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A Critical Study of Confidentiality Obligations and Insider Trading Risks in Mergers and Acquisitions Transactions in India

Anto Joe Francis

LLM Student,

Amity Law School, Amity University, Bengaluru

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A Critical Study of Confidentiality Obligations and Insider Trading Risks in Mergers and Acquisitions Transactions in India

ABSTRACT

M&A transactions involve the exchange of significant proprietary and unpublished price sensitive information among transaction parties, advisers and intermediaries. India's laws and regulations regarding confidentiality and insider trading in M&A deals have been drastically reformed based on the SEBI (Prohibition of Insider Trading) Regulations 2015. This paper discusses the regulations pertaining to confidentiality obligations and insider trading risks in Indian M&A transactions, specifically under the SEBI Act, 1992, the SEBI (Prohibition of Insider Trading) Regulations, 2015, the Companies Act, 2013 and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. This study adopts doctrinal and analytical and investigates the existence and nature of legal uncertainties, obstacles to enforcement and compliance gaps, such as with regard to due diligence, disclosure of unpublished price sensitive information, digital surveillance, cross-border enforcement and confidentiality agreements. The paper identifies the areas of structural weaknesses in the present regulatory framework and makes several practical suggestions to enhance regulatory compliance, market integrity and reduce insider trading risks in the M&A transactions in India.

KEYWORDS

Insider Trading, Mergers and Acquisitions, Confidentiality Obligations, SEBI PIT Regulations 2015, Unpublished Price Sensitive Information (UPSI), Market Abuse

1. INTRODUCTION

Since the economic liberalization of India, the mergers and acquisitions (M&A) market has grown significantly in size and complexity.¹ Such transactions inherently involve the disclosure of confidential business information to various parties such as acquirers, target companies, advisers and regulatory authorities.²

¹ S.S. Sodhi, *Corporate Mergers and Acquisitions: Law and Procedure* 98-105 (Bloomsbury 2020).

² Inst. of Co. Sec'ys of India, *Professional Programme Study Material: Corporate Restructuring, Insolvency, Liquidation & Winding-Up* 82-91 (2023).

When the confidential information is disclosed, there are serious risks of insider trading during the M&A transaction period. Access to such information, especially information which is considered to be unpublished price sensitive information (UPSI), may trade on the basis of such information before it is made public. This creates an unfair informational advantage and undermines market fairness and investor confidence.³

The SEBI (Prohibition of Insider Trading) Regulations, 2015 were a major change in the definition of insider and disclosure requirements and information barriers in India's insider trading laws.⁴ However, doctrinal and enforcement challenges remain, especially in M&A.

The aim of this paper is to explore the delicate balance that Indian law has to strike between the requirements of confidentiality and disclosure in M&A transactions. It explores statutory provisions, judicial precedents, the regulatory challenges and the use of non-disclosure agreements to prevent misuse of confidential information, remedy compliance deficiencies and reduce the risk of insider trading in Indian M&A transactions.

2. LITERATURE REVIEW

The concepts of confidentiality and insider trading are closely linked in mergers and acquisitions (M&A) transactions, where the negotiation, due diligence, valuation and structuring of the transaction itself gives rise to the disclosure of commercially sensitive, yet unpublished price sensitive information (UPSI).⁵ Such sharing involves significant risks of information leakage, misuse of confidential information and market abuse, especially when the information is provided to an insider or to a person connected with an insider, prior to the public release of information.⁶ While Indian legal scholarship has explored the issues of confidentiality obligations in M&A transactions and insider trading regulations separately, there has been little focus on the connection between the two.

The understanding of insider trading regulation in India has been significantly shaped by several scholars and regulatory sources. Sandeep Parekh delivers a thorough discussion of the Indian securities law and the practical difficulties of establishing a communication or misuse of UPSI case, particularly in the absence of direct evidence of such communication or misuse.⁷ His research has brought the evidentiary

³ Sandeep Parekh, *Securities Laws in India* 312–19 (LexisNexis 2019).

