

Trends and Developments

Contributed by:

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Nishith Desai Associates is an India-centric global law firm with offices in Mumbai, Bengaluru, Delhi, Silicon Valley, Singapore, Munich and New York. The gaming practice comprises three leaders and 12 qualified lawyers. The team has been a pioneer in the industry, and the gaming practice has existed almost as long as the online gaming industry in India. The team has worked on multiple innovative and out-of-the-

box transactions in the gaming space, particularly cross-jurisdictional investments and entry strategies for foreign clients. The firm's focus on research and academic work in this area enables it to provide cutting-edge solutions for clients. Nishith Desai Associates has also been instrumental in industry-wide efforts and policy advocacy on behalf of the Indian gaming industry.

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India represents the second-largest online gaming community, with an impressive 442 million user base. As per a study by Grant Thornton Bharat in collaboration with industry body E-Gaming Federation, the Indian gaming industry is projected to experience a whopping growth rate of 20% to reach INR231 billion in 2025, from INR220 billion in 2023. Real money skill gaming accounts for approximately 83–84% of the revenue. Prime Minister Modi heralded the role of the gaming industry in job creation and outlined the government's goal to establish India as a global leader in the gaming industry during his speech on Indian Independence Day in August 2024. This followed his interaction with top gamers earlier in 2024, where he sought to understand the regulatory issues in the industry and recognised the need for a minimal intervention approach to video gaming regulation. He stressed the importance of Indian youth leading the use of Indian culture to create innovative multiplayer games that attract global audiences, positioning India as a top game exporter.

The gaming industry also forms a critical part of India's "Digital India" initiative, which is set to transform India to a digitally empowered nation. In furtherance of this aim, the federal Cabinet

approved the establishment of a National Centre of Excellence (NCoE) for the Animation, Visual Effects, Gaming, Comics and Extended Reality (AVGC-XR) sector in September 2024. The NCoE will act as a nodal institute for skilling, research and development, IP/content creation based on India's heritage, and as an incubation centre for start-ups in the industry. There are also proposals underway to explicitly clarify that 100% foreign direct investment (FDI) is permitted in the skill gaming sector through the automatic route.

Despite the promising growth of India's online gaming industry and repeated recognition of the need to prioritise the role of the gaming industry, regulatory uncertainty continues to loom, for real money gaming in particular. Simultaneously, ongoing uncertainty around Goods and Services Tax (GST) creates further challenges to industry growth.

Scrutiny of offshore advertising and the offering of illegal gaming services continues to increase, from various Indian regulatory authorities such as the Ministry of Electronics and Information Technology (MEITY), Enforcement Directorate (ED), and Indian tax authorities.

We have discussed below some of the key trends and developments in 2024 and their potential impact on the industry in India.

Positioning India as a Global Gaming Hub: TRAI Recommendations and AVGC Policy

In April 2022, the Ministry of Information and Broadcasting (MIB) set up an Animation, Visual Effects, Gaming and Comics (AVGC) Task Force (the “AVGC Task Force”), to boost industry potential through various training initiatives and government incentives. The AVGC Task Force released its report in December 2022, which recognised the potential of the gaming industry and its contribution to the Indian economy. In furtherance of the same, in September 2024, the Union Cabinet approved the establishment of a NCoE in Mumbai to support skilling, education, industry development, research and innovation in the AVGC sector, particularly in gaming. Further, the MIB has announced that the National AVGC-XR Policy will be implemented soon, along with the introduction of a National AVGC-XR Mission. The AVGC-XR Policy is currently awaiting cabinet approval. The policy is designed to be the framework for the sector’s development and provide guidance to states, which will develop their own AVGC policies. The National AVGC-XR Mission will create an integrated plan for promotion and growth of the AVGC sector.

The Telecom Regulatory Authority of India (TRAI) released its recommendations to the National Broadcasting Policy in June 2024. The recommendations include incentives to attract skilled gamers, content creators and industry professionals to establish India as a “Gaming Content Hub”. The recommendations suggest that India consider a gaming visa similar to Dubai’s and align its AVGC Policy accordingly. It also recommended measures to unlock India’s potential as a “Gaming Content Hub” by creating and sup-

porting infrastructures such as plug and play labs, incubators and by encouraging start-ups and new players.

FDI Limits Proposed to be Explicitly Liberalised in Skill Gaming Sector

The Foreign Direct Investment Policy of India (the “FDI Policy”), as codified into law by the Foreign Exchange Management Act, 1999 and the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (the “Non-Debt Rules”), prohibits FDI in lottery and gambling and betting (including casinos).

The terms “gambling and betting (including casinos)” are not defined under the FDI Policy/Non-Debt Rules. Due to this, the authorised dealer banks that process investments, and the Department of Industrial Policy and Promotion (DPIIT), (the Central department that provides approvals for FDI), have grappled with distinguishing between “gambling” and “games of skill” for FDI purposes.

