

REGULATORY ROADMAP FOR ONLINE SKILL GAMING PLATFORMS

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Background

After years of seeking government recognition, the online skill gaming industry has come of age and been identified as one of the key pillars of the economy with the announcement of the AVGC (Animation, Visual Effects, Gaming and Comics) task force in the Union Budget 2022. The Hon'ble Prime Minister in his multiple interactions on Budget 2022 has stressed on the need to promote this fast-growing sector to encourage make-in-India games and has also remarked that this industry has the potential to become a INR 3 lakh crore industry in next few years.

Online games of skill can broadly be categorised as casual games, e-competitions, e-sports and fantasy sports¹. As per reports² Online gaming is a USD 1.8Bn sunrise sector in India. Revenues from the online gaming industry in India is expected to reach \$5Bn+ by 2025. As per Deloitte, in its report on Fantasy Sports: Creating a Virtuous Cycle of Sports Development³, the market size of fantasy sports was 34,600 Cr in FY

21 and it is expected to reach 1,65,000 Cr by 2025. The report also noted that the medium term CAGR for fantasy sports is expected to be 38% for FY 21-FY27. Online games are among the fastest growing industries in India and have a huge potential in contributing significantly towards the growth of the digital economy. India, with its increasing digital base, software developers and avid gamers has a potential to be a world leader in this area. The Union Minister of Commerce & Industry, Consumer Affairs & Food & Public Distribution and Textiles, Shri Piyush Goyal while addressing the valedictory session of 2nd edition of CII Summit FX in 2021 on Global Animation, Visual Effects, Gaming and Comics (AVGC) & Immersive Media had while highlighting the AVGC sector's growth potential stated that the sector is growing at 9 % and is expected to reach ~Rs 3 lakh crore (US\$ 43.93 bn) by 2024 (CAGR of 13.5%).⁴

The industry thus holds immense promise in terms of adding to a

¹https://www.ikigailaw.com/wp-content/uploads/2021/03/IL-and-IAMAI_Digital-gaming-report_02032021.pdf

²<https://www.bcg.com/en-in/mobile-gaming-market-opportunity-in-india>

³<https://fifs.in/publication/#>

⁴<https://pib.gov.in/PressReleaseSelfframePage.aspx?PRID=1749713>

bouquet of existing innovative products in the market, for revenue enhancement and employment. Hon'ble PM also stressed on the need of supporting local games. In his remarks he mentioned that even though India is a country rich with many innovative games, many of those played were created in other countries and foreign companies continue to benefit from it.⁵ The Union Minister, Shri Piyush Goyal while discussing AVGC sector had also stated that the sector has potential to become the torch bearer of "Create in India" & "Brand India". AVGC sector has channelised the creative energy of our youth during the pandemic and it has the power to project India's creativity globally.⁶

With the above background the objective behind this working

paper is to examine the issues relating to online skill gaming and the way forward. The working paper also touches upon the existing regulatory framework for a better understanding of the issues faced by the industry, gamers, and the ways to ensure a protective regulatory framework ensuring growth rather than the present restrictive and ambiguous framework.

⁵<https://zeenews.india.com/india/india-should-lead-digital-gaming-sector-develop-games-inspired-by-its-culture-folk-tales-pm-narendra-modi-2304643.html>

⁶<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1749713>

Current Legal Position: India

The States are empowered to regulate gambling and betting under Schedule VII Entry 34 i.e., Betting & Gambling of the Constitution of India under List II. This power however does not extend to regulating online games of skill as gambling and betting only covers chance-based games played for stakes and excludes games of skill. Some States, however, have extended their jurisdiction and enacted separate legislations extending the present scope of their respective legislations on gambling to online skill gaming. Upon analysis of the State legislations the following scenarios have emerged: -

- a. In some States online gaming and gambling is allowed through license e.g., Sikkim & Meghalaya (over intranet).
- b. In Nagaland only online games of skill are allowed through license.
- c. In some States online gaming including games of skill when played with money is prohibited e.g., Telangana, Andhra Pradesh.
- d. In some States online gaming

including games of skill irrespective of the fact whether money is involved is prohibited. Eg. Orissa Prevention of Gambling Act could be interpreted to ban gaming per se. (also include Assam)