⁴ Justice N.K. Sodhi Committee, *Report of the High Level Committee to Review the SEBI (Prohibition of Insider Trading) Regulations, 1992* 5–18 (2013).

⁵ Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, reg. 2(1)(n).

⁶ Parekh, *supra* note 3, at 312–19.

⁷ *Id.*

challenge to regulators in establishing trading on unpublished information to the forefront. Likewise, Vikram Raghavan examines India's securities regulatory regime and the key principles governing integrity of securities markets, investor protection and disclosure requirements.⁸ The regulatory regime applicable to insider trading in India has been a subject of significant overhaul after recommendations of Justice N.K. Sodhi Committee, which expanded the definition of insider, expanded the scope of insider and added the concept of legitimate purpose of communication of information in the course of commercial transaction, in the SEBI (Prohibition of Insider Trading) Regulations.⁹

In the case of M&A transactions, Umakanth Varottil looks at the corporate governance issues focusing specifically on the governance framework, board oversight, fiduciary duties, risk management and governance challenges in takeover transactions.¹⁰ His research focuses on issues of governance complexity due to information asymmetry and decision-making in the M&A context. Likewise, S.S. Sodhi examines the regulatory and procedural aspects of mergers and acquisitions in India such as due diligence, structuring transactions and regulatory considerations.¹¹ As a whole these works provide valuable insights on the legal and governance aspects of M&A transaction in India.

In spite of this, there are still some gaps in the literature. First, there has been little research on the relationship between contractual confidentiality requirements including non-disclosure agreements, confidentiality clauses & internal information barriers and insider trading compliance in the context of M&A transactions. Second, current scholarship tends to be more on statutory interpretation and enforcement of regulations than on practical issues that crop up in the course of due diligence, information sharing and transaction structuring. Third, technological advancements are beginning to arise which create fresh opportunities for information leakage and insider trading, issues that have not been adequately discussed in Indian legal scholarship. The aim of this study is to fill these gaps by critically analyzing the legal framework, issues in enforcement and compliance in India in relation to confidentiality obligations and the risks of insider trading in M&A.

3. RESEARCH METHODOLOGY

This study adopts doctrinal and analytical research methodology. The doctrinal approach is based on the study of the text, structure and

⁸ Vikram Raghavan, *Securities Regulation in India* 201-10 (Oxford Univ. Press 2014).

⁹ Justice N.K. Sodhi Committee, *supra* note 4, at 5-18.

¹⁰ Umakanth Varottil, Corporate Governance in M&A Transactions, 24 Nat'l L. Sch. India Rev. 51, 52-60 (2013).

¹¹ Sodhi, *supra* note 1, at 98-140.

interpretation of the relevant legal sources such as the SEBI Act, 1992, the SEBI (Prohibition of Insider Trading) Regulations, 2015, the Companies Act, 2013 and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Besides, the study is based on judicial and quasi-judicial decisions of the Supreme Court of India and the Securities Appellate Tribunal (SAT) on insider trading and M&A transactions.

The analytical approach is used to detect any shortcomings, gaps and uncertainties in the current regulatory regime. Specific attention is given to the definition of insider and unpublished price sensitive information (UPSI), acceptable disclosure of confidential information, appropriate penalties and compliance requirements under non-disclosure agreements. The study critically examines the effectiveness of the existing legal framework in India in addressing confidentiality obligations and insider trading risks in M&A transactions.

4. 4. CONFIDENTIALITY OBLIGATIONS AND INSIDER TRADING IN INDIAN M&A: A CRITICAL ANALYSIS

4.1 The Statutory Framework: Key Legislation

The rules relating to confidentiality and insider trading in mergers and acquisitions transactions in India are primarily derived from the disclosure requirements for listed companies, corporate law and securities law provisions. The purpose of these legal measures is to control the disclosure of unpublished price sensitive information (UPSI), the misuse of confidential information and the integrity of the market in M&A transactions. Below are discussed the key legislative instruments that regulate this framework.

