

**COMMENTS TO NITI AAYOG'S DRAFT ON GUIDING PRINCIPLES FOR FANTASY
SPORTS INDUSTRY IN INDIA**

1. Background

- 1.1. On 5th December 2020, NITI Aayog released a draft for discussion titled 'Guiding Principles for the Uniform National-Level Regulation of Online Fantasy Sports Platforms in India' ("**Draft Report**"), seeking comments from different stakeholders of fantasy sports industry by 18th January 2020.
- 1.2. The Draft Report proposes to establish a single self-regulatory organization ("**SRO**"), a Government recognized body for online fantasy sports platforms ("**OFSPs**"). The SRO framework seeks to achieve the following objectives:
 - (a) To bring clarity on legality of fantasy sports and implement a pan-India policy for comprehensive governance of online fantasy sports.
 - (b) To provide a flexible self-regulatory framework, or 'light-touch' regulations, this will ensure transparent governance without impeding innovation for the OFSPs.
 - (c) To provide a unified grievance redressal mechanism for resolving consumer complaints and settling disputes between or around OFSPs.
- 1.3. The Draft Report includes a set of guiding principles ("**Draft Guiding Principles**") which must form the basis of self-regulation and treated as a uniform "regulatory sandbox". A list of key Draft Guiding Principles are as follows:
 - (a) SRO will be empowered, inter alia, to determine whether an OFSP's format of the fantasy sports game is skill-predominant or not.
 - (b) OFSPs which are member of SRO ("**OFSP-members**") will enjoy a nation-wide uniform safe-harbor exemption under gambling laws across different states.
 - (c) OFSPs have to strictly comply with standards set by Advertising Standards Council of India (ASCI) for advertising real-money games.¹ Accordingly, the ads cannot display fantasy sports as a source of sustenance or a lottery or an investment opportunity.
 - (d) An OFSP requires approval from independent evaluation committee of the SRO for operating a game not predominant in skill to a certain extent.
 - (e) OFSPs cannot offer 'pay-to-play' fantasy sports games to minors or users below 18 year of age.

2. Preliminary

- 2.1. We appreciate the efforts of NITI Aayog for introducing these Draft Guiding Principles and calling for stakeholders' consultation on the document. This submission encapsulates our

¹ Press Release -Game's up for misleading gaming ads, ASCI (24th November 2020) <https://www.ascionline.org/images/pdf/press-release-gaming-guidelines.pdf> (as available on 12th January 2021)

comments in response to the Draft Guiding Principles and seeks to highlight certain important aspects of the Indian online gaming industry which have remained thereby unaddressed. .

3. Overarching Concerns and Recommendations

3.1. Include other ‘pay-to-play’ online games in the envisaged framework

3.1.1. The Draft Report proposes a framework to govern those online gaming platforms which offer fantasy sports games only. It is noteworthy that along with ‘fantasy sports’ there are other categories of online games as well which are offered by OFSPs through the same platform. The categories of online games can be classified as: (i) Casual Games, electronic games played for recreation and fun; (ii) Esports, electronic games in which two or more players compete for scores or victory; (iii) Fantasy Sports, games in which users prepare virtual teams of real players playing in real world sports and compete with each other; (iv) other e-competitions, skill based real money online games like card games (rummy and poker).²

3.1.2. It is suggested that NITI Aayog should consider OFSPs such as Mobile Premier League and Paytm First Games which offer all of the afore-mentioned categories on the same mobile application through which they offer fantasy sports games.³ The framework should act as a the window of opportunity to introduce regulatory principles for different categories of online games. Governing the OFSP industry alone, could result in complex situation of regulatory uncertainty for many OFSPs and the online gaming industry overall.

3.2. Define the extent and scope of the term “fantasy sports”

3.2.1. The Draft Report neither defines the term “fantasy sports” nor enlists activities that might constitute the same under the proposed framework. The regulatory constraints which may arise out of the proposed framework due to the lack of a definition of ‘fantasy sports’ are as follows:

3.2.2. *Whether ‘free-to-play’ formats are also required to be ‘skill-predominant’?*

The Draft Guiding Principles provide that ‘all formats’ of fantasy sports games as offered by OFSPs should be skill-predominant.⁴ It is uncertain whether ‘free-to-play’ formats of fantasy sports games will also fall under the ambit of the umbrella term ‘all formats’. There are various digital service providers which frequently organize prediction based games for free for their customers to advertise the services and reward customers with vouchers, gifts, discounts and

² The evolving landscape of sports gaming in India, KPMG-IFSG (March, 2019) <https://assets.kpmg/content/dam/kpmg/in/pdf/2019/03/online-gaming-india-fantasy-sports.pdf> (as available on 12 January 2021)

³ FAQs, Paytm First Games, https://paytmfirstgames.com/about_us; About the MPL Gaming App, MPL, <https://www.mpl.live/>.

