments by way of the IT (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 ("Amendment Rules").

The Amendment Rules mark an important milestone for the Indian online gaming industry. Through the Amendment Rules, the Indian government has taken a firm step towards safeguarding Indian gamers and their funds against online scams and frauds, encouraging responsible gaming, and protecting young and vulnerable users against online abuse and indecency.

In this update, we have analyzed some of the key aspects of the Amendment Rules and certain additional factors relevant to the Indian online gaming sector.

Recognition of Online Games and Online Real Money Games

Over the last decade, India has seen a huge uptick in the number of online real money games available to Indian users. However, in the absence of formal recognition, genuine real money games have often suffered with interference from state governments and a lack of public faith. Additionally, as the sector remained unregulated, many fraudulent games and scams, both offshore and onshore, have been perpetrated on Indian users.

The Amendment Rules have now introduced the following concepts:

- Permissible online game: This includes permissible online real money games and all other online games which are not real money games.
- Permissible online real money game: This includes only such games which have been verified by a self-regulatory body ("SRB") (*more on this below*).

Online Gaming Intermediaries (*more on this below*) will now have to ensure that they do not host or allow any third party to host through their platforms any online real money game that has not been verified as a permissible online real money game. As a result, Indian users will now be able to distinguish between genuine real money games and fraudulent ones. This is a significant step towards legitimizing online games, including real money games, and has the

potential to significantly increase the user base of such games and increase investor interest in the Indian online gaming sector.

Classification of Online Game Providers as Intermediaries

The Amendment Rules classify a provider of online games as an “intermediary” under the Information Technology Act, 2000 (the “IT Act”), thereby creating a separate classification called “Online Gaming Intermediary.”

Earlier, in 2021, the government introduced the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (the “**Intermediary Guidelines**”). The Intermediary Guidelines superseded the erstwhile Information Technology (Intermediary Guidelines) Rules, 2011, and brought in significantly stricter provisions to regulate digital media and social media platforms. Our detailed analysis of the Intermediary Guidelines can be read [here](#).

Inclusion of Online Gaming Intermediaries as an “intermediary” is, therefore, a significant development, which gives the government overreaching powers to direct any Online Gaming Intermediary to block public access to any online game (the interest of the sovereignty, integrity, defence or security of India, India’s friendly relations with foreign states, public order or to prevent user harm) and provide any required information to law enforcement authorities (in relation to investigations, prosecutions, or cybersecurity incidents) within a prescribed time period.

Additional compliance requirements for RM Intermediaries

In addition to the compliance requirements already applicable to intermediaries under the Intermediary Guidelines, the Amendment Rules impose extra compliance requirements particularly on Online Gaming Intermediaries who provide access to permissible real money games (each an “**RM Intermediary**”). Some of the key requirements applicable to RM Intermediaries are as follows:

- having a physical contact address in India (the details of which are required to be published on its platform) for the purposes of receiving any communication addressed to it;
- displaying a demonstrable and visible mark of registration on all online real money games confirming that such games are permissible online real money games verified by an SRB;
- ensuring that its rules and regulations, privacy policy, terms of service and user agreement inform the gamer of:
 - measures taken to safeguard deposits made by such gamer;
 - manner of determination and distribution of winnings, and policy related to withdrawal or refund of the deposit made;

- the know-your-customer procedure followed by the RM Intermediary; and
 - the verification framework adopted by the relevant SRB while verifying the relevant online real money games.
- before accepting any deposit in cash or kind from any user for a permissible online real money game, identifying such user and verifying such user's identity in line with procedure required to be followed by an entity regulated by the Reserve Bank of India for identification and verification of a customer; and
 - informing its users of any change in privacy policy, user agreement, or rules and regulations within twenty-four (24) hours of such change. This requirement is more onerous than the one applicable to other intermediaries who are required to inform their users of such changes periodically (at least once every year).

No financing: In addition to the above, for encouraging responsible gaming, the Amendment Rules specifically prohibit RM Intermediaries from financing or allowing any third party to finance any user for playing permissible online real money games.

Extension to other Online Gaming Intermediaries: While the requirements and compliances discussed above currently apply only to RM Intermediaries, under the Amendment Rules, the Central Government has retained the power to require any Online Gaming Intermediary providing any online game to comply with the Amendment Rules in the interest of the sovereignty, integrity, defence or security of India, India's friendly relations with foreign states, public order or to prevent user harm.

