

Gaming Law Wrap

May 31, 2022

RAJASTHAN INTRODUCES BILL TO REGULATE FANTASY – BASED FORMATS AND ESPORTS

- On May 17, 2022, the State of Rajasthan published a draft of *Rajasthan Virtual Online Sports (Regulation) Bill* (“**Draft Bill**”), seeking stakeholder comments.
- The Draft Bill purposes a licensing regime, to regulate pay-to-participate formats of (i) Fantasy Sports, (ii) E-Sports, and (iii) Derivative Formats, (i.e., formats of ‘fantasy based selection’) (collectively, “**Virtual Online Sports**”). Previously, the Rajasthan High Court had recognized a certain format of fantasy sport as a game of skill¹.
- The Draft Bill proposes a co-regulatory framework between the State and industry led self-regulatory bodies.
- The Draft Bill (i) has vague and overlapping definitions, (ii) does not include other games of skill in its ambit, (iii) lacks robust player protection measures, (iv) relies on judicial pronouncements to determine statutory treatment of games, (v) vests self-regulatory bodies with excessive adjudicatory and disciplinary powers, among others.

I. SUMMARY OF PROVISIONS OF DRAFT BILL

Some of the key provisions of the Draft Bill are summarized below. We have discussed the licensing provisions in **Annexure A** to this hotline.

1. Games covered under the Draft Bill

- The Draft Bill introduces a licensing regime for pay-to-play versions of Fantasy Sports², Derivative Formats³, and E-Sports⁴. Operators offering these games are prohibited from offering them in the absence of a license in the State of Rajasthan⁵.
- Free to play versions of these games are excluded from the applicability of the Draft Bill⁶.
- Unlike the licensing regimes for skill games introduced by the States of Meghalaya⁷ and Nagaland⁸, (i) other games of skill such as Rummy and Poker are not included in proposed licensing regime, and (ii) the Draft Bill does not appear to have the flexibility for other games of skill to be recognized and be eligible for a license.
- However, such other online games of skill may continue to avail of the general exemption for games of skill under the *Rajasthan Public Gambling Ordinance, 1949* and hence, continue to be offered in Rajasthan.

2. Issuance of License, Eligibility for License, and License Terms and Conditions

- We have covered this in **Annexure A** to this hotline. The license will be issued by the licensing authority constituted under the Draft Bill.

3. Rajasthan Virtual Online Sports Commission and Powers of Commission

- The Draft Bill provides for the constitution of the Rajasthan Virtual Online Sports Commission (“**Commission**”)⁹ comprising of (i) a retired judge of the High Court/Supreme court, (ii) a person having vast experience in sports and sports federation, and (iii) a retired Government servant not below the rank of Secretary¹⁰.
- The Commission is empowered¹¹ to:
 - act as an appellate body against orders passed by the ombudsman of the self-regulatory organisation (please see point 5 below),
 - recommend license terms and conditions to the Government,
 - issue advisories, caution notices and recommendations to self-regulatory organisations,
 - submit periodic reports to the Government of licensees’ activities,
 - recognize self-regulatory organisations (please see point 4 below), and
 - recognize codes of ethics and governance, charters, and bye laws adopted by self-regulatory bodies.

4. Constitution of Self-Regulatory Organisations

- The draft Bill provides for the recognition of self-regulatory organisations¹² (“**SRO**”) by courts or the Commission¹³.

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- The Commission is authorised to provide recognition to SROs based on certain criteria, such as:
 - The SRO must have its registered office in India.
 - The SRO must have as its 'primary' purpose, the administration, regulation and promotion in respect of each class of the regulated games.
 - The board and management of the SRO must comprise of Indian citizens
 - The SRO's members must constitute the majority of the pay to participate registered users in India.
 - The SRO must have an ombudsman/similar dispute resolution mechanism with a minimum functioning of at least three years.
 - The SRO's constitutional documents and bye laws must provide for codes of ethics and governance, rules of fairplay, consumer grievance redressal, dispute resolution mechanisms, and responsible advertising and marketing.
- The SRO is required to carry out day to day administration and regulation of Virtual Online Sports¹⁴, and is also vested with adjudicatory and disciplinary powers.
- Powers and functions of SROs¹⁵: The SROs are vested with wide powers such as:
 - Administering and regulating day to day operations of each class of Virtual Online Sports,
 - Issuing directions/orders for compliance with codes of ethics and governance.
 - Certifying formats as Virtual Online Sports which are in accordance with their code of ethics/governance¹⁶.
 - Constituting an office of Ombudsman to act as a dispute redressal body to adjudicate disputes between licensees and licensees and players.
 - Levying penalties and fines for 'particular segment of the industry' which must be credited to the State of Rajasthan.