Recently, court rulings have provided clarity on certain aspects. For instance, in a significant ruling, the High Court of Bombay has upheld that foreign investment in entities offering games with no real-money rewards does not amount to “betting and gambling” under the FDI Policy. The court interpreted past Supreme Court judgments and reiterated that the predominant element of the activity (skill or chance) would determine the character of the game. In order to constitute gambling, a game (i) must be predominantly a game of chance, and (ii) must be played for a reward. However, notwithstanding these rulings, there is a strong need for regulatory certainty in FDI in increasingly diverse and innovative games of skill.

In an effort to simplify and streamline FDI in the industry, as per news reports, the government is planning on explicitly clarifying 100% FDI in real money games of skill entities through the automatic route – ie, where no permission is required. In pursuance of the same, as per news reports, the DPIIT has sought clarity on the distinction between games of skill and games of chance from various ministries, such as MIB, MEITY and NITI Aayog, to draft a policy permitting 100% FDI in online gaming. Discussions are reportedly underway at various levels of the government regarding the DPIIT proposal. The outcome of this exercise could significantly boost regulatory certainty, and therefore investment in the already burgeoning Indian real money skill gaming industry.

Federal Self-Regulatory Approach Shelved, Establishment of Government Regulator

At the close of 2022, MEITY was appointed the federal regulator for online gaming, and the Ministry of Youth Affairs and Sports was appointed as the federal regulator for e-sports. This was a significant step towards long-sought federal regulations for the online gaming industry, hitherto governed by antiquated and inconsistent state-wide laws.

As discussed in the [India Law and Practice chapter in this guide](#), the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 were amended in April 2023, to create a federal framework to regulate online gaming (“Gaming Amendments”), which were expected to operate in parallel with the state-wide gaming legislation (“Gaming Enactments”). Some of the key features of the Gaming Amendments are set out below.

- The Gaming Amendments proposed a co-regulatory framework between designated self-regulatory bodies (SRB) and the MEITY.
- Only companies incorporated in India were eligible to apply to be an SRB.
- Two types of games were sought to be regulated: (i) permissible online real money games (PORMG) and (ii) other online games. Online gaming intermediaries offering PORMG would be overseen by SRBs.
- These SRBs would be responsible for verifying a game as permissible, PORMG, provided it met specific criteria, such as excluding any form of wagering on outcomes. As a result, games of chance, and games like sports betting were intended to be excluded from the regulatory framework.

However, notably the government has retreated from the co-regulatory framework in the Gaming Amendments, now considering the establishment of a federal government regulator instead. As per news reports dated January–February 2024, MEITY examined the proposals submitted for SRBs and concluded that they were heavily dominated by major industry players, and would not be representative of the various stakeholders. Hence, the central government shelved the proposal and per such reports has taken it upon itself to regulate gaming. It is yet to be seen what direction MEITY proposes to take with respect to the new regulations. The National Law University (NLU) Delhi, in collaboration with the E-Gaming Federation, is engaging with industry stakeholders to chart the course for future gaming regulations. NLUD was expected to submit its report to MEITY after the general elections.

In parallel, a non-governmental organisation has filed a petition before the Delhi High Court challenging the Gaming Amendments, including on the grounds that the Centre has issued the

amendments by usurping the state's exclusive legislative competence to regulate online gaming. The matter is still pending before the court.

States are continuing to regulate the gaming industry at a state level by considering addressing various forms of user harm, including gaming addiction amongst children under the Gaming Enactments. For example, Tamil Nadu is considering introducing daily usage and monetary caps for online gaming and ban on gaming during certain hours (between midnight and 5AM).

Supreme Court to Examine Constitutionality of Bans on Skill Games

Under most Gaming Enactments, offering or playing games of chance for money is prohibited, while games of skill are generally exempt. Offering and playing games of skill has been recognised as a constitutionally protected activity by the Supreme Court and various state High Courts. A few states such as Nagaland, Sikkim and Tamil Nadu, have opted to regulate such games through licensing regimes, while others have attempted to ban even games of skill, when played for monetary stakes. However, High Courts in certain states have ruled these prohibitions unconstitutional.

- Kerala – the Kerala High Court overturned a ban on online rummy for stakes in 2021, and that decision is now under appeal before a larger bench before the High Court.
- Tamil Nadu – in April 2023, Tamil Nadu introduced the Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Act, 2022, which aimed to ban games like poker and rummy. While physical versions of games like rummy and poker have been recognised as games of skill, the Tamil Nadu government sought to ban the same on the basis that the online versions of these games

were games of chance, due to the manner in which the games were played online. In November 2023, the Madras High Court struck down the restrictions on rummy and poker as unconstitutional. The court also notably held that the same level of brain activity would be required to play poker and rummy online as it would be required to play these games offline. The Court however did uphold the constitutionality of other provisions of the Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Act, 2023, which sought to regulate, not prohibit, online games of skill. The Tamil Nadu government has since filed a Special Leave Petition (SLP), a petition seeking permission to appeal before the Supreme Court challenging the Madras High Court's ruling.