4.1.1 SEBI (Prohibition of Insider Trading) Regulations, 2015

The SEBI (Prohibition of Insider Trading) Regulations, 2015, enacted based on the recommendations of the Justice N.K. Sodhi Committee is the main regulatory law governing insider trading in India.¹² The 2015 Regulations introduced major changes, which directly affected mergers and acquisitions transactions. The definition of 'insider' under Regulation 2(1)(g) is wide and includes, for example, deal advisers, legal counsel, investment bankers and due diligence professionals involved in the M&A transaction.¹³

Regulation 2(1)(n) defines unpublished price sensitive information (UPSI) as information relating to a company or its securities that is not generally available and which, upon

¹² Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, No. SEBI/LAD-NRO/GN/2015-16/09, Gazette of India (Jan. 15, 2015).

¹³ Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, reg. 2(1)(g).

becoming public, is likely to materially affect the price of securities.¹⁴ In the M&A context, UPSI typically includes information relating to acquisition price, transaction structure, strategic rationale and board decisions.

The term 'communication for legitimate purposes' in the Regulations 2015, is defined in Regulation 3, is one of the important provisions of the Regulations, because it allows for communication for 'legitimate purposes' as well as for the performance of duties or discharge of legal obligations.¹⁵ The provision establishes a partial disclosure defence for UPSI when it comes to an M&A transaction, even when it comes to the due diligence process. However, there is some uncertainty because the meaning of the term 'legitimate purpose' is not clear in the legislation. This ambiguity creates practical issues around what can be released and what protections should be put in place to prevent disclosure of confidential information being used inappropriately in an M&A process.

4.1.2 Companies Act, 2013 and Takeover Code, 2011

The Companies Act, 2013 is complementary to the SEBI (Prohibition of Insider Trading) Regulations, 2015 which imposes fiduciary duties on directors and Key Managerial Personnel of the company engaged in M&A transactions. Section 166 of the Companies Act provides that the directors have to act in good faith and for the best interests of the company, its shareholders, employees and other stakeholders.¹⁶ This responsibility also applies to the use of confidential corporate information, which must not be used for personal gain or be disclosed without proper authorization. The Companies Act serves to reinforce the confidentiality obligations, in addition to contractual actions taken during the M&A negotiations and due diligence, including through non-disclosure agreements.

The Takeover Code is the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, which govern acquisition of shares, voting rights and control of listed companies.¹⁷ At various stages of an acquisition, the Takeover Code requires disclosure, including when certain thresholds of shareholdings are reached. The disclosure requirements involved in these negotiations are very delicate: on the one hand they must be confidential and on

¹⁴ Id. reg. 2(1)(n).

¹⁵ Id. reg. 3.

¹⁶ Companies Act, 2013, No. 18 of 2013, § 166 (India).

¹⁷ Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, No. SEBI/LAD-NRO/GN/2011-12/006 (India).

the other, they must be disclosed in a timely manner. The Takeover Code thus emphasizes the conflict between requirements for confidentiality and requirements for disclosure in M&A transactions.

4.2 Landmark Cases in Indian Jurisprudence

Insider trading in India has been significantly influenced by judicial rulings, especially in the context of mergers and acquisitions transactions. Courts and tribunals have in various decisions defined the scope of insider trading liability, set evidence requirements and provided definitions of key concepts like insider, connected person and unpublished price sensitive information (UPSI).¹⁸ In the following cases, the development of Indian law in relation to the obligations of confidentiality and insider trading risk in M&A transactions is highlighted.