Self-Regulatory Body

A significant aspect of the Amendment Rules is the provision of self-regulation of Online Gaming Intermediaries and creation of SRBs in that respect. In our analysis of the Draft Amendments (available [here](#)), we had discussed the provisions related to creation, powers, and responsibilities of SRBs in detail. While the concept and functions of the SRBs remain along the lines of the Draft Amendments, the Amendment Rules also make some important revisions and updates thereto.

Primary Function is verifying Online Real Money Games

The primary function of each SRB will be to verify online real money games for the purpose of declaring permissible online real money games. Each SRB will have to maintain on its website and mobile applicable an updated repository of all games verified by such SRB, including relevant information such as date, period and reason of verification, and reason for suspension or revocation (if applicable).

Form of SRB, Board Composition and Capacity

An SRB can be set up only in the form of a company registered under Section 8 of the

Companies Act, 2013 with its membership being representative of the gaming industry. Further, the Amendment Rules prescribe a well-structured board composition for all SRBs with emphasis on, *inter alia*, individuals with domain expertise, experience in education, mental health, and protection of child rights. Furthermore, the board of each SRB will also have a nominee of MeitY.

It is pertinent to note that the Amendment Rules require each SRB to have “sufficient capacity,” including sufficient financial capacity to perform its functions. The Amendment Rules, however, do not prescribe any thresholds for determining what constitutes “sufficient capacity.”

Key takeaways

Self-regulation through a well-defined framework under the Amendment Rules has been welcomed by the gaming industry. That said, there remain aspects (listed below), which will require further clarity.

Where are we on the debate of game of skill and game of chance?

As the Draft Amendments pointed out, and now the Amendment Rules firmly confirm, the Central Government has side-stepped the debate of what is betting or gambling, i.e., what constitutes a game of skill (which is not seen as betting or gambling) and what constitutes a game of chance (which is seen as betting or gambling and is prohibited in various Indian states). The Amendment Rules put a responsibility on SRBs to satisfy themselves during the verification process of a real money game that such game “does not involve wagering of any outcome.” As we noted in our analysis of the Draft Amendments, under the Indian constitutional framework, the Central Government does not have the power to regulate betting and gambling. Such power rests with state governments, who can, under Entry 34, List II, Seventh Schedule of the Constitution of India, legislate on betting and gambling within such state (*more on this below*). Therefore, stakeholders, as well as SRBs, will have to continue to rely on guidance from Indian case laws and asymmetric state legislations on a case-to-case basis to determine what constitutes betting, gambling or wagering and which games will be permissible in which location.

Another important issue that affects Online Gaming Intermediaries (which is entirely dependent on the determination of game of skill versus game of chance) is to ascertain the applicable rate of goods and services tax (“GST”), an indirect tax levied on the supply of goods or services. The classification as gambling (i.e., games of chance) versus non-gambling (i.e., games of skill) is relevant here as gambling is identified as a service chargeable to GST at 28%, whereas non-gambling activities are chargeable to GST at 18%. We understand from press reports that there is an ongoing deliberation at the level of the Group of Ministers as to whether: (a) GST should be charged at the rate of 28% on both, games of skill and games of chance; and (b) whether the tax base should be the entire amount which a player deposits for a game. This is currently undecided, and reports suggest that the ministers are seeking legal opinions on the issue.

Foreign investment in the online gaming sector

Foreign investors and funds will still need to be careful while investing in Indian online gaming companies as foreign investment in any type of betting or gambling activity remains strictly prohibited under Indian foreign exchange control regulations. As discussed above, the Amendment Rules do not provide any clarity on online games that constitute betting or gambling and those that do not.

Will game publishers be treated as online gaming intermediaries?

The Draft Amendments were not clear on whether Online Gaming Intermediaries will only cover platforms which host games published by third party publishers or gaming studios, or whether they will also cover gaming studios, publishers and developers. During a discussion on the Draft Amendments in the Indian parliament in February 2023, MeitY had apparently clarified that a game publisher would not be covered as an “intermediary.” However, this clarification seemed to leave a gaping hole in the regulatory framework for online gaming as it overlooked one of the principal stakeholders, i.e., the creators of online games.