The above, has resulted in inconsistent laws across states. It has also resulted in States enacting legislations in contravention of the prescribed Constitutional powers. This was also recognised in **Junglee Games India Pvt. Ltd. v. State of Tamil Nadu**⁷ where Tamil Nadu Gaming and Police (Amendment) Act, 2021 amending the Tamil Nadu Gaming Act, 1930 was challenged. The ordinance prohibited all forms of games being conducted in cyberspace, irrespective of the game involved being a game of mere skill, if such game is played for a wager, bet, money or other stake. The Madras HC held the Amendment to be patently arbitrary, unjust, especially in the backdrop of the judicial precedents that govern the field. The amendment was held to be violative of Article 19(1)(g) and Article 14 of the Constitution. The Court also

⁷(2021) SCC Online Mad 2762

observed that the amendment is so convoluted that the amended meaning of 'gaming' runs through all the provisions, and it is not possible to save any provision. Recently in **All India Gaming Federation v. State of Karnataka**⁸, the Karnataka High Court clearly held that games of skill not being gambling, betting or wagering cannot be prohibited by States via Entry 34 of List II, Seventh Schedule of the Constitution of India. Further, it was held that no matter how liberally one construes Entry 1(Public order) and Entry 2(Police) of List II of the Seventh Schedule of the Constitution of India, games of skill cannot fall within their parameters. An activity which is a legitimate business under Article 19 (1) (g) of the Constitution and is not res extra commercium cannot intrinsically give rise to any issue of 'Public order' or 'Police'. Similarly, the material presented by the State is insufficient to make a ground for legislative competence under Entry 6 (Public health) of List II of the Seventh Schedule of the Constitution of India.

The Courts have been consistent in their view that games of skill are not gambling, betting or wagering. The Courts have created a distinction between game of skill and gambling and concluded that any game which

requires a pre-dominance of skill is a game of skill. This stand has been taken by Courts consistently in all cases since the beginning in cases such as **The State of Bombay v. R. M. D. Chamarbaugwala**⁹, **Andhra Pradesh v. K. Satyanarayana & Ors**¹⁰ till recently in **Head Digital Works Private Limited v. State of Kerala**¹¹, **Junglee Games India Pvt. Ltd. v. State of Tamil Nadu**¹² and **All India Gaming Federation v. State of Karnataka**.¹³ The Kerala High Court in **Head Digital Works Private Limited v. State of Kerala**¹⁴, declared that the notification issued amending the exemption notification issued under Section 14A of the Kerala Gaming Act, 1960 and keeping online rummy when played for stakes outside the purview of the exemption notification is arbitrary, illegal and violative of Article 14 and 19(1)(g) of the Constitution of India. The court highlighted games played with or without stakes does not alter the nature of the game as a game of skill. The Court held that *"As such playing for stakes or playing not for stakes can never be a criterion to find out whether a game is a game of skill..."* However, when there is application of the test of game of skill there are inconsistent views taken by High Courts e.g. Madras HC¹⁵ ruled that poker and rummy

⁸All India Gaming Federation v. The State of Karnataka, W.P. No. 18703/2021

⁹1957 SCR 874

¹⁰1968 SCR (2) 387

¹¹WP(C) NO. 7785 OF 2021

¹²(2021) SCC OnLine Mad 2762

¹³All India Gaming Federation v. The State of Karnataka, W.P. No. 18703/2021

¹⁴WP(C) NO. 7785 OF 2021

was a game of skill whereas Gujarat HC¹⁶ ruled that poker is a game of chance. This has resulted in inconsistent application of law. At present whether an online game falls within the scope of gambling or not is being decided on a case-to-case basis leading to ambiguity in application of laws. This also creates uncertainty for businesses and exposure to consumers / players of being exposed to games of chance under the guise of claiming games of skill exclusion. In the case of Fantasy sports, several cases were filed across India to adjudge whether they amount to games of skill or not. There was a consensus across high courts that fantasy sports are a game of skill and finality to this was provided by the Supreme Court in **Avinash Mehrotra v. The State of Rajasthan & Ors.**¹⁷ wherein the SC reaffirmed the decision of the Rajasthan High Court that a particular format of Fantasy Sport involves a predominant element of skill and is not gambling, betting or wagering. The Rajasthan High Court¹⁸ had held that the result of fantasy sports is not determined by chance or accident and the result of the game is determined by skill. The Rajasthan High Court had further held that whether any team in the real-world match wins or loses, is also immaterial as the selection of virtual team by the