4.2.1 Hindustan Lever Limited v. SEBI (1998)

One of the landmark decisions in Indian insider trading jurisprudence is *Hindustan Lever Limited v. SEBI*, which was in the context of mergers and acquisitions. In the instance of *Hindustan Lever Limited (HLL)*, it was a case of buying shares in *Brooke Bond Lipton India Limited (BBLIL)* just before its public announcement of the merger between the two companies. SEBI said that HLL had traded on basis of unpublished price sensitive information (UPSI) about the proposed merger, as it was connected person of BBLIL through its corporate relationship with HLL.¹⁹

Finally, the adjudicating authority determined that HLL was not liable for insider trading and that the fact that two entities are in a corporate relationship alone is not sufficient to imply liability for insider trading. It noted that there is a requirement to establish ownership or access to certain unpublished price sensitive information. The case emphasized some of the defects with India's previous insider trading definition, notably, the lack of a 'deemed possession' or 'misappropriation' doctrine.²⁰ The decision played a major role in the extension of the definition of 'insider' in the SEBI (Prohibition of Insider Trading) Regulations, 2015.

4.2.2 SEBI v. Rakesh Agarwal (2004)

The case of *SEBI v Rakesh Agarwal* is an important case in the Indian insider trading law that addresses communication of

¹⁸ Nishith Desai Assocs., *Prohibition of Insider Trading in India: A Legal & Practical Guide* 12–19 (2023).

¹⁹ *Hindustan Lever Ltd. v. SEBI*, (1998) 18 SCL 311 (SAT).

²⁰ Parekh, *supra* note 3, at 316–18.

unpublished price sensitive information (UPSI) during the takeover transaction. The case involved Rakesh Agrawal, Managing Director of ABS Industries Ltd., who possessed UPSI relating to the proposed acquisition of ABS Industries by Bayer AG. He disclosed this information to his brother-in-law, who purchased shares and earned profits based on that information.²¹

The Securities Appellate Tribunal held that the communication of UPSI was intended to facilitate the successful completion of the takeover transaction rather than for personal gain. He therefore was not held liable for insider trading. This decision has been widely faulted in a number of publications for its lack of clarity between motive and culpability. It also expressed concerns about the erosion of the market integrity principle, which underpins the regulation of insider trading.

4.2.3 *Manoj Gaur v. SEBI*

In *Manoj Gaur*, the Securities Appellate Tribunal ruled on the allegation of insider trading on securities when the company had unpublished price sensitive information (UPSI). The case pointed out that the definition of insider trading liability was being based on circumstantial evidence, trading pattern, timing of the trading and the relationship of the parties.²² The ruling upheld the concept that it is not always required to have direct evidence of communication or of a violation of UPSI and that substantial evidence of insider trading could be inferred from a combination of access to confidential information and suspicious trading activity in the context of a broader set of facts and circumstances.²³

The case is especially relevant as it relates to mergers and acquisitions transactions, in which the exchange of confidential information is a regular occurrence between directors, promoters, legal counsel, investment bankers and consultants during due diligence and negotiations. In these transactions, it is often hard to prove that the communication or misuse of UPSI has taken place directly. The principles surfacing in the case of *Manoj Gaur* versus SEBI, therefore, emphasize the necessity of having strict confidentiality requirements, efficient information barriers and comprehensive compliance frameworks to curb the possibility of misusing confidential information and limit the amount of insider trading risks that exist in M&A transactions.

²¹ *Rakesh Agrawal v. SEBI*, Appeal No. 33 of 2001 (Securities App. Trib. Oct. 14, 2003).

²² *Manoj Gaur v. SEBI*, Appeal No. 64 of 2012 (Securities App. Trib. Oct. 3, 2012).

²³ Inst. of Co. Sec'ys of India, *Guidance Note on Prevention of Insider Trading* 28-34 (2021).

