



**Comments / Inputs of Cyber Saathi Foundation
On Proposed Amendments to Intermediary Guidelines 2021
For Regulating Online Gaming©***

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**Comments / Inputs of Cyber Saathi Foundation
On Draft amendments to IT Rules 2021 in relation to Online Gaming©***

*“(Online) Gaming is the new entertainment destination”
(Nappinai. N. S. (2017)¹)*

Online Gaming & Safe Harbour Provisions – Limitations in Resorting to Regulations instead of A Parliament Enacted Law²

A critical balancing act comes to play on any proposal, be it from the Central Government or a State Government, whilst crafting regulations that rely on parent acts of parliament. Expanding the scope beyond what was intended or that which may result in formulation of laws by the executive instead of resorting to Parliament enacted laws would certainly face the risk of a strike down.

That online gaming is a source of concern that needed to be regulated and that such regulation could actually enable the industry and help it to grow is a certainty. That laws provide such certainty and transparency that enable is also a given.

The issue at hand is therefore not on the necessity for regulating online gaming (which in fact is critical and already delayed) but more on the sustainability of the propositions that the Ministry of Electronics & IT (“MeitY”) has put forth in the

¹ Nappinai N. S. (2017). Technology Laws Decoded. LexisNexis.

² Whilst the Proposed Amendments to the Intermediary Guidelines, 2021 pertained to Online Gaming only in the draft circulated on January 2, 2023, the draft of January 17, 2023 included Fake news amendments. Given the statement of the Ministry that separate consultations will be held with respect to these fake news proposals, this report is limited to the proposals for amendments to regulate online gaming;

form of amendments³ to the extant Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, (“Intermediary Guidelines”), which rely on the powers flowing from Section 79 read with 87 (and to some extent Section 69A) of the Parent Act being the Information Technology Act, 2000 (as amended) (“**IT Act**”).

Section 79 IT Act provides ‘safe harbour’ or ‘exemptions’ from liability to Intermediaries, as defined in the IT Act, subject to their compliance with the conditions set out in Sub clauses (2) and (3) of the said provision. Delegation of authority to the Central Government to formulate regulations or guidelines for Intermediaries forms part of the above subclause (2), based whereon Section 87 (zg) IT Act draws its power. When MeitY therefore proposes to amend the Intermediary Guidelines, it is ring fenced and limited to providing regulatory or rule frameworks to that which is covered under the parent law being Section 79 IT Act. The definition of Intermediaries is wide and could include online gaming platforms, provided they have no control over the content or its transmission or its dissemination. Hence whilst it may be within the purview of the Central Government to formulate rules or regulations based on such delegated authority, the same would be limited to such forms of Intermediaries, as defined under Section 2(w) read with Section 79 IT Act.

The proposed amendments would have to be viewed therefore through these lens of delegated legislation without confusing or confounding the same with the necessity for regulating online gaming.

³ Refer to MeitY’s online circulation of the proposed amendments to the Intermediary Guidelines including provisions for regulating online gaming (through its draft circulated for public consultation on January 2, 2023) (<https://www.meity.gov.in/writereaddata/files/Draft%20notification%20for%20amendment%20to%20IT%20Rules%202021%20for%20Online%20Gaming.pdf>) and fake news (through the draft circulated on January 17, 2023);

There is also the criticality of the Centre / State turf delineations, considering the limited scope of the State jurisdiction to “Betting AND Gambling” under List II of the Seventh Schedule of the Constitution of India, as opposed to the larger scope for the Center. This also plays a key role whilst evaluating the proposed additions to the Intermediary Guidelines.

Inputs on Draft Amendments

1. Definitions

The amendments propose two additions namely of “online game” (Rule 2(qa)) and “online gaming intermediary” (Rule 2(qb)). The former has to be read with the latter i.e., whilst the definition of online game may be wide given the inclusion being predicated on Intermediary guidelines, it is limited in its applicability only to Intermediaries i.e., those who have no control over content, dissemination or transmission of such content. This very limitation would impact further additions and all such amendments would have to be evaluated based on this limitation placed by the parent Act i.e., the IT Act.

Recommendations:

The following recommendations are given without prejudice to the issues raised above on legality.

