



April 2023

## Regulation of online real money games and fact checking of fake news

On April 6, 2023, the Ministry of Electronics and Information Technology (“MeitY”) [notified](#) the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 (“Amendment”).

While the Amendment primarily focuses on regulation of online real money games (including through self-regulatory bodies (“SRBs”)), it also contains provisions relating to fact checking of fake news.

Notably, the MeitY had earlier released a draft amendment (“Draft Amendment”) to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“IT Rules”) for public consultation – which the Amendment is based on. Many stakeholders including JSA submitted feedback on the Draft Amendment, and while the Amendment incorporates certain feedback and suggestions made, there remain provisions which are ambiguous and incongruous. For a detailed analysis of the Draft Amendment, please refer to the [JSA Prism of January 6, 2023](#).

We have summarised notable provisions of the Amendment and our take on them below.

1. **What is an ‘online gaming intermediary’?**: The Amendment applies to ‘online gaming intermediaries’ – defined as *“any intermediary that enables the users of its computer resource to access one or more online games.”*

While a literal reading of this definition implies that all intermediaries which facilitate access to online games (which could include app stores, cloud service providers, internet services providers etc.) are ‘online gaming intermediaries’ – in our view, the classification of ‘online gaming intermediary’ would be limited to publishers/developers/operators of ‘online games’.

This is because it would be unreasonable (and in some cases impossible) for intermediaries which merely facilitate access to online games to comply with the obligations imposed under the IT Rules on online gaming intermediaries (discussed below).

In our (JSA’s) submissions on the Draft Amendment, we had requested the MeitY to clarify that the definition of ‘online gaming intermediary’ seeks to include publishers/developers/operators of online games and not intermediaries which host, advertise or enable user access online games. However, the MeitY has not addressed this issue in the Amendment.

Notably, the Minister for Electronics and Information Technology has made contradictory statements in this regard during parliamentary questions and debates. For example, when questioned, the Minister [answered](#) that the definition of ‘intermediary’ under the Information Technology Act, 2000 (“IT Act”) and IT Rules does not include publishers. However, he has also [stated](#) “. . .the Government has taken the right first step by treating the online gaming apps and websites as intermediaries and brought them under the first step of regulation under the intermediary provisions.”

In view of the above, there is currently a level of ambiguity regarding the scope of the definition of ‘online gaming intermediary’. We understand that the MeitY will issue clarifications/FAQs regarding the IT Rules which could clarify this ambiguity – however, there is no definite timeline for the same.

2. **Distinction between ‘online game’ and ‘online real money game’:** The Amendment defines ‘online games’ as all games which are accessible through the internet. Notably, this definition is linked to the mode of accessibility and not the substantive qualities/features of the game. Therefore, if a game is both accessible online (for example, through an app store) and offline (for example, through a disk) – only the online version of the game would fall within the purview of the IT Rules.

The Amendment also distinguishes between ‘online games’ and ‘online real money games’ (“**Online RMG**”) – the latter being online games where users make deposits (in cash or kind) with the expectation to earn winnings (in cash or kind) based on their performance in the game. Therefore, online games which do not involve money-in and money-out will not be considered Online RMG. Examples of such online games which would not fall within the classification of Online RMG are (a) pay-to-play online games with no element of winnings in cash or kind; and (b) free-to-play online games which involve winnings in cash or kind.

In our submissions on the Draft Amendment, we had requested that the MeitY clarify that the term ‘in kind’ in relation to deposits and winnings of Online RMG be substituted for ‘cash-equivalent’ in order to ensure clarity – since a literal reading of the word ‘kind’ could potentially include within the classification of Online RMG, online games which are not ‘money-in-money-out’.

For example, a user could pay to play a game with the expectation of winning a trophy with no monetary value outside such game. However, such trophy may be considered a winning ‘in kind’ – classifying such game as an ‘online game’ under the Draft Amendment. However, the MeitY has not addressed this issue in the Amendment.

In view of the above, there is currently a level of ambiguity regarding the scope of the definition of the word ‘kind’ in the context of deposits and winnings. As discussed above, we expect the MeitY to issue clarifications/FAQs which could clarify this ambiguity – however, there is no definite timeline for the same.