5. Dispute Resolution Mechanism

- The Draft Bill contemplates a two-tier dispute redressal mechanism for disputes between licensees, and disputes between users and the licensees as follows:
 - Tier 1: The Ombudsman constituted by the SRO, to adjudicate
 - Tier 2: The Commission, to act as an appellate body against orders passed by the Ombudsman at Tier 1.

We have covered the various types of disputes which may arise under the Draft Bill and the forum for appeal in **Annexure B**.

6. Adjudicating Officer

- the Draft Bill seeks to appoint an adjudicating officer who may impose penalties and fines on licensees for violations of (i) the Draft Bill, (ii) rules framed under the Draft Bill, or (iii) license conditions¹⁷.
- Upon being directed by the adjudicating officer that the licensee has violated any provision of the Act, Rules or license conditions, the licensing authority cancels the license¹⁸.
- The adjudicating officer is vested with powers of a civil court, and may summon witnesses, seek documents, receive evidence, among others¹⁹.
- Appeals against orders of the adjudicating officer may be filed before commercial courts²⁰.

7. Offences and Penalties

- The Draft Bill seeks to impose a penalty of upto four lakhs (per day of contravention) on a person/entity who offers a Virtual Online Sport without obtaining a license, or who continues to offer such games upon suspension of license²¹.
- Other offences by licensees are as below:

Offence by Licensee	Penalty
Violation of the Advertising Standard Council of India's <i>Code for Self-Regulation in Advertising</i> (" ASCI Code "), and failure to comply with the ASCI's directions.	Upto INR 2 lakhs
Violation of the SRO's code of ethics and governance, and failure to comply with the directions of the SRO.	Upto INR 2 lakhs
Obtaining license by furnishing incorrect information, which licensee knows or believes to be false.	Upto INR 2 lakhs
Making deliberate mis-declaration to licensing authority in order to obtain a license.	Upto INR 2 lakhs
Failure to maintain records or produce documents or information for licensing authority.	Upto INR 2 lakhs
Violation of advisories, caution notices and recommendations issued by	No penalty specified

The Draft Bill is unclear as to who will impose certain penalties.

■ Power to recover losses²³:

- In addition to the levy of penalties or fines, if a licensee who has violated the Act, rules, or license conditions has, in addition, caused loss to the Government or 'any person,' the adjudicating officer is empowered to recover losses and compensation from the licensee and award the same to the Government, or other affected persons.

II. ANALYSIS

1. Recognition of other Online Games of Skill

- The Draft Bill only recognizes Virtual Online Sports Formats, and does not have any scope for additional game formats to be recognized and regulated under its provisions.
- Article 14²⁴ of the Constitution of India requires equal treatment of law by equal persons, accordingly all similar game formats (i.e., all games of skill) should be treated equally by the Draft Bill. Accordingly, all games of skill should be recognized and regulated similarly under the Draft Bill.
- Other State legislations such as the *Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill, Act, ("Nagaland Act")* and the *Meghalaya Regulation of Gaming Act, 2021, ("Meghalaya Act")* also recognize several games as games of skill, such as Poker, Rummy, virtual stock games, chess, Sudoku, quiz games, among others. The Nagaland Act and the Meghalaya Act also provide flexibility for additional games to be recognized as games of skill. The Nagaland Act permits the licensing authority in the State to recognize additional games as games of skill based on certain parameters²⁵, and the Meghalaya Act also recognizes that the State Government may permit other games of skill from time to time²⁶.