- a. In the definition of “online game”, ensuring a wider applicability may be required particularly with the mode of offering varying. Hence rephrasing ‘online’ to ‘digital’ and ‘internet’ to any device or digital space may be advisable;

- b. Deleting references to ‘making of deposits’ or of ‘expectation of earning winnings’ may be considered given that an Intermediary by their very definition cannot either accept deposits or give out earnings. Such actions predicate awareness of content and / or recipient of transmission, which is contrary to the very remit of Section 79 IT Act;
- c. Similarly definition of “online gaming intermediary” needs to be reviewed as any platform that offers ‘one game’ cannot claim to be ignorant of content being offered and hence would not be an Intermediary any attempt at explaining the inclusive definition of Intermediary has to still be within the remit of the parent Act;

2. Rule 3 (1):

- a. Rule 3(1)(b): **Recommendations**
 - i. The proposed substitutions at clause (b), sub-clause (ix) may be clarified to include ‘any law for the time being in force in India’ including Central or State laws;
 - ii. The proposed substitutions at clause (b), sub-clause (ix) may read as “including... gambling AND betting...”
- b. Rule 3(1)(ma): The Rule may clarify if the intent is for the Intermediary to verify both with an online gaming Intermediary AND the Self - Regulatory Body or either;

3. Rule 4: Recommendations

- a. Additions at Rule 4 may be moved to Rule 3, as not all online gaming Intermediaries are likely to be Significant Social Media Intermediaries;
- b. Rule 4A(b): The Rules framed thereunder apply purportedly to “Online Gaming Intermediaries”. However, the asks therein with respect to transparency on deposits, winnings (except general notices on risks) are contrary to the role and functionality of an Intermediary, who purportedly is not aware of the contents and does not have control over contents on its platform. The very basis of the requirements takes such entities, which has control over games offered on their platforms out of the purview of the definition of Intermediaries and also consequently out of the ambit of Section 79 IT Act.
- c. Rule 4A(d): This rule also suffers from the same issue as above i.e., once an online gaming Intermediary is aware of the recipient or participant the same defies the restrictions under Section 79(2)(b) IT Act;
- d. Rule 4B:
 - i. Rule 4B in its entirety may be subjected to judicial review for sustainability considering the limited remit of Section 79 IT Act and the amplification given therein including of application of Section 69A IT Act and also the formulation and registration of Self - Regulatory Bodies for online gaming Intermediaries.

- ii. Referencing Section 69A IT Act under this provision also dilutes or deflects the powers of takedowns that are available to a wider range of violations than under Section 69A IT Act. Hence a review of both of these provisions under Rule 4B is necessitated;
- iii. Clarity on an SRO or SRB's rights where non Intermediaries, but entities into online gaming are members may also be clarified;
- iv. Rule4B(9): Clarifying the consequences of de-certification on online games registered with a SRO/SRB is essential i.e., can they migrate to another SRO / SRB more so if they are not in violation?
- v. Provision for delisting a game not in compliance instead of cancellation of certification, as a whole of a SRO / SRB may also be considered, as non – compliance may be individual to a game or entity and not always of the SRO/SRB.

4. Rule 6A: Recommendations

- a. Rule 6A may be modified in line with the proposed modifications to the definitions of Online games and online gaming Intermediary. The residual clause may be simplified.
- b. The above is however tempered with this qualifier – Online games are being regulated through delegated authority already. There cannot be further delegation. Hence in effect, a residual clause permitting the Central

Government to add or modify the Intermediary Guidelines is effectively unnecessary, redundant and a tautology that may be avoided. As has been wont, in any event where the Government has felt the necessity, it has added to or modified a year plus Intermediary Guidelines.

- c. Further under delegated legislation, it may not be sustainable to further delegate and modify through mere notifications. Hence the said provision requires to be modified to make it sustainable.
- d. Simplicity in the definition of online games and online gaming Intermediary may effectively resolve the issues under Rule 6A.

5. Conclusion:

The Government has undertaken a much needed requirement i.e., for regulating online gaming. However, by making the regulations under Intermediary Guidelines, the Government has effectively restricted its applicability to a very limited set of Intermediaries, which may be offering online gaming and not to the entire vast industry.

The need of the hour is for Parliament enacted laws and not for such myopic regulations. It appears that the Law Commission's suggestion to postpone any regulation may be well advised.

The Government has to ensure that the intent and purpose behind this exercise i.e., to regulate online gaming and make it a safer environment can and should be met only through Parliament enacted laws and ought to work towards the same. Meanwhile if it believes that this limited applicability would meet some ends, the same would still have to be undertaken within the remit of law and the predicates of the parent legislation. All recommendations submitted above may be read therefore with this qualifier that the recommendations do not intend to colour the proposal of the amendments with legality. The intent is laudable, the approach is flawed and the hope is that the same would be remedied at the earliest and a stop-gap arrangement is not made into a permanent fixture. Whilst so, since law ought to ensure certainty and longevity, it would also be imperative to ensure that any proposals for Intermediaries are sustainable in the long run too whereby the same may be adapted to meet the requirements of all online gaming entities and not just those falling within the ambit of Intermediaries.