3. **Permissible online games:** As per the Amendment, online games which are not Online RMG are automatically considered ‘permissible online games’ and need not undergo certification/verification. On the other hand, Online RMG must be certified/verified by an SRB in order to be offered or advertised to users in India.

Notably, the Central Government also has the right to restrict/prohibit regular online games (which are not Online RMG) or subject such online games to similar conditions as Online RMG (such as certification/verification) if it believes such action is necessary for (a) sovereignty and integrity of India; (b) security of the State; (c) friendly relations with foreign States; (d) public order; or (e) preventing user harm (i.e., any effect which is detrimental to users).

4. **Due diligence obligations:** The Amendment appears impose proactive due diligence obligations on all intermediaries – stating that intermediaries must themselves take reasonable efforts to cause users not to engage in prohibited activities. However, it is to be seen whether these obligations will stand judicial scrutiny in light of precedent by the Supreme Court of India<sup>1</sup> which has held that it is unreasonable to expect large intermediaries to be able to proactively police their platforms (i.e., to independently judge the legitimacy of the millions of requests they receive to take down content).

The Amendment also introduces new due diligence obligations on intermediaries. Notably, all intermediaries are now required to prohibit:

- a) any online game which causes user harm (i.e., any effect which is detrimental to users);
- b) any online game which is not a permissible online game (as discussed above permissible online games are (a) online games that are not Online RMG; (b) Online RMG verified by an SRB; and (c) not specified otherwise by the Central Government);

<sup>1</sup> Shreya Singhal v. Union of India (2015) 5 SCC 1

- c) fake, false and/or misleading content about the Central Government which has been flagged by a fact checking body to be notified by the MeitY; and
- d) advertisements (including surrogate advertisements) or promotion of any online game which is not a permissible online game or online gaming intermediary offering such online game.

5. **Additional obligations on online gaming intermediaries which offer Online RMG:** The Amendment imposes additional obligations on online gaming intermediaries which offer Online RMG.

For example, while intermediaries are generally required to inform their users of any changes to their terms of use once a year, online gaming intermediaries offering Online RMG must do so within 24 (twenty-four) hours of such change. Similarly, if a law enforcement agency requests information or assistance, online gaming intermediaries offering Online RMG must comply with such requests within 24 (twenty-four) hours (as compared to 72 (seventy-two) hours for ordinary intermediaries).

The Amendment also introduces obligations specific to online gaming intermediaries which offer Online RMG, including obligations to:

- a) display a demonstrable and visible mark of verification of online game, as obtained from the SRB (discussed below) to indicate that the game offered is a permissible online real money game;
- b) include within their terms of use, all terms as to deposit and withdrawal of funds, fees, determination and distribution of winnings, know your customer (“KYC”) procedures and measures taken to protect deposits to ensure clarity to users; and
- c) prohibit financing to users (as credit) to enable them to play such online games.

Other obligations imposed on online gaming intermediaries which offer Online RMG are similar to those of significant social media intermediaries (“SSMIs”):

- a) appointment of resident chief compliance officer (“CCO”), resident nodal contact person and resident grievance officer (however, unlike in the case of SSMIs, the CCO and nodal officer of an online gaming intermediary may be the same person);
- b) a physical contact address in India; and
- c) enabling users to verify their accounts and providing such accounts with a visible mark of verification.

Notably, the Draft Amendment contained additional obligations on online gaming intermediaries, such as the obligation to (a) display a random number generation certificate; and (b) no-bot certificate – which have been done away with in the Amendment based on stakeholder feedback.

6. **KYC Obligations:** Online gaming intermediaries which offer Online RMG are required to conduct KYC of users before accepting deposits from users as per the procedure prescribed by the Reserve Bank of India.

Notably, under the Draft Amendment, the obligation to conduct KYC arose at the time of commencement of a user account-based relationship. However, based on stakeholder comments, the MeitY has relaxed this obligation to apply only at the time of accepting a user’s deposit.

7. **Designation of SRB:** In order to verify an Online RMG as a permissible online game, the Amendment empowers the Central Government to designate as many SRBs as it deems fit.