- Karnataka – petitions were brought before the Karnataka High Court to challenge the provisions of the Karnataka Police (Amendment) Act, 2021, which sought to ban all online games involving stakes, including skill-based games. The Karnataka High Court ruled these provisions unconstitutional. The Karnataka government has also filed an SLP against this decision.

Accordingly, the SLPs seeking permission to appeal the judgements from Tamil Nadu and Karnataka have been combined and are currently pending before the Supreme Court.

In addition, writ petitions were filed in the Telangana High Court challenging the Telangana Gaming (Amendment) Act, 2017, which sought to ban skill-based games played for stakes. Following Tamil Nadu and Karnataka, the Telangana government filed a transfer petition to have the case heard alongside the other appeals in the Supreme Court. The case is yet to be clubbed with the other petitions.

Thus, there are five matters now before the Supreme Court. The outcome of these cases will play a critical role in determining whether states can ban skill-based games, with the Supreme Court's decision being binding on all Indian states.

These High Court rulings suggest increasing recognition of the constitutional right to offer and play skill-based games by the Indian court, but the final outcome of the ongoing special leave petitions before the Supreme Court will lay the question to rest.

GST on Online Gaming

With effect from 1 October 2023, the GST laws were amended to levy 28% GST, on the total deposit amount. These amendments have significantly impacted the sector since their introduction, leading to layoffs and the closure of some start-ups due to the tax burden. The industry had earlier been paying 18% GST on the service fee charged by the platforms. A survey of gaming companies indicate that most companies prefer that the GST be applied to the gross gaming revenue, instead of the deposit amount.

Retrospective GST notices

While the GST amendments are operational from 1 October 2023, Indian real money gaming operators have received a slew of notices from GST authorities in India seeking to implement the 28% GST on the deposit amount retrospectively for previous years (March 2017 – July 2023) as well. Operators have challenged the issuance of the show cause notices before the High Courts. In many instances, the relevant High Courts have granted a stay on the operation of the show cause notices to the gaming operators. These cases have been consolidated and are currently awaiting adjudication before the Supreme Court. In these matters the operators have challenged

the legal provisions on the basis of which the show cause notices were issued. The matter was next listed on 5 November 2024.

Amendments could bring relief for retrospective GST dues

Through a recent amendment introducing Section 11 A to the Central Goods and Services Tax Act, 2017, the government is considering softening its stance on levying GST in certain cases. This provision empowers the government, on the recommendations of the GST Council, to allow regularisation of non-levy or short levy of GST, where tax was being short paid or not paid due to generally prevalent practices. The government is empowered to implement this relief by notifying such practices upon recommendations of the GST Council. However, no notification has been issued to date.

Since the real money gaming industry was paying GST at the rate of 18% on the service fee as a general practice, this provision is expected to provide relief to the industry. However, the benefit cannot be confirmed in the absence of a notification to this effect. Despite the 28% GST implication, investor sentiment remains strong in the gaming industry, with deal activity reflecting confidence in the sustained potential of the industry.

GST registration for offshore operators

The amendments also require compulsory GST registration for offshore gaming operators and blocking of gaming platforms in case of non-compliance. The GST authorities have urged MEITY to block over 170 offshore online gaming platforms for non-compliance with the registration requirement under the GST laws. Tax collection from online gaming has been reported to have increased by 412% owing to the GST amendments.

Increased Scrutiny of Offshore Gambling Operators Targeting India

As mentioned above, games of chance like casino, sports betting, etc, are prohibited under Indian gaming enactments. In addition, Indian foreign exchange control laws prohibit the remittance of money by Indian users abroad for gaming activity, including lottery and sweepstakes, amongst others.

However, offshore operators usually offer gambling products remotely, often in violation of Indian anti-money laundering and exchange control laws by routing funds through cash transfers, hawala transactions or other complex methods.

Indian regulators and enforcement authorities have increased scrutiny and enforcement action against such operators. The local/domestic industry has also been vocal against such operators and sought to distinguish themselves from the offshore “gambling” industry.

Blocking of websites

MEITY had directed certain Indian telecoms service providers to block access to several offshore sports betting and gambling platforms offered remotely in India. Based on news reports, the blocking appears to have been triggered by various violations, including non-compliance with exchange control and money laundering laws and GST violations raised by GST authorities. As of December 2023, MEITY is reported to have blocked around 174 betting and gambling applications.