4.2.4 SEBI v. Abhijit Rajan (2022)

In *SEBI v. Abhijit Rajan*, the Supreme Court considered whether it is enough to establish insider trading liability if the person involved in insider trading has the unpublished price sensitive information (UPSI) at the time of the trading.²⁴ The Court observed that surrounding circumstances, motive and the broader transactional context remain relevant in determining whether trades were executed on the basis of UPSI. The decision emphasized the difficulty of establishing an insider trading violation, especially where the transaction is a corporate restructuring or strategic transaction.²⁵

The ruling reiterated that the insider trading liability cannot be established just from the fact that the defendant had UPSI within the context and that the court must consider that issue. The ruling is important in a mergers and acquisitions transaction where several entities such as Directors, Advisers, Investment Bankers and Consultants may have a legitimate need to access confidential information throughout the negotiation and due diligence process. The decision underscores the need to ensure strong safeguards for confidentiality and compliance to protect against misuse of UPSI in M&A transactions.

4.3 Insider Trading Risks in M&A Transactions

Mergers and acquisitions (M&A) transactions involve sharing of sensitive financial, commercial and strategic data across various parties, such as the acquiring company, acquired company, legal counsel, investment bankers, consultants and regulatory bodies. Because these transactions are confidential, there are substantial insider trading risks throughout the M&A process²⁶. The risk mainly arises from the communication, access and potential use of unpublished price sensitive information (UPSI) prior to its publication.

4.3.1 Preliminary Negotiations

The possibility of insider trading starts during the initial negotiation process, when the parties are engaging in confidential talks about potential mergers, acquisitions or strategic alliances.²⁷ In this phase, information about the proposed transaction, valuation expectations and strategic plans could be UPSI. If such

²⁴ *SEBI v. Abhijit Rajan*, Civil Appeal No. 563 of 2020 (S.C. Sept. 19, 2022).

²⁵ Nishith Desai Assocs., *supra* note 18, at 30–36.

²⁶ Rajat Sethi, Sudip Mahapatra & Jinaly Dani, *Insider Trading Regulations: Implications for M&A Transactions, SEBI's Investigative Powers and Penalties Imposed*, 2 NLS Bus. L. Rev. 1, 8–14 (2016).

²⁷ Wei Ying Wan, *Insider Trading: Issues in the Context of Mergers and Acquisitions*, 18 Sing. Acad. L.J. 1, 6–12 (2006).

information leaks, it could allow those who know the information or are connected to the information to buy and sell securities before the information is public.

4.3.2 Due Diligence Stage

One of the highest levels of insider trading risk exists during the due diligence phase of M&A transactions. At this point, a great deal of confidential information is exchanged between the target business and the possible acquirer, such as financial statements, business plans, operational data and compliance records.²⁸ The risk of unauthorized disclosure or misuse of UPSI is increased where more than one professional or adviser is involved. This risk can be increased further by failure to implement adequate confidentiality controls and implement weak access restrictions.

4.3.3 Board Approval and Deal Structuring

There are also risks of insider trading that occur in the course of board discussions and structuring deals. The pricing, transaction structure, funding and strategic considerations are discussed in this stage. Directors, senior management and advisers have access to such information and might use it improperly for their own benefit or, in indirect ways, pass it on to third parties.²⁹ This is a sensitive compliance stage, as it is conducted in a confidential manner among the board members.

4.3.4 Pre-Announcement Stage

The pre-announcement stage is one of the most sensitive stages in M&A transactions. The short time prior to public announcement involves increased insider trading dangers as the deal is approaching finalization but before it is made public. Leakage of UPSI at this time could lead to abnormal trading practices, market distortion and unfair advantage to some market participants.³⁰ Hence, it is critical to implement appropriate confidentiality requirements and create information barriers during this phase to reduce insider trading risks.

4.3.5 Common Modes of Information Leakage in M&A Transactions

Unauthorized disclosure or indirect communication of unpublished price sensitive information (UPSI) is the typical method for insider trading in a merger and acquisition

²⁸ Umakanth Varottil, *Due Diligence in Share Acquisitions: Navigating the Insider Trading Regime*, 28 *Butterworths J. Int'l Banking & Fin. L.* 562, 562-66 (2013).