2. Excessive Powers of SROs

- Under the Draft Bill, SROs are given wide-ranging powers, *inter alia*, to (i) evaluate and approve game formats²⁷, (ii) adjudicate disputes between users and licensees through dispute redressal bodies²⁸, (iii) levy penalties and fines for a particular segment of the industry²⁹. [The types of orders which may be passed by the SRO are outlined in **Annexure B**].
- A statute should not empower a private self-regulatory body to levy statutory fines and penalties on behalf of a State Government.
- In the matter of *Lotus Herbals Pvt. Ltd. v Union of India & Anr*³⁰ the High Court of Bombay had recognized that statutory authorities cannot outsource/delegate their powers to self-regulatory bodies. In this matter, the court recognized that in case of violation of the ASCI Code (which must be adhered to by broadcasters under the *Cable Television Networks (Regulation) Act, 1995* and the *Cable Television Network Rules, 1994* ("**Cable TV Law**"), it would be *upto the competent authority under the Cable TV Law to take action in accordance with law*, and not ASCI. The court also recognized that in case of ASCI's process and recommendations being carried out to the detriment of the advertiser, the complaint must be adjudicated in accordance with law and *independent of ASCI's recommendations*.
- Accordingly, the SROs appointed under the Draft Bill should not be vested with statutory powers of the State of Rajasthan to determine violations and levy penalties and fines. Instead, the self-regulatory bodies may have recommendatory powers, i.e., be empowered to issue recommendations to the Commission with respect to breach of license terms and conditions. The Commission/licensing authority may then make the final determination in this respect. A similar process is envisaged under the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021* ("**IT Rules**"), where the self-regulatory body cannot levy fines, nor issue orders to delete/modify content to the publisher, however in case the body believes the content is required to be modified/deleted, it may make a reference to the Ministry of Information and Broadcasting³¹.
- There are also procedural difficulties with vesting SROs with such adjudicatory powers:
 - No avenue for appeal: There is no avenue for operators to appeal against orders of the SROs. Even a writ petition against such orders may not be maintainable, since the SROs are private bodies. We have covered the types of orders which may be passed by the SRO in **Annexure B** to this note.
 - Enforcing orders against non-members: Powers of self-regulatory bodies are contractual in nature between members and the body. Accordingly, it is unclear how orders of the SROs will be enforced against non-members against who complaints are made, especially since SROs may enforce orders against a 'particular segment of the industry'³². The Draft Bill also does not appear to mandate that licensees become members of SROs.

3. Independence of SROs

- As stated above, the SROs have been vested with wide-ranging adjudicatory and disciplinary powers. Separately, operators may disclose confidential information, such as novel game formats to the SRO for approval.
- It is accordingly critical for the SRO to be independent of industry influence, and have no conflict of interest while carrying out its functions. Having no bias is one of the core aspects of natural justice.
- Most self-regulatory bodies set up in other industries, such as the Broadcasting Content Complaints Council set up

by the Indian Broadcasting Foundation, or the Advertising Standards Council of India, are set up as entirely independent self-regulatory bodies.

- The SROs recognized under the Draft Bill should also be required to be independent under the Draft Bill, i.e., their directors and shareholders should not have any interest in another gaming company.

4. Vagueness in respect of Offences and Penalties

- The Draft Bill is vague in respect of (1) which authority determines violation of the Draft Bill, and (2) quantum of penalties in case of certain violations. We have highlighted these instances in point 7 in Part I) above.
- For instance, it is unclear:
 - Which authority will determine which authority will determine if a license has been obtained by making false information³³, or by making a mis-declaration³⁴.
 - What would be the consequence of violation of advisories, caution notices and recommendations issued by the Commission, which are simply stated to be 'binding' on 'all concerned'.³⁵

5. Vague and restrictive Criteria for recognition of Self-Regulatory Organisations:

- The current criteria which the Commission must consider while recognizing self-regulatory organisations are restrictive and would bar most self-regulatory bodies from obtaining recognition.
- *The self-regulatory body must have, as its 'primary' purpose, the administration, regulation and promotion in respect of each class of Sports Engagement Platform*³⁶. Notable, long-standing self-regulatory gaming bodies represent and advocate on behalf of a wide variety of online skill gaming operators, not just fantasy/sports operators.

Accordingly, this provision should be rephrased to recognize self-regulatory bodies representing operators offering all types of skill gaming operators.
- *The self-regulatory body must have a demonstrated functioning of 3 years with an existing office of the Ombudsman or similar dispute resolution mechanism*³⁷. Implementation of this provision would effectively bar (i) new self-regulatory bodies, and (ii) self-regulatory bodies that do not currently have dispute resolution bodies from obtaining recognition by the Commission for at least three years. Accordingly, this provision should be rephrased to omit the words '*demonstrated functioning of 3 years.*'
- *The self-regulatory body shall have members, who constitute the majority of 'pay to participate' registered users in India*³⁸. It is unclear whether this provision is referring to registered users participating in the games covered by the Draft Bill, or registered users across all gaming platforms. It is also unclear whether the majority must be in respect of individual games, or across all three types of games/across all online games of skill. In either event, introduction of such a criterion would (i) stifle creation and recognition of new self-regulatory bodies *and* (ii) specialised self-regulatory bodies representing only a certain class of operators. Accordingly, this provision ought to be omitted in its entirety.