participant involves choosing players from both the teams playing in the real world. It has also been held by various High Courts that fantasy sports is a legitimate business activity protected under Article 19(1)(g) of the Constitution of India i.e., freedom to practise any profession, or to carry on any occupation, trade or business and business.

Recently, Hon'ble Minister of State for Electronics and Information and Technology, Shri Rajeev Chandrashekhar¹⁹, in response to a Parliament Question has recently stated that online gaming platforms are a new emerging category of intermediaries which are required to follow the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("intermediary rules, 2021"). Another important aspect of his reply was the recognition of the distinction between online gaming and gambling.

The IT Act, 2000 provides safe harbour to intermediaries as long as the intermediaries are compliant with the IT Act and intermediary rules, 2021.

¹⁵Junglee Games India Pvt. Ltd. v. State of Tamil Nadu(2021) SCC OnLine Mad 2762

¹⁶Dominance Games Pvt. Ltd. v. State of Gujarat 2017 SCC OnLine Guj 1838

¹⁷SLP (C) No. 18478/2020

¹⁸CWP 20779/2019 in Ravindra Singh Chaudhary v. UOI & Ors.

¹⁹<http://164.100.24.220/loksabhaquestions/annex/178/AU201.pdf>

Need for a regulation

Legislative grey areas are creating roadblocks to industry's innovative offerings to users. The Government is committed to keep a check on illegal betting and gambling menace however, the absence of legal and factual segregation on legitimate businesses and games of skill entails in clubbing online games of skill erroneously with gambling. The lack of such segregation results in arbitrary and blanket prohibitions at the State level which prohibit legitimate business activities. The only beneficiaries of such ad-hoc prohibitions are the illegal offshore and onshore operators which function outside any regulatory or legislative framework. Lack of government recognition and support for the online skill gaming industry is, therefore, only benefitting the illegal operators which are leaving Indian users vulnerable to frauds and financial risk.

The need for regulating online gaming was first highlighted by Law Commission in its 276th report²⁰. The Law Commission recommended that *"since horse-racing, being considered a game of*

skill, has been exempted from the ambit of blanket prohibition on "gambling", both by the legislatures and the judiciary, other skill-centric games may also be afforded this exemption." NITI Aayog had also come out with suggestions on guiding principles to regulate online fantasy sports²¹. The report aimed at providing regulatory and policy clarity for Fantasy Sports as a game of skill distinct from betting and gambling. It suggested on the requirement of a self-regulatory framework for OFSP (Online Fantasy Sports Platforms)

There is an urgent need for a common set of principles governing online gaming intermediaries under the Information Technology Act, 2000. These safe harbour principles are not only required for the growth of the industry but also from the Government's perspective of curbing illegal activities and from the perspective of user protection.

Owing to the online gaming sector's immense growth potential there has also been a constant demand from the industry and other stakeholders to regulate online

²⁰<https://lawcommissionofindia.nic.in/reports/Report276.pdf>

²¹https://www.niti.gov.in/sites/default/files/2020-12/FantasySports_DraftForComments.pdf

gaming for ensuring an effective online gaming regulatory ecosystem which protects vulnerable gamers and at the same time harnesses growth. Internet is ubiquitous, for online gaming industry to reach its true potential the industry cannot be subject to different laws in different States and be dependent on judicial interpretation on a case-to-case basis. There is a need for a standard law regulating this space with clear definition of online games of skill and unambiguous rules of taxation. Separate laws for online gaming in different States also go against one of the core principles of the Union Government i.e., ease of doing business.