⁴ Principle 2, Annexure 1, Draft Guiding Principles.

points.⁵ These contests allow participants to predict the winner or the line-up of players of the real-world sports fixtures. Without the definition of ‘fantasy sports’, all the digital platforms organizing such prediction-based games will require the approval of SRO. As SRO will recognize only the skill-based competitions, the prediction-based games will be held as invalid.

It is suggested that NITI Aayog should include a model definition of the term ‘fantasy sports’ in the Draft Guiding Principles. Also, the definition shall specifically exclude ‘free-to-play’ formats from the definition. An element-wise definition of ‘fantasy sports’ is suggested as follows:

“The term ‘fantasy sports’ means a game of any duration conducted on the Internet in which a registered player does all of the following:

- (1) Competes against other registered players as the owner or manager of an imaginary or simulated team of professional athletes in an imaginary or simulated game.*
- (2) Uses the statistics accumulated by the professional athletes in real-world professional sporting events to determine the scores of the imaginary or simulated game.*
- (3) Plays for a predetermined prize.*
- (4) Pay a charge to an authorized operator providing the game in order to participate.”⁶*

3.2.3. Which OFSP should seek approval?

The proposed framework states that an OFSP operator is required to obtain prior approval of the evaluation committee of the SRO, in cases where it is offering a pay-to-play variant of fantasy sports contest that varies from the judicially determined format and ‘game of skill’.⁷ It is ambiguous as to which ‘format’ the Draft Guiding Principles are referring to. Further the clarity is required as to who will evaluate an OFSP to determine whether variation exists and what consequences an OFSP operator would face for not seeking approval from the SRO.

Till date, three judicial precedents by different High Courts have objectively analysed the format of a popular fantasy sports platform ‘Dream 11’ to be a ‘game of skill’.⁸ The Courts found Dream 11 to be a ‘game of skill’ on the basis of its format’s following features: (i) The success in Dream 11’s fantasy sports depends upon user’s exercise of skills based on superior knowledge, judgment and attention; (ii) The result is not dependent on the winning or losing of a particular team in real world game or any particular day. These features are subjective and can only be determined by

⁵ Zomato brings back its ‘predict and win’ game, <https://www.exchange4media.com/digital-news/zomato-brings-back-its-in-app-predict-win-game-97141.html>.

⁶ Gambling: Internet Fantasy Sports Game Protection Act, Assemb. B. 1437, 2015– 2016 Reg. Sess. (Cal. 2015) (as amended in Assemb., Sept. 10, 2015), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1437.

⁷ Principle 2, Annexure 1, Draft Guiding Principles.

⁸ Chandresh Sankhla v. State of Rajasthan, 2020 SCC OnLine Raj 264; Gurdeep Singh Sachar v. Union of India, Judgment dated 30th April 2019 in Criminal P.I.L. No. 16 of 2019; Varun Gumber v. U.T., Chandigarh, 2017 CriLJ 3827.

evaluating the in-game experience on a case-to-case basis. Therefore, a dedicated body will be required to determine whether an OFSP varies from the judicially approved format and to what degrees.

- 3.2.4. It is suggested that the Draft Guiding Principles shall make the aforementioned criteria as a standard for obtaining approval of the independent evaluation committee of the SRO. This way the independent committee will be the responsible body to test an OFSP and decide whether an OFSP's format is skill based or not. Accordingly, it will streamline the approval process with the evaluation committee's "power to set rules or recommend changes to formats" for OFSPs.⁹

3.3. Ensuring that the SRO must be an inclusive body with uniform representation

- 3.3.1. An SRO is established in order to address regulatory concerns and provide for the best practices to be followed by the industry with regards to their customers and other participants in the ecosystem.¹⁰ Therefore, the SRO framework should be designed to protect the interests of all the stakeholders involved in the OFSP market.

- 3.3.2. *All the member-OFSPs shall have equal role and uniform representation*

The Draft Guiding Principles mention that the organization recognized as SRO must be a fantasy sports focused industry body with membership of those OFSPs which have at least 66 percent of aggregate registered users in India.. This is a vague and absurd eligibility criterion for recognition as SRO.¹¹ There are multiple numbers of OFSPs in India; however the concentration of users is not uniform across all OFSPs.¹² Due to this, OFSPs with large domestic user base can become members as only they will fulfil the requirement and many other small platforms will be left out.

Some OFSPs have more concentration of registered users than others and hence exercise greater influence over the market. Upcoming OFSPs can be unfairly affected. The eligibility criterion for the industry body must clarify that an industry body will be recognized as SRO if its members include majority of the industry segment and it is representing diverse participants, in terms of number and role.