6. Disputes which are violation of License terms and conditions

- As stated in Part I above, the Draft Bill contemplates a (1) two tier dispute resolution mechanism for disputes between licensees, and disputes between users and licensees, as well as (2) an adjudicating officer who may impose penalties/fines on licensees for violation of the Draft Bill, rules framed thereunder, and/or the license conditions.
- However, it is unclear which mechanism is required to be followed in case a dispute between a user/licensee also concerns a violation of a license condition or an offence under the Act or Rules.
- *For example*, if a user's complaint concerns player funds not being held in a separate bank account, and license conditions mandate that operators hold player funds in a separate bank account, it is unclear whether the SRO should adjudicate that dispute, or the adjudicating officer.

7. Recognition by courts, or Accreditation by bodies, as a criterion for License:

- The draft Bill requires judicial recognition or accreditation by third party as one of the possible criteria for games to be eligible for a license, per the following definitions and provisions:
 - "'Derivative Formats' shall mean and include any format of fantasy – based selection that *has been judicially upheld and recognized by a Court of competent jurisdiction in India...*"
 - The proviso to the definition of "Fantasy Sports Platforms" states that "*Provided that no Fantasy Sports Platforms shall be permitted to offer an Online Competition of Fantasy Sports unless the following **judicially upheld criteria are incorporated therein...***"
 - "Esports" shall mean a simulated real life '*domestic or internationally recognized sports and games in the form of Online Competitions.*' The proviso to the definition of 'Esports Platforms' further states that "*Provided that no Esports Platforms shall conduct any Esports Competitions that do not adhere to the following criteria... (ii) such simulated versions of Esports **shall be recognised by accredited Sporting Federations, both domestic and international or by any other appropriate authority.***"
- Recognition by third party federations or courts should not be a criteria for a State to recognize a game format. The draft Bill itself should ideally identify the games and criteria.

8. Lack of avenue for appeal for orders from Licensing Authority

- There are various orders which may be passed by the licensing authority constituted under the Draft Bill, such as (1) rejecting licensing application (2) varying license condition (3) cancellation of license (4) refusal to renew license, [set out in **Annexure B** to this hotline].

- However, there is no appellate authority before which an applicant or licensee may appeal to challenge orders of the licensing authority.

- The only avenue available to parties may then be to challenge the order by way of writ petition before the High Court. However, this may deprive licensees/applicants of expeditious redressal. Accordingly, an appellate body should be set up to hear appeals from such orders of the licensing authority.

9. Lack of defined Player Protection Measures:

- The Draft Bill requires the Self-Regulatory Bodies to introduce Code of Ethics and rules of fair play. However, it does not identify the provisions which need to be included by the Self-Regulatory bodies in their codes, such as *inter alia*, measures for vulnerable player protection, player KYC, responsible gaming, financial transparency, among others.
- The draft Bill should identify the core provisions which must be included by self-regulatory bodies in their codes, to bring about uniformity in standards for player protection.
- To draw a parallel, the IT Rules mandates that online publishers introduce their own age gating, age rating and content classification measures, however permits them to determine those measures at their discretion.

10. Overlapping and Unclear Definitions

The draft Bill contains several repetitious and vague definitions, which may be omitted, such as:

- Separate definitions for (i) game formats and (ii) platforms offering such games, such as 'Esports' and 'Esports Platforms,' 'Fantasy Sport' and 'Fantasy Sport Platforms.' The substance of the definition of the platforms are the same, and accordingly the draft Bill may retain only one definition of 'platform,' if required.
- All-encompassing definitions such as 'Virtual Online Sports,' which simply reiterate the three games identified in the draft Bill.
- Definition of 'Sports Engagement Platform,' which is vague. It is unclear what types of platforms are sought to be included in this definition.

III. CONCLUSION

Over the years, we at NDA have advocated for a central law for India's online gaming industry³⁹. Due to the reach of the internet, there are territoriality issues for State Governments to regulate this industry. Further, due to haphazard, differential State-specific treatment of the same games, there is business uncertainty for operators under the current regime, which also stifles innovation. Accordingly, the need of the hour is a strong Central legislation for online gaming. There have been reports that the Central Government has formed an inter-ministerial panel to regulate online gaming as well⁴⁰. Further, an AVCG Task Force has been announced to further realise the potential of this industry.

Accordingly, it appears the Central Government is considering the way forward for this industry. Therefore, ideally State legislations should withdraw State-specific laws such as the Draft Bill to make way for a central legislation.

However, if the State of Rajasthan is inclined to continue with the Draft Bill, the above mentioned inconsistencies and issues must be taken into account, or the law is liable to be challenged before the High Courts. In particular, the overarching powers of SROs must be regulated. While SROs may ensure day to day compliance with the State law and license conditions by operators, the determination of violations of the law and imposition of penalties should continue to vest with the State.