²⁹ Paul L. Davies & Sarah Worthington, *Gower Principles of Modern Company Law* 623-29 (10th ed. 2016).

³⁰ Wei Ying Wan, *supra* note 27, at 15-20.

transaction. The leaks can happen in several ways, such as through the informal sharing of information between the parties to the deal, the use of virtual data rooms by the parties without authorization, the sharing of confidential information and the use of digital communication via encrypted messaging platforms.³¹

The usual suspects range from lawyers, investment bankers, consultants, senior management to employees in due diligence and deal structuring. In many instances, the insiders can either directly trade in securities or give them confidential information to a family member, an associate or a third party that trades before the insiders make it public. The fraudulent use of UPSI becomes very difficult to identify when trading takes place through connected accounts, proxy accounts or algorithmic trading systems. These activities undermine market integrity and make the task of regulators more difficult.³²

4.4 Structural Deficiencies in the Indian Framework

Though the regulatory framework of insider trading in India has undergone substantial changes, there are a number of structural flaws that would impact the enforcement in mergers and acquisitions transactions.³³ These gaps result in compliance uncertainty, reduced regulation and a higher risk of misuse of unpublished price sensitive information (UPSI). The major structural concerns include ambiguity in terms of the legitimate purpose, limitations in digital surveillance, cross-border difficulties for enforcement and inadequacy of the existing penalty framework.

4.4.1 Ambiguity in Legitimate Purpose

As per Regulation 3(1) of the SEBI (Prohibition of Insider Trading) Regulations, 2015, the communication of UPSI is allowed for legal obligations, performance of duties or for legitimate purposes.³⁴ Legitimate purpose is not, however, defined in the Regulations and there are no specific categories of activity for which there is a legitimate purpose.

This ambiguity in definition poses huge compliance issues in mergers and acquisitions transactions where communication of UPSI may be required in the course of due diligence, negotiations and structuring the deal.³⁵ Lack of a clear regulatory framework means that deal advisers, investment bankers, lawyers and other

³¹ Inst. of Co. Sec'ys of India, *supra* note 23, at 88-101.

³² Securities and Exchange Board of India, Annual Report 2022-2023, 152-58 (2023).

³³ Inst. of Co. Sec'ys of India, *supra* note 23, at 130-145.

³⁴ Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, reg. 3(1).

³⁵ *Id.* reg. 3.

intermediaries are left with questions regarding the extent to which information can be shared. This uncertainty has a chilling effect on the due diligence process, which is an essential element in the process of risk assessment, valuing and structuring an M&A transaction. Too much caution could delay transactions and too little caution could make trades more susceptible to insider trading or improper use of confidential information.

4.4.2 Digital Surveillance Gap

Modern M&A transactions increasingly rely on encrypted digital communication systems, third party-managed virtual data rooms (VDR) and technology-driven trading systems.³⁶ All these developments have made monitoring confidentiality breaches and insider trading risks in M&A transactions more complex.

The current surveillance systems of Securities and Exchange Board of India are mainly based on the post-trade analysis of the market data and trading movements. However, these systems are not always effective in combating insider trading through an encrypted messaging service or algorithmic trading on the basis of leaked unpublished price sensitive information (UPSI).³⁷ It becomes more important when the confidential information of the deals is communicated through various digital platforms. While SEBI's Annual Report 2022-23 recognizes that technology-driven market manipulation is a new danger, the current regulatory response remains inadequate to address new challenges of digital surveillance.

4.4.3 Cross-Border Enforcement Challenges

Preventing insider trading and keeping information confidential is difficult in the case of cross-border mergers and acquisitions. There is a risk of information leakage and unauthorized trading due to the sharing of unpublished price sensitive information across jurisdictions during due diligence, negotiations and deal structuring.³⁸ While the SEBI (Prohibition of Insider Trading) Regulations, 2015 prohibit insider trading in the Indian securities market, Securities and Exchange Board of India (SEBI) is currently constrained in its ability to conduct investigations and take action against off-shore violations of the regulations. As a result, matters of jurisdiction, cross-border information disclosure and lagging regulatory co-operation remain a major hurdle in M&A processes.