Attachment orders and arrests by ED in connection with money laundering

The ED under the Prevention of Money Laundering Act, 2002 is continually cracking down on illegal and offshore gambling operators. Recently, the ED issued an attachment order for proper-

ties worth around INR260 million (approximately USD3,093,493), including assets in cryptocurrency wallets. This was in a case of fraud involving an app, “Fiewin” linked to a Chinese national, where the amount in question was around INR4 billion (approximately USD47,592,200). The ED also issued an attachment order. In another investigation linked to money laundering by another unlawful online gaming app “E-Nugget”, the ED seized nearly INR900 million (approximately USD10,708,243) from cryptocurrency wallets of exchanges. In the infamous Mahadev betting app case involving large-scale money laundering from illegal betting activities, the ED has frozen assets over around INR5.8 billion (approximately USD69,008,678).

Advisories against surrogate advertisements

The Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022 (the “Misleading Ads Guidelines”) issued under the Consumer Protection Act, 2019 (CPA) prohibit the advertisement of goods, products or services, whose production, sale or provision, are prohibited under law. Most state gaming enactments have specific prohibitions against the advertisement of gambling or games of chance. The Misleading Ads Guidelines also prohibit the surrogate advertisement or indirect advertisement of goods or services whose advertising is otherwise prohibited or restricted by law.

Offshore operators have been continually engaged in advertising sports betting entities under the guise of news platform (on several occasions, MIB has noted that the logos of such surrogate news websites bear a striking resemblance to those of betting platforms). The Advertising Standards Council of India (ASCI) flagged and reported 700 advertisements from illegal betting and gambling companies to the

MIB between April and August 2024. This was reportedly prompted by the rampant advertising by offshore betting platforms during the Indian Pro Kabaddi League.

The MIB, the federal Ministry responsible for online advertisements, has issued an advisory directing social media platforms and online advertisement intermediaries to refrain from publishing and broadcasting direct and surrogate advertisements of offshore online betting platforms. The Central Consumer Protection Authority (CCPA) has also issued an advisory expressing concerns on the endorsement and promotion of betting activities by celebrities and influencers. The advisories also advise against targeting such content towards Indian audiences and requiring social media intermediaries to conduct sensitisation efforts such that users refrain from posting such content.

The Press Council of India has asked print media as well to adhere to the directives issued by the CCPA.

Domestic skill gaming industry seeks to distinguish itself from offshore gambling operators

As of August 2024, various stakeholders from the real money gaming industry met with senior officials of MIB to discuss, among other things, the possibility of MIB certification/seal for legitimate games, to distinguish them from illegal offshore betting apps. Domestic operators have approached MIB with this concern owing to their struggles with tax burden and profitability, while illegal foreign players continue to expand their user base.

Rules Under the Data Protection Law to be Issued

India introduced its first comprehensive data protection law in the form of the Digital Personal Data Protection Act, 2023 (DPDPA) on 11 August 2023. However, the DPDPA is yet to be brought into effect. It will be made effective once its provisions are operationalised through detailed implementation rules.

As per the statements made by the Cabinet Minister for the MEITY in August 2024, the rules were expected to be released for public consultation in September 2024. The rules are yet awaited. Once brought into force, the DPDPA will be applicable to the collection and processing of personal data by online gaming operators.

The DPDPA borrows several features of the General Data Protection Regulation (GDPR), in terms of key stakeholders (data principal, data fiduciary, and data processor), notice and consent requirements, security measures, key rights of data principals, and certain grounds for processing. However, there are also marked differences in terms of obligations for cross-border data transfers, data breach reporting requirements, aspects of grievance redressal and quantum of penalties, amongst others.

One of the notable features of the DPDPA is the consent requirement for processing children's data. Under the DPDPA, verifiable consent of the parent must be taken before the personal data of a child is processed. The DPDPA also prohibits data fiduciaries from processing the data of child in a manner that is likely to have a "detrimental effect" on their well-being, and from undertaking tracking or behavioural monitoring or targeted advertisements directed at children. There may be certain exceptions from verifiable parental consent and the prohibition on tracking,

behavioural monitoring and targeted advertisement for classes of data fiduciaries or for certain purposes, as may be prescribed the rules to be issued under the DPDPA. Further, the Central government may, by notification, exempt data fiduciaries from any or all such obligations for processing personal data of children above a particular age, if they are satisfied that the data fiduciary has ensured that processing of personal data of children is undertaken in a verifiably safe manner.

This provision will have a large impact on gaming operators targeting minors, including those offering free-to-play games with targeted advertising. Further, it is unclear if “tracking or behavioural monitoring” would include features to check user progress, cheating, cyberbullying, or detect other harmful activity.