At present there is no comprehensive law and ministry/body looking into the issues of content of online games, responsible gaming, self-exclusion²², age rating, age gating, neutrality of platforms and regulating websites that are fly by night operators. As highlighted above there is a need to protect players from online harms and

redress their grievances in the online gaming space. There is also a need for the Government to institute mechanisms for recognising Self-Regulatory Organisations to ensure that these issues are dealt with and redressed by industry experts having requisite knowledge in collaboration with the government. A light touch regulatory framework with a self-regulatory organisation (SRO) as recommended by NITI Aayog for fantasy sports may be adopted for the entire online skill gaming sector. Given the rapid pace of innovation in this sector, the role of independent (SRO) will be critical to ensure adherence to government laws and at the same time ensure ease of doing business.

²²Self-exclusion allows these individuals to voluntarily ban themselves from online gaming activities.

Legislature's perspective

The issue of the need for a regulation of online games is also continuously being emphasised during Parliament sessions. Private Member Bill for regulation of online games was introduced by Hon'ble MP Sh. Shrikant E. Shinde²³. Winter session of the Parliament in 2021 saw an informed debate on this topic led by Hon'ble M.P. Shri Sushil Modi²⁴. This budget session also saw a variety of parliament questions covering online gaming, e-sports and fantasy sports. This budget session in many ways showcased the starting point for a positive ecosystem for online games of skill platforms. The creation of the Animation, Visual Effects, Gaming and Comics task force was announced in the Union Budget 2022-23. This was followed by Hon'ble Minister of State for Electronics and Information and Technology Shri Rajeev Chandrashekar²⁵ recognising online gaming as a new emerging category of intermediaries who are required to follow the intermediary rules, 2021. While these developments showcase the positive outlook of the Union Government towards regulating

online games of skill there is much more to be done for a comprehensive ecosystem enabling growth and offering protection.

Telangana which was one of the first states to ban online games of skill in 2017 has announced that they would come up with a model law to regulate online games of skill and encourage the growth of this sector. This change of policy may be attributed to the economic benefits of this sector in terms of employment, investments and tax revenues to the government. Additionally, Telangana has seen a large number of cyber frauds being committed by fly-by-night and illegitimate offshore operators due to absence of legitimate online gaming players. Tamil Nadu has filed an SLP challenging the decision of the Madras High Court in the Supreme Court and is yet to take a stance on the subject. Karnataka, which was one of the first states to create an AVGC policy, is yet to decide on the next course of action post the judgement of the High Court striking down the amendments to the police law to include online games of skill. It may

²³<http://164.100.47.4/billtexts/lbills/asintroduced/2629LS%20As%20In.pdf>

²⁴ <https://www.indiatoday.in/india-today-insight/story/why-does-sushil-modi-want-to-regulate-online-gaming-1886893-2021-12-12>

²⁵<http://164.100.24.220/loksabhaquestions/annex/178/AU201.pdf>

be noted that states have taken contrasting and conflicting views with their own policies. It may therefore be imperative for the Central Government to step-in and

ensure responsible growth of this sunrise sector of India's digital economy and prevent states from taking a paternalistic approach.

Power of the Central Government to regulate online games of Skill

NITI Aayog has recommended a uniform national level regulatory framework for online fantasy sports and provide a safe harbour for platforms that adhere to a set of guidelines and principles as may be laid down by the Central Government. Further, the document said: “While OFSPs operate through online media on a pan-India basis, their regulation proceeds under varied State-wise regulatory regimes. This means that fantasy sports users’ interests of transparency, OFSP operator integrity, and fairness may vary from state-to-state, resulting in an inconsistent experience and the risk of forum/jurisdiction shopping. This may even deprive sports fans in some states of their right to engage actively on these OFSPs”.