The Amendment empowers these SRBs to verify online real money games offered by their members, so long as they do not involve wagering on any outcome and comply with obligations imposed by the IT Rules. Once a game is verified, the online RMG and the online gaming intermediary enabling access to such Online RMG must display a demonstrable and visible mark of such verification to indicate that the Online RMG is permissible under the IT Rules.

The Amendment also mandates SRBs to publish on their websites and mobile applications (a) an updated list of its members, present and former, along with their date of membership and business identity number; (b) an

updated list of Online RMG verified by it along with details of the applicant, period of validity of verification and reasons of verification and details of revocation, if applicable; (c) a framework for verifying an online game; and (d) a framework for redressal of grievances.

Notably, although the Amendment empowers SRBs to verify online real money games, such verification is subject to oversight by the MeitY.

It is also pertinent to note that the obligations imposed by the Amendment on online gaming intermediaries will only come into effect after 3 (three) months of date on which the Central Government designates at least 3 (three) such SRBs.

8. **Accessibility of grievance redressal mechanism:** The Amendment clarifies that the name of an intermediary's grievance officer, his/her contact details and details of the intermediary's grievance redressal mechanism must be 'prominently published' in a clearly visible manner, such that such details can be accessed on (a) the home page of the intermediary's website or a webpage directly accessible therefrom; and (b) on the home screen of an intermediary's mobile application or an app screen directly accessible therefrom.

9. **Expanded scope of Grievance Appellate Committees ("GACs"):** The Amendment expands the scope of grievances which may be referred to GACs to include grievances which are not resolved by intermediaries and SRBs within the timelines prescribed under the IT Rules. Prior to the Amendment, only people who were aggrieved by the decision of an intermediary's grievance officer were entitled to appeal the same to a GAC.

Additionally, now SRBs (like intermediaries) are also required to comply with all orders of the GAC and publish reports of such compliance on their websites.

10. **Should online gaming platforms be regulated under the IT Rules?:** The IT Rules may not be the appropriate framework to regulate online gaming platforms, since online gaming platforms are not intermediaries and would not be entitled to safe harbour under Section 79 of the Information Technology Act, 2000 ("**IT Act**") for violation of law by the online gaming platform itself. While online gaming platforms may perform the role of intermediaries to the extent that they enable users to interact with each other – they are not intermediaries with respect to the games they operate.

There is no penalty for non-compliance with the IT Rules (including the obligations inserted by the Amendment); and any non-compliance (a) will result in loss of intermediary status; and (b) could result in blocking of the online gaming platform under Section 69A of the IT Act. Additionally, from a risk (mitigation) perspective, the Amendment will have no impact on online gaming platforms for non-compliance with existing State laws on betting or gambling – such as Andhra Pradesh, Telangana, Odisha, Assam and, most recently, Tamil Nadu.

## Gaming Law Practice

With the advent of the Internet, mobile gaming, eSports and the proliferation of sports wagering we represent technology providers for internet and mobile gaming, various operators and payment solution companies seeking to work with and form partnerships with this industry. Our lawyers have substantial experience in all facets of gaming laws, covering a range of issues confronted by our clients within the industry, including those related to technology, equipment, and faced by service provider to the industry. Additionally, our teams support clients in regulatory and compliance matters, including assisting our clients in obtaining regulatory approvals, drafting internal compliance procedures and, conducting internal investigations in connection with alleged regulatory violations. In recent years, JSA has built a niche in advising online/mobile gaming, gambling and e-sports companies and technology providers. JSA also counsels such businesses in a range of corporate matters, including financings, mergers & acquisitions, labour and employment matters, and all facets of litigation.

JSA helps navigate all the complexities of the industry, and our experience stretches across the complete spectrum of gaming and esports, including: (a) Interactions with regulatory bodies; (b) Structuring and negotiating agreements between the various parties involved in this highly regulated industry; (c) Advising on the aspects of a game may categorize it to be gambling; (d) Drafting terms and conditions of a game, mobile gaming applications, e-sport tournaments and other such events/competitions; (e) Advising on compliance matters, including regulations in internet and mobile gaming; (f) Conducting and supporting internal audits, investigations and diligence exercises.

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24 Ranked Lawyers



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11 Ranked Lawyers



7 Practices and  
2 Ranked Lawyers



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