³⁶ Inst. of Co. Sec'ys of India, *supra* note 23, at 88-101.

³⁷ Int'l Org. of Sec. Commissions, *Objectives and Principles of Securities Regulation* 7-15 (2017).

³⁸ Nishith Desai Assocs., *Insider Trading Regulations - A Primer* 15-22 (2013).

4.4.4 Inadequacy of Existing Penalty Framework

Insider trading is penalized under Section 15G of the SEBI Act, 1992, which also has a provision of penalty of up to three times the amount of profits or ₹25 crore whichever is higher.³⁹ In reality, the penalties are often comparatively low as a result of the fact that their practical enforcement often results in penalties significantly lower than those prescribed under law, which means that the existing penalties may not be sufficient as a deterrent. Penalties imposed in several cases of insider trading and restructuring of the companies were significantly lower than the maximum prescribed penalty. This has led to the question of whether the existing penalty system is working to adequately discourage insider trading in high-value M&A transactions.

4.5 Confidentiality Agreements and Their Intersection with PIT Regulations

The most common contract tool for stopping unauthorized disclosure or misuse of confidential information in mergers and acquisitions transactions is the Non-Disclosure Agreement (NDA).⁴⁰ Most M&A related NDA in India define confidential information, provide guidelines for use of confidential information, limit access of confidential information in recipient's organization and include post-termination confidentiality obligations. On a review of the typical Indian M&A NDA, however, it is seen that these are more of a tool to protect each other from a breach of contract, rather than an active measure that would prevent any insider trading violation.⁴¹

A significant compliance gap exists in normal Indian M&A, NDAs do not contain specific duties to speak about insider trading risks. There is no specific mention of any duties under the SEBI (Prohibition of Insider Trading) Regulations, 2015 in most NDA nor is there any specific prohibition on trading on unpublished price sensitive information (UPSI) arising out of the deal. In addition, they do not always have a clearly established deal team that has access to UPSI, technology-based access restrictions within virtual data rooms and digital communications or the need for timely notification of any confidential leaks.⁴² The lack of these protections can lead to potential misuse of confidential information and highlights the importance of strengthening the contractual controls based on regulatory requirements.

³⁹ Securities and Exchange Board of India Act, 1992, No. 15 of 1992, § 15G (India).

⁴⁰ Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* § 13.02, at 13-5 to 13-18 (2020).

⁴¹ Id

⁴² Varottil, *supra* note 28, at 562–66.

5. FINDINGS AND RERCOMMENDATIONS

5.1 Key Findings

The following are some key findings from this study:

- The SEBI (Prohibition of Insider Trading) Regulations, 2015 is a significant improvement over the previous regulatory framework. But an uncertain concept of the 'legitimate purpose' for communications of unpublished price sensitive information (UPSI) persists in mergers and acquisitions transactions.
- Indian law on insider trading in M&A transactions has been moving towards a more purposive and stricter interpretation of insider trading. But challenges to evidence and limitations of jurisdiction still hamper effective enforcement.
- With the advancement of technology, like encrypted digital communication platforms, virtual data rooms, and algorithmic trading systems, insider trading risks in M&A transactions have grown considerably, posing new challenges to regulatory oversight.
- The primary purpose of standard Indian M&A non-disclosure agreement is to serve as a tool for confidentiality protection and breach management, rather than as effective mechanisms to prevent insider trading.
- The current Indian regulatory framework lacks adequate provisions to cover market sounding, access control in virtual data rooms, technology-related risks of today's M&A transactions.
- Cross-border M&A transactions remain significant enforcement issues, especially regarding confidentiality controls, information disclosure and proper regulatory cooperation between jurisdictions.