The text of the Amendment Rules does not provide any further clarity in this regard. That said, the definition of “Online Gaming Intermediary” under the Amendment Rules contains broader language than that under the Draft Amendments. Under the Amendment Rules, an Online Gaming Intermediary is any intermediary that “enables the users of its computer resource to access one or more online games.” This may be interpreted in any of the following two ways:

- (i) If an intermediary enables its users to access any online game, such intermediary will be an Online Gaming Intermediary, regardless of the publisher of the game. Therefore, it is possible that the intermediary may be the publisher of the game too.
- (ii) An Online Gaming Intermediary will be any intermediary that enables its users to access any online game published by any third party. This is because, technically, an “intermediary” as defined under the Information Technology Act, 2000, is any person who on behalf of another person receives, stores or transmits any electronic record or provides any service with respect to such electronic record.

In our view the interpretation in (i) above should be adopted by all stakeholders for the following reasons:

- If the interpretation in (ii) is taken, game publishers will be left out of the definition of Online Game Intermediaries. This will dilute the ambit of the Amendment Rules and the Amendment Rules will lose some of its teeth. Based on this interpretation, the Amendment Rules will not directly prohibit publishers from creating harmful online games but, instead, will only police pure intermediaries such as network service providers, app stores, etc., from allowing such games to become easily available.

- The Amendment Rules, *inter alia*, require Online Gaming Intermediaries to “make reasonable efforts **by itself and** to cause the users of its computer resource to not host, display, upload, modify, publish, transmit, store, update or share any information that ... (ix) **is in the nature of an online game that is not verified as a permissible online game.**” The terms “by itself and” have been introduced under the Amendment Rules along with the inclusion of sub-clause (ix) dealing specifically with non-permissible online games. One way to interpret this amendment is that Online Gaming Intermediaries are also required to ensure that no non-permissible game is published or hosted by them (and not just third parties using their computer resources).

Admittedly the above interpretation is conservative in nature, but one that stakeholders should take unless the MeitY clarifies otherwise, or an Indian court takes a definitive position on this issue.

Regulatory dichotomy and the case of Tamil Nadu

Under Entry 34, List II, of the Constitution of India, each Indian state has the power to regulate betting and gambling within such state. This has led to different Indian states coming out with different definitions of betting or gambling. Perhaps, it is symbolic that on the heels of the Amendment Rules, on April 10, 2023, the Governor of Tamil Nadu gave his assent to the Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Act, 2022 (the “**TN Act**”). A gazette notification is expected shortly from the government of Tamil Nadu to give the TN Act the force of law.

Once enacted, the TN Act will have its own definitions of “online game,” “online gambling” and “online game of chance” as applicable in the state of Tamil Nadu. Therefore, it is within the realms of possibility that an online real money game gets verified by an SRB as permissible under the Amendment Rules, and yet falls foul of the TN Act if it is deemed to be an “online game of chance” under the TN Act. A case-in-point is online poker and online rummy, which have both been adjudged by Indian courts to be predominantly games of skill but have been specifically designated as games of chance and prohibited under the TN Act.

Further, although the main feature of the Amendment Rules is the concept of self-regulation, the TN Act contemplates a separate regulatory regime for local online game providers, including a requirement to register with a Tamil Nadu authority. Such regulatory dichotomy is likely to exist for the foreseeable future and Tamil Nadu will likely not be the only state which enacts its own law with respect to online gambling.

Non-resident Online Gaming Intermediaries

The Amendment Rules specifically require each RM Intermediary to maintain a physical presence in India. This will require purely offshore RM Intermediaries to set up an Indian office either in the form of a wholly owned subsidiary company, a limited liability partnership or a branch office. The choice of the Indian entity will be driven by considerations under Indian foreign exchange and tax laws.

In this regard, it is pertinent to note that non-residents are taxable in India on income that is sourced in India. Thus, non-resident Online Gaming Intermediaries or online game providers, as applicable, may be subject to tax in India if: (a) they have more than 300,000 users in India; or (b) their income receipts are more than INR 20,000,000 in a financial year. Further, Online Gaming Intermediaries or online game providers, as applicable, will be subject to withholding tax obligations, which require the person responsible for paying winnings to the players to withhold taxes at prescribed rates (if the winnings exceed INR 10,000).