

Unpacking the Pitfalls: A Critical Analysis of Draft IT Rules for Online Gaming

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Introduction

Recently, the Ministry of Electronics and Information Technology [“MeitY”] introduced [further amendments](#) to the [IT Rules, 2021](#) regarding online gaming after it was [notified as the nodal ministry](#) for online gaming. The proposed rules require gaming companies to be part of a self-regulatory body, only publish games approved by such bodies, follow know-your-customer (KYC) norms, set up a grievance redressal system, and classify online gaming platforms as intermediaries among other things. However, the proposed rules, which have been opened for public consultation have raised some important concerns like ambiguity in definition of online games, classification of gaming platforms as intermediaries, lack of distinction between games of skill and games of chance, concerns over self-regulatory body and excessive powers in the hands of government. This article offers a synopsis of these issues which need to be addressed by the government before finalising the rules.

Need for Central Regulation of Online Gaming

The current archaic laws have created inconsistency in online gaming regulation. Gambling comes under the [State List](#) and has been banned by many states. In the view of many [gambling related suicides](#) due to addiction and financial losses, many states have tried to regulate or outright ban the ‘game of chance.’ However, the problem arose when the states banned games that held legal by the Courts called ‘game of skill.’ So, it has been a consistent demand from the gaming industry to clearly demarcate game of skill and game of chance to streamline the process. Additionally, Intra-state activities common in online gaming would not come under the state list since only parliament can make laws having extra-territorial applicability. These concerns stress for a central regulatory framework. However, concerns remain [whether the central government lacks legislative competence to regulate online gaming](#).

Issues with the Draft IT Rules

There are several concerns over the draft IT rules on online gaming:

I. Definition of Online Games

The proposed definition of online games in the regulations is vague and creates more confusion for the industry. Rule 2(1)(qa) defines “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”. It is unclear whether the free-to-play games that do not require any money in order to participate in the game but have in-game purchases will fall within the purview of the term ‘online gaming.’ Another concern is that the definition of online game seems to legitimise gambling as a player who is gambling makes a deposit with the expectation of winning. The question, then arises whether this makes gambling an online game and thereby legal.

2. The classification of Online Gaming Platforms as Intermediaries

The draft rules classify online gaming platforms as ‘intermediaries.’ According to Rule 2(1)(qb), “online gaming intermediary” means an intermediary that offers one or more than one online game. However, classifying gaming firms as intermediaries makes little sense as most of them are publishers as they are publishing their own content through these games and hence, they are responsible for the content they publish. Essentially, gaming platforms are publishers. Previously, [the Ministry of Information & Broadcasting has stated that gaming platforms should be classified as ‘publishers’ and not as an ‘intermediary.’](#) Section 79 of the IT Act states that an intermediary shall not be liable for hosting any third-party content. Therefore, if online gaming platforms are classified as intermediaries, they will be exempt from penal action for publishing any third-party content. However, they will be held responsible for such content as a publisher.

3. No distinction between Game of Skill and Game of Chance

It was anticipated that the rules will define and make clear demarcation between a game of skill and a game of chance. However, the rules do not define the two terms. The existing gambling laws [[Public Gambling Act, 1867](#)] are vague and outdated. They merely state that games of skill are not prohibited under the act. The Act does not define what constitutes these games, and leaves the same for the courts to interpret. This lack of clear distinction has often led to skill-based games getting confused for chance-based games and getting banned. The rules should provide a safe harbour to games of skill. It misses an opportunity to clearly define and distinguish between these two. Additionally, [the games of skill and games of chance are taxed differently.](#) While skill-based games are taxed at 18%, chance-based games are taxed at 28%. A clear distinction between the two will make it easier to identify the rate of tax to be levied over such games and help in a good tax regime.

4. Concerns over Self-Regulatory body

The draft IT rules propose the establishment of a Self-regulatory body (SRB) that would be responsible for registering and approving games as well as providing a grievance redressal mechanism. The SRB has also been tasked to come up with a regulatory framework which will include parameters to adjudge and regulate the content of online games and include safeguards against potential harms. An online gaming intermediary will be able to host a game only if a game has been registered and approved by the SRB. The issue that arises is that the wording used in the rules provides discretionary powers to the SRB whether to register a game or not. The phrase ‘may register’ should be replaced with ‘shall register’ to remove the discretion allotted to SRB in registering a game if it fulfils other conditions in the rules. Furthermore, the decision of the SRB in case of a grievance redressal is final and there is no appellate body to safeguard game publishers if SRB chooses not to register a game. Considering that these SRBs are to be appointed by MeitY, it will likely have influence over such SRB. It will essentially give government broad powers regarding registration of games. Therefore, it is necessary that an appellate body be set-up to prevent such unfair practices by the government or the SRB.

5. Excessive powers to government by Rule 6A

The proposed rule 6A allows the government to declare any game as an online game even if the game does not require any deposit if the government is convinced “*that such game may create a risk of harm to the sovereignty and integrity of India or security of the State or friendly relations with foreign States or public order, on account of causing addiction or other harm among children.*” This essentially grants powers unbridled to the government creating scope

for its possible misuse. The government may block or restrict access to any game it does not like.

Way Forward

The rules are a step in right direction and have largely received a [positive response from the gaming industry](#). However, some issues still persist which need to be addressed

The government needs to ensure that there are no unnecessary hassles for a gamer in order to promote the industry. Rule 4A introduces a know-your-customer (KYC) procedure to be followed by the intermediary for registration of the account of a user. However, most of the times in real money games, the users prefer to play 'free games,' where KYC procedure might not be required and will only create hassle for a user. It is also imperative that government supports small, emerging players in the industry and give them due consideration while framing the rules. The Requirement of having three separate employees-Grievance Officer, Chief Compliance Officer and Nodal Contact Officer on the payroll of Online Gaming Intermediary is onerous especially for startups and mid-sized gaming companies. It is suggested that intermediaries be given the option to have only one employee that may perform all the three functions. It is also proposed that MeitY puts a cap on the fee charged by SRB for registration as it has been noticed that SRBs have charged exponentially [high rates](#) for registration. It gives an unfair competitive advantage to large companies as such high fees cannot be afforded by startups and small companies. These changes are necessary for promoting the gaming industry. It was anticipated that the rules will lay a framework for clear and uniform laws across the country. However, the rules are far from achieving it. The government will fare better by consulting various stakeholders to remove grey-areas and address other issues in the proposed rules before finalising it.