The competence of the Central Government to regulate the online games of skill sector has been a subject of debate. However, given

that online skill games are already intermediaries under Entry 31 of List I of the Constitution of India, as also indicated by the government in response to Parliament questions, there is a clear case for competence of the Central Government to regulate this industry. The Central Government is competent to bring separate set of intermediary rules for the online games of skill platforms under the Information Technology Act, 2000. The Central Government is also empowered to bring a separate legislation covering online games of skill under the following provisions of the Constitution:

I. Entry 31 of Union List (List I): *‘wireless, broadcasting and other like forms of communication’*. Games of skill platforms are intermediaries and hence shall be regulated under the Information technology Act, 2000 and Intermediary Guidelines.²⁶

²⁶<https://lawcommissionofindia.nic.in/reports/Report276.pdf>

ii. **Entry 42 of List I:** *“Inter-State trade and commerce”*. Online games of skill are by virtue of being played over internet fall within Inter-State trade and commerce. The operators of online games fall within definition of OIDAR and IGST is applicable on them.²⁷

iii. **Article 248 read with Entry 97 of Union List (List I):** residuary power of legislation, Parliament can make any law with respect to any matter not enumerated in the Concurrent List (List III) or State List (List II)

²⁷<https://www.cbic.gov.in/resources/htdocs-cbec/gst/OIDAR.pdf>

Way Forward

As enumerated above, there is a need to regulate online games of skill for promotion of industry, protection of users and powers of the Government to tackle illegal activities. It was recently announced that the Government is looking to revamp the new Information Technology Act²⁸. Regulation of online gaming space can also be one of the many aspects covered in the new IT Act. It must however be noted that considerable time is taken in enacting any new legislation. Therefore, it is vital that the Government considers regulating online games of skill within the four corners of existing framework i.e., through intermediary rules for online games of skill under the Information Technology Act, 2000 while continuing to work on a separate light touch legislation. This would ensure minimum due diligence requirement to be followed by all games of skill platforms ensuring player protection while harnessing growth of the online gaming industry. It will at the same time ensure Constitutional propriety by ensuring that online games of skill are regulated by the Union while gambling / betting is regulated/prohibited by the State.

The IT Act, 2000 under sub-clause (zg) of Section 87 empowers the Central Government to provide guidelines to be observed by intermediaries. The Intermediary Rules, 2021 may be amended to include the specific light touch guidelines relating to online games of skill intermediaries owing to their distinct nature. The following aspects can be covered while amending the Intermediary Rules, 2021:

(i) Distinction between game of skill and games of chance:

- Bring clarity and uniformity in the meaning, definition, and scope of games of skill. A clear distinction between games of skill and games of Chance are required to be brought out.
- Online games of skill can be regulated by the intermediary rules whereas gambling shall continue to be regulated by the State.
- Bring clarity and uniformity and ensure only online games of skill are allowed.

(ii) Grievance Redressal Mechanism: Put in place a redressal mechanism for protection of users from online harm. A model

²⁸<https://indianexpress.com/article/india/centre-starts-talks-for-new-it-law-looks-at-stalking-to-social-media-7570744/>

prescribed for publishers and OTT platforms in the Intermediary Rules, 2021²⁹ can be considered i.e., Tier 1: grievance redressal mechanism by the online games of skill platform, Tier 2: grievance redressal mechanism provided by the Self-Regulatory Organization, Tier 3: oversight mechanism by inter-departmental committee set up by the administering Ministry.

(iii) Ensure appropriate safeguards for responsible gaming and responsible advertising and marketing communications.

(iv) Broad classification of online games of skill. viz., Esports, Fantasy Sports, E-competition (Card games) and Casual Games (all games which do not fall under the above three categories, approved as games of skill and has a prize pool element).

(v) Protection of Children:

- Age rating and gating system standards can be set for protecting children.
- Gaming platforms can be prescribed to build a framework for parental controls framework such as setting timings/time-limits for child's access to age-appropriate online games of skills, notification to parents when the child access online games of skill etc.

- Ensuring that online gaming companies do not place digital advertisements on their platform regarding any illegal products/services/activities or any content harmful to children.
- Online gaming apps must not deliberately provide facilities for gaming in such a way as to appeal particularly to children for contents and formats that are inappropriate for children and make them vulnerable to online abuse.
- In formats which are appropriate to adults, access must not be allowed to children.