5.2 Recommendations

5.2.1 Legislative Amendment to Define 'Legitimate Purpose'

Securities and Exchange Board of India (SEBI) should define the term 'legitimate purpose' in SEBI (Prohibition of Insider Trading) Regulations, 2015 by providing a non-exhaustive list of the disclosures allowed in relation to M&A transactions. These disclosures can include due diligence, engagement of financial advisers and disclosures to regulatory authorities, but they can only be made on a need-to-know basis and the recipients will be bound by written confidentiality agreements.

5.2.2 Introduction of a Market Sounding Framework

Prior to the disclosure of a public announcement of a transaction,

a structured market sounding mechanism should be introduced by SEBI to control the disclosure of sensitive information to the prospective investors or acquirers. Such a system must also involve the maintenance of detailed records, need the consent of recipients in writing and must include reporting requirements to ensure accountability and discourage the misuse of unpublished price sensitive information (UPSI).

5.2.3 Mandatory Digital Compliance Infrastructure

To ensure access logs are kept, access is limited by role and necessity, and access to virtual data rooms is monitored through the digital process during M&A transactions, SEBI should publish detailed guidelines that cover these concerns. Communications involving deal-related UPSI among investment bankers, legal advisers and deal teams should be properly documented and monitored to minimize the risk of information leakage and misuse.

5.2.4 Regulatory Model NDA for M&A Transactions

In consultation with the industry bodies, a model non-disclosure agreement should be framed by SEBI in case of mergers and acquisitions involving listed entities. The obligations to comply with PIT Regulations, the prohibition of trading during transaction periods, the identification of authorized deal teams, technological access controls and mandatory reporting of breaches should be included in such a model NDA. It is not mandatory, but should be considered a guideline for the use of market participants.

5.2.5 Strengthening Cross-Border Enforcement Cooperation

Insider trading regimes should be better coordinated and information shared to boost cross-border enforcement cooperation between Indian and other jurisdictions. Improved cooperation with other securities regulators would enhance investigations and enforcement in the area of cross-border M&A transactions with confidentiality breaches and insider trading risks.

5.2.6 Enhanced Penalty and Disgorgement Regime

The insider trading law, SEBI Act, Section 15G should be made more stringent, to provide a higher level of deterrence in insider trading cases involving M&A transactions. Penalties for repeat and serious violations and good enforcement mechanisms for disgorgement would be helpful to the enforcement process. SEBI should also provide reasons in detail for granting penalties for greater transparency, consistency and accountability.

6. CONCLUSION

The regime of confidentiality obligations and insider trading in mergers and acquisitions in India has evolved significantly since the enactment of the SEBI (Prohibition of Insider Trading) Regulations, 2015. The existing legal framework also offers a vital basis for upholding the integrity of the market and setting disclosure requirements in connection with mergers and acquisitions, along with the Companies Act, 2013 and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Yet there are still many legal uncertainties, compliance issues and enforcement gaps.

This study concludes that Indian jurisprudence has gradually evolved from a strict definition of insider trading to a more pragmatic and market integrity focused interpretation of Insider Trading. The circumstances considered in the decisions of *Hindustan Lever Limited v. SEBI* and *SEBI v. Abhijit Rajan* show a growing focus on circumstantial evidence, a wider interpretation of insider relationships and enhanced regulatory oversight. These advances have not, however, addressed some of the fundamental structural gaps that exist, such as the definition of legitimate purpose, digital surveillance limitations, challenges to enforcement across borders and current shortcomings in the penalty system.

It finds that the regulatory framework needs to be more transaction-oriented and structured in order to tackle issues of confidentiality and insider trading in M&A transactions in India. Greater compliance mechanisms, more transparent disclosure rules, better digital monitoring and stronger enforcement measures are needed to tackle new risks. The goal of confidentiality and transparency should not be at odds, rather these goals need to be balanced, guided by a transparent legal framework, compliance mechanisms and responsive regulatory enforcement.

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