– Tanisha Khanna & Gowree Gokhale

You can direct your queries or comments to the authors

¹ Chandresh Sankhla v State of Rajasthan & Ors. DB Civil Writ Petition No. 6653/2019 High Court of Rajasthan, Bench at Jaipur, Ravindra Singh Chaudhary v Union of India & Ors D.B. Civil Writ Petition (PIL) No. 20779/2019, Mohan Lal Nama W/o Late Shri Murlidhar Nama v Union of India & Ors DB Civil Writ Petition No. 11122/2020, Saahil Nalwaya v. State of Rajasthan DB Civil Writ Petition No. 2026/2021.

² Section 2 (k) "Fantasy Sports" means any Online Competition in which a contest is offered by the Fantasy Sports Platform where users are permitted to emulate selectors, coaches, captains of online teams, consisting of real-life players or teams, that compete against online teams of other users with results tabulated on the basis of statistics generated by the real-life sportspersons in officially sanctioned sports matches, including but not limited to, pay-to-participate variants where users pay Entry Fee to participate in the contest on the basis that the contest's aggregate Prize Monies and Awards are contributed to by all the participating users;

³ Section 2 (f) "Derivative Formats" shall mean and include any format of fantasy-based selection that has been judicially upheld and recognised by a Court of competent jurisdiction in India or certified by the Self Regulatory Organisation, where there is a predominant element of skill and is based on the statistics, analysis and knowledge of the relevant real life products and/or services under this Act;

⁴ Section 2 (h) "Esports" shall mean a simulated real life domestic or internationally recognised sports and games in the form of Online Competitions, played over the internet, including through an internet web site or a mobile application and approved from time to time by the Government or accredited Sporting Federations or appropriate authority as may be notified;

⁵ Section 3(1), Draft Bill

⁶ Section 3(b), Draft Bill: Nothing in this Act shall apply to: (b) The organisation of any Competition that users do not participate for money or valuable security.

⁷ Meghalaya Regulation of Gaming Act, 2021

⁸ Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill, Act 2015

⁹ Chapter IV, Section 17, Draft Bill

¹⁰ Section 17(i) – (iii), Draft Bill

¹¹ Section 18, Draft Bill

¹² (v) "Self-Regulatory Organisation" means and includes an industry association registered as a Section 8 Company under the Companies Act, 2013, or a society registered under the Rajasthan Society Registration Act, 1958 or a trust registered under the India

Trusts Act, 1882 and legally recognised by the courts of competent jurisdiction or Commission under this Act to represent a particular class of Virtual Online Sports with the aim of protecting the users, resolving the disputes and promoting ethical and professional standards;

¹³ Section 12, Draft Bill

¹⁴ Section 12(1), Draft Bill

¹⁵ Section 13, Draft Bill

¹⁶ Section 14(2), Draft Bill

¹⁷ Section 20(2) and Section 20(3) of the Draft Bill

¹⁸ Section 11, Draft Bill

¹⁹ Section 20(4), Draft Bill

²⁰ Section 26, Draft Bill

²¹ Section 19(6), Draft Bill

²² Section 20(2), Draft Bill

²³ Section 20(3), Draft Bill

²⁴ 14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

²⁵ Section 4, Nagaland Act provides that "4. The Licensing Authority shall be entitled to determine and add to the list of games which are 'games of skill' based on the aforementioned parameters. "

²⁶ Section 2(k) read with Schedule B (xxi) "Any other game of skill permitted by the State Government from time to time"

²⁷ Section 13(c)

²⁸ Section 13(d)

²⁹ Section 13(e)

³⁰ WP(L) No. 2845 of 2015, High Court of Bombay

³¹ Section 12(4)(e), IT Rules

³² Section 13(e)

³³ Section 19(3), Draft Bill

³⁴ Section 19(4), Draft Bill

³⁵ Section 18(4), Draft Bill

³⁶ Section 12(5)(b), Draft Bill

³⁷ Section 12(5)(c), Draft Bill

³⁸ Section 12(5)(d)

³⁹ *Central Law for Skill Games: Need of the Hour, Gokhale and Khanna: Skill Games in India [2019] 8 GLR, available:*

<https://www.liebertpub.com/doi/10.1089/glr.2.2019.2382>, <https://www.nishithdesai.com/NewsDetails/5394>

⁴⁰ <https://timesofindia.indiatimes.com/business/india-business/govt-forms-inter-ministerial-panel-to-regulate-online-gaming/articleshow/91821159.cms>

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