(vi) Reasonable Security & Privacy:

- Ensuring protection of privacy and data while at the same time providing for a mechanism for traceability in case of illegal activities.
- Provisions should ensure that the online gaming software are secure and tamper proof.
- It must be ensured that the online gaming companies share all relevant information with Appropriate Government and Law Enforcement Agencies (LEAs) so as to enable effectively discharge their functions, in particular in relation to

²⁹https://www.meity.gov.in/writereaddata/files/Intermediary_Guidelines_and_Digital_Media_Ethics_Code_Rules-2021.pdf

prevention of money laundering; compliance of FEMA, combating the financing of terrorism; investigation of suspected betting and cheating, combating of problem gambling.

(vii) Financial Protection:

- Additional authentication for in-app purchases, especially for games which are offered to children.
- Ensure platforms maintain separate accounts for operational expenses and prize pools and pay-outs to the users, mandating that all transactions should be done through electronic modes for transparency etc.
- Provisions to ensure fair and transparent participation for the players. Diligence Mechanism such as Responsible play policies, transparency, KYC Norms, privacy and security as per applicable laws. Linkage of all gaming transactions to operators' and players' Aadhar cards/PAN Cards.

(viii) Offshore gaming platforms: Mechanism to tackle the problems created by offshore gaming sites systematically operating in India. There should be a requirement for

such platforms to have a liaison office in India and register with a Self-Regulating Organisation. In case the offshore gaming platforms do not abide by these requirements they should not be allowed to operate in India. This would help the Government in identification of offshore gaming platforms in case of any offence or illegal activity. It would also help the Government in taxing such sites/apps.

(ix) Recognising self-regulatory mechanism: Self-regulating organisations ensure high standards of self-regulation while maintaining operational efficiencies. The Government has officially recognised the self-regulating organisations in the intermediary rules, 2021 for publishers/OTT³⁰. RBI came out with its framework for Self-Regulatory Organisation for Payment System Operators in Oct 2020.³¹ Recently, a self-regulatory organisation has also come up in the field of ed-tech.³² NITI Aayog recognized the importance of self-regulation specifically to the online fantasy sports industry in its report Online Fantasy Sports Platform (OFSP) in May 2021.³³

- NITI Aayog had recommended that the governance of the self-regulatory organisation should be undertaken by an

³⁰<https://www.meity.gov.in/content/notification-dated-25th-february-2021-gsr-139e-information-technology-intermediary>

³¹<https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11986&Mode=0>

³²https://www.business-standard.com/article/companies/india-s-leading-edtech-firms-announce-formation-of-self-regulatory-body-122011200394_1.html

³³https://www.niti.gov.in/sites/default/files/2020-12/FantasySports_DraftForComments.pdf

independent oversight board comprising of reputed persons with experience in governance, law and administration, who may be elected or appointed by members of the self-regulatory organisation for fixed terms.

- The independent oversight board should be responsible for the implementation of the uniform guidelines and principles and ensuring OFSPs' continued adherence and compliance therewith, including through periodic review of member operations.

The suggestions of NITI Aayog can be applied for a Self-Regulating Organisation can be universally applied for a Self-Regulating

organization for online games of skill platforms. Apart from the above the Self-Regulating Organisation can also develop mechanisms for monitoring member platforms and reporting any scrupulous activity to appropriate authorities such as CERT-In. In **Ravindra Singh Chaudhary v. Union of India**³⁴ the Rajasthan High Court held that the Fantasy Sports industry does not function in a "total regulatory vacuum" considering the self-regulatory measures and best practices adopted by the FIFS through its charter. This judgement highlights the importance of recognising self-regulatory organisations in online games of skill space.

Summary of recommendations

It is in the interest of the citizens, Government, and the industry that intermediary rules, 2021 may be amended to include specific provisions for online game of skill intermediaries. There is an urgent need to protect players and online games of skill industry.

Without the requisite Government support the promising industry may not flourish to its true potential and users remain vulnerable to online harms without adequate grievance redressal mechanisms. It is imperative for MeitY being the nodal Ministry to initiate the process of inclusion of guidelines for online games of skill intermediaries with administrative support from the concerned line Ministry.

³⁴D.B. Civil Writ Petition No. 20779/2019

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