- 3.3.3. *The SRO shall be an inclusive body with diverse market participants*

⁹ Principle 2, Annexure 1, Draft Guiding Principles.

¹⁰ Draft framework for recognition of a Self-Regulatory Organisation for Payment System Operators, https://www.rbi.org.in/scripts/bs_viewcontent.aspx?Id=3892.

¹¹ Pg 6, Draft Guiding Principles.

¹² Number of users of top fantasy sports companies India 2018, <https://www.statista.com/statistics/1065111/india-number-of-users-of-top-fantasy-sports-companies/#:~:text=As%20of%20February%202019%2C%20the.11%20in%20the%20Indian%20market>. [As of February 2019, the Indian fantasy sports company Dream 11 had around 50 million users on its platform. This was followed by the two companies, 11 wickets and My Team 11, with a user base of 10 million people, indicating a big lead for Dream 11 in the Indian market]

From consumers to payment service providers, fantasy sports industry contains legion of stakeholders. Advertisers generate revenue, users use different payment platforms and so one game of fantasy sports involves contributions from a number of stakeholders. . The Draft Guiding Principles should also call for different stakeholders of the fantasy sports market to be identified and invited to join SRO This will lead to holistic, inclusive and all-pervasive regulatory framework for the industry which will aid in meeting regulatory objectives in a more participative manner.

3.4. Need to introduce mandatory safeguards in organizational framework of SRO

3.4.1. The Draft Report envisage creation of 3 (three) internal bodies within the SRO: (a) an independent oversight board; (b) a grievance redressal mechanism; and (c) an evaluation committee (*collectively*, “**Internal Bodies**”).¹³ It states that an independent oversight board will be responsible for implementation of the Draft Guiding Principles and the guidelines but it is unclear who will be responsible to issue these guidelines. A grievance redressal mechanism has been contemplated but there is no guidance on minimum standards which must be followed while handling consumer grievances. Crucially, the SRO framework does not specify any governance model or broad principles within limits of which the Internal Bodies will work.

3.4.2. It is suggested that the Draft Guiding Principles must specify that the SRO should be a non-profit organization. Further, it shall include a governing body in addition to the Internal Bodies such that it should be comprised of fixed number of individuals who have no vested interest in fantasy sports industry and are elected by OFSP-members. Subsequently, the Draft Guiding Principles should mention that the governing body of SRO will be responsible for providing the governance model and guidelines to be followed by Internal Bodies. The selection of members should be done on the basis of periodic election process conducted by another independent body including members having experience in law, administration, and governance.

3.4.3. The Draft Guiding Principles shall provide that the governing body must ensure equality and integrity in the governance of the SRO, including eligibility criteria for members and procedure for voting within organization. It shall further provide that the SRO’s governance framework must include minimum safeguards required to ensure independence of oversight board and procedural transparency in the working of the evaluation committee. The minimum standards to be followed by the grievance redressal body must include the principle of natural justice and that complaints will be handled in a fair, timely, transparent and effective manner.

3.5. Clarity on how the safe harbor immunity for OFSPs will be implemented under state gambling laws

3.5.1. The Draft Guiding Principles mention that the SRO shall communicate a request to all Indian states to grant criminal immunity or safe harbor to OFSPs for such fantasy sports formats that are

¹³ Pg 6, Draft Guiding Principles.

compliant with the Draft Guiding Principles.¹⁴ Given the fact that ‘gambling and betting’ is a state subject under the Constitution of India, it remains unclear how the safe harbor mechanism will be implemented within the states which will reject the request of SRO.¹⁵

- 3.5.2. It is suggested that NITI Aayog in the Draft Guiding Principles may release a clarificatory note that fantasy sports games does not fall under the ambit of the term “gambling and betting” and hence it can be considered as subject not falling under the List II (State List) of the Seventh Schedule of the Constitution of India. The fantasy sports games may be governed by the Union Government using its residuary powers as a subject falling under Entry 97 of List I (Union List) of the Seventh Schedule of the Constitution of India. In terms of sports, which is a subject falling under the State List, the Delhi High Court has held that the sports in its extant form cannot be bound by territorial limits of one state.¹⁶

¹⁴ Para 8, Annexure-1, Draft Guiding Principles.

¹⁵ Entry 34, List II, Seventh Schedule, the Constitution of India, 1950.

¹⁶ Para 62, Indian Olympic Association v Union of India, (2014) 5 High Court Cases (Del) 432 [“it is held that though "sports" per se falls within the legislative field of the state, international sports, and Olympic sports, involving international and inter-state ("national") ramifications are covered under Entry 97 of List I of Seventh Schedule”]