

# Technology Law Analysis

November 03, 2022

## ADDITIONAL COMPLIANCES FOR INTERMEDIARIES UNDER RECENTLY AMENDED INTERMEDIARY GUIDELINES

### SUMMARY

India notified the amendments to the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* ("IT Rules") on October 28, 2022 by way of the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2022* ("Amended Rules"). The amendments come into effect immediately, and introduce a number of important obligations for intermediary platforms including very quick timelines for resolution of grievances, and acting as a protector of fundamental rights. It also introduces the construct of "Grievance Appellate Committee" to decide appeals arising from decisions of an intermediary's Grievance Officer.

The Amended Rules are in furtherance of the draft of amendments released by the Ministry of Electronics and Information Technology ("MeitY") on June 6, 2022. Public comments were sought on the draft, followed by consultation process. There was push back to several proposed amendments. However, the amendments have still gone through, imposing several, somewhat vague obligations on intermediary platforms.

### KEY AMENDED RULES

#### 1. Publication of terms and conditions in local language and obligations regarding unlawful content

- i. Rule 3(1) (a) of the Amended Rules require intermediaries to:
  - publish their rules and regulations, privacy policy and user agreement ("User Terms") on their websites and mobile applications in English or any language specified in the Eighth Schedule to the Constitution for access or usage of its computer resource by any person in the language of his choice, and
  - ensure compliance of the same.
- ii. Rule 3(1)(b) of the Amended Rules requires intermediaries to take 'reasonable efforts' to ensure that users do not publish the prescribed categories of unlawful content.
- iii. Rule 3(1) (f) of the Amendment Rules require intermediaries to periodically (at least once in a year) inform users in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice about the User Terms or any changes to it.

#### NDA's take:

- Publication of User Terms in English should suffice. Intermediaries may consider publishing its User Terms in few other widely spoken local languages in India (to be chosen from the languages specified in the Eighth Schedule to the Constitution). This should not be a must have.
- The reference to publish User Terms in language of the user's choice is very board. Meeting the request to provide User Terms in a language of user's choice is cumbersome, burdensome, with an added risk of translation not been accurate per se. There could also be consistency issues with the original language of the User Terms and local language.
- The scope of the term 'ensure compliance' with User Terms under Amended Rule 3 (1) (a) is vague, i.e., it is unclear whether a) intermediaries are required to ensure that users do not publish any content in violation of the terms and conditions (this will amount to pre-filtration), or b) intermediaries are required to simply enforce their terms and conditions, i.e., take down content which has violated their User Terms. The press note accompanying the Draft Amendments indicates that it is the latter interpretation.
- The terminology of 'reasonable efforts' in Rule 3(1)(b) of the Amended Rules is vague and does not define the exact scope of obligations.

#### 2. Accessibility to Service

Rule 3(m) of the Amended Rules requires intermediaries to take all reasonable measures to ensure accessibility of its services to users along with reasonable expectation of due diligence, privacy and transparency.

#### NDA's take:

- The requirement to take reasonable measures to ensure accessibility of services to users, and to meet users' reasonable expectations of due diligence, privacy, and transparency is unclear, i.e.:

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- The terminology of 'reasonable measures' is vague and does not define the exact scope of obligations.
- It is unclear what "due diligence" obligations are being referred to here. The IT Rules as a whole prescribe due diligence obligations for intermediaries.
- The term 'transparency,' can be subjective and is vague i.e., what processes are intermediaries required to be transparent about?
- There is no clarity on what could be the 'reasonable' expectation of due diligence, privacy and transparency.

The expectation seems to be that the processes used to monitor, and take down or blocking of content is fair, transparent and reasonable for all. This could mean that take down or blocking is consistent with the intermediary's policies and is undertaken after due notice to the user.

### 3. Respecting rights accorded to citizens under the Constitution of India

Rule 3 (n) of Amended Rules require intermediaries to respect the rights accorded to citizens under the Constitution of India under Article 14, 19 and 21.

#### NDA's take:

- There has been a plethora of Indian judgments which clarify that fundamental rights under the Constitution such as freedom of speech and expression, and protection of life and personal liberty (which has been interpreted to include the right to privacy), are only enforceable against the State and instrumentalities of the State. These rights are not enforceable against private entities nor have been applied in case of publication of views on other media.
- For example, an individual cannot require a private newspaper to publish an article, nor force a private TV channel broadcast their interview, citing the fundamental right to freedom of speech and expression.
- Accordingly, this obligation cannot be imposed on private intermediary platforms (specially by way of rules, under a principal act which does not have such contemplation), nor will such an obligation be enforceable against such platforms and maybe challenged in future.

### 4. Expeditious Actions

Rule 3(2) of Amended Rules requires intermediaries to:

- Resolves complaint in the nature of request for removal of information or communication link relating to a vast variety of legal issues including privacy, obscenity, misinformation, impersonations, etc. expeditiously within 72 hours of such reporting by user and any other complaints within 15 days.
- Build appropriate safeguards to avoid any misuses by users.

#### NDA's take:

- Intermediaries will need to address and resolve certain user complaints within 72 hours, except for matters where complaints can be resolved within 15 days. This may involve making challenging determinations, such as whether content is (a) patently false or misleading (which may require fact-checking), (b) threatens public order (which may require determination of local sentiment), among others within a short period of time.
- The terminology of 'appropriate safeguards to avoid misuse by users' is vague and does not define the exact scope of obligations. It appears that regulator wants to make sure that intermediaries are not subjected to frivolous grievances.

### 5. Appeals to Grievance Appellate Committee

Rule 3A of the Amended Rules provides for the constitution of 'one or more' Grievance Appellate Committees ("GAC") by the Central Government within three months from the date of commencement of the Amendment Rules (i.e., three months from October 28, 2022, which would be [January 28, 2022](#)):

- 'Any person' aggrieved by a decision of an intermediary's grievance officer may appeal against those decisions to the GAC within 30 days of receipt of the grievance officer's decision.
- The GAC is required to deal with the appeals expeditiously and 'endeavour' to resolve the appeal within 30 days of receipt of the appeal.
- Intermediaries are required to comply with orders of the GAC, and publish reports of compliance on their websites.

#### NDA's take:

- The framework of setting up a GAC under the IT Rules could itself be challenged on grounds of being unconstitutional, as well as *ultra vires* the primary legislation.
- The constitution and qualification of members in the GAC are not clear. This is critical given the diverse, and new-age issues that will be taken up before GAC in the future. It is also not clear on how the intermediaries or GAC will deal with issues which require evidence or judicial intervention.
- The process followed by the GAC is unclear. It is also unclear if they will hear representation from the user and the intermediary before taking a final decision on the matter.

### FINAL WORD

The Amended Rules will require intermediaries to bring in several process changes. The unclear wording of several of the provisions may result in litigations. For the time-being, the Amended Rules are in effect and intermediaries are obligated to comply, lest they risk losing their safe harbour. Intermediaries should review their existing tech and processes to evaluate if they are sufficient to ensure compliance with these amendments. Intermediaries should also re-visit their User Terms to see if the requirements under Amended Rules are being met. As an example, intermediaries may consider specifically stating that they are committed to principles of equality, free speech, privacy and personal liberty to broadly cover the parameters under Articles 14, 19 and 21 of the Constitution of India. Other relevant changes can be made to their processes and User Terms to meet the requirements of due diligence, privacy

and transparency, expected of intermediaries under the Amended Rules.

– **Aparna Gaur, Aarushi Jain & Gowree Gokhale**

You can direct your queries or comments to the authors

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