
BEYOND BORDERS: A COMPARATIVE STUDY OF EXTRATERRITORIAL INSIDER TRADING ENFORCEMENT IN INDIA

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ABSTRACT:

*Hindustan Lever Limited v. SEBI*¹ was one of the earliest cases in India in regard to insider trading where the terms ‘insider’ and ‘unpublished price sensitive information’ was coined and clearly defined in the wake of the rising concerns around such activities. Earliest efforts towards prevention of insider trading were made through the SEBI (Prohibition of Insider Trading) Regulations of 1992. Insider trading has been a growing concern, especially with the increased globalized economy where cross-border transactions are extremely common. Through the years, a robust framework has been developed in Indian to place control on and prevent insider trading through various SEBI Regulations. However, in the international sphere, India has lagged in enacting adequate provisions with extraterritorial applicability to effectively deter insider trading committed by foreign nationals, thereby allowing numerous individuals and entities to evade legal accountability.

This paper undertakes a comprehensive and critical analysis of the prevailing legal framework of insider trading within the Indian jurisdiction, with a particular emphasis on the complex issue of cross-border insider trading perpetrated by foreign nationals and the discernible lacunae within the extant regulatory architecture. Further, the paper will engage in a comparative analysis with the legal frameworks of the United States and European Union who have adopted stringent laws to prevent such activities. By juxtaposing the existing legal structure with the perils of regulatory insufficiency in this domain, this paper seeks to advocate for a reconsideration and recalibration of the legislative framework, urging substantive amendments and refinements aligned with the contemporary global economic landscape to more effectively combat insider trading on a transnational scale.

¹ *Hindustan Lever Limited v. SEBI* (1998) 18 SCL 311 MOF.

I. Introduction:

It was only in the late 1970s that insider trading had gained recognition in India as an unfair practice and one that needed to be curbed through statutes. The Sachar Committee in 1979 was the first body to raise concerns that various company employees in possession of price sensitive information could possibly misuse the same to manipulate the market, leading to financial injustice and detriment to the public investors. They made various recommendations to amend the *Companies Act 1956*, in order to include compelling full disclosure of transactions by people in possession of sensitive information, prohibition of transactions during specific periods as well as placing accountability of profit on the insider. This was followed up by two other committees who raised similar concerns and warranted the need for SEBI to come up with regulations to assess and scrutinize the same.² SEBI finally in 1992 came up with the *SEBI (Insider Trading) Regulations* which declared insider trading as a fraudulent practice and any person convicted of the same would be subject to punishment under Section 15G of the Act³. This was heavily amended in 2002 to meet the changing circumstances and nuances in the financial market, ultimately culminating in what is presently known as *SEBI (Prohibition of Insider Trading) Regulations*⁴. Though a clear definition has not been provided by the Regulations itself, it can be deemed to be an act of mistrust and lacking transparency. Insider trading is said to have been committed when persons within the company, use information which has not been granted access to the general public, in order to gain premature benefits at the cost of the public investors.

The various domestic legislations to prohibit insider trading has been objectively watertight ensuring fair and efficient market environment and practices. However, the significance and efficacious application of these laws extend beyond the borders of the country. Given India's position as a key player in the global economic landscape, it is imperative that its legislative framework aligns with international standards and incorporates provisions allowing for extraterritorial applicability. This would enhance the credibility of Indian markets by establishing legal safeguards that bolster investor confidence, while simultaneously mitigating the exploitation of legislative loopholes and the absence of punitive measures for foreign

² Hari Shankar Singh, 'INSIDER TRADING : BEHIND CLOSED DOORS' (2024) Manupatra Articles < <https://articles.manupatra.com/article-details/INSIDER-TRADING-BEHIND-CLOSED-DOORS> > date accessed 4 May 2025.

³ The Securities and Exchange Board of India Act 1992, s 15G.

⁴ SEBI (Prohibition of Insider Trading) Regulations, 2015.

nations that enable their actions to gain unfair advantage.

II. Existing Legal Framework Governing Insider Trading in India:

Until the framing of the 1992 regulations, there was so specific legislation or statutory framework to prohibit the practice of insider trading. The SEBI then provided clear definitions to the terms “insider” and “connected persons” and the scope and contents of “unpublished price sensitive information (UPSI)”.⁵ Specifically, Section 12A of the 1992 Act⁶ prohibits the use of manipulative and deceptive devices in connection with securities listed on the stock exchange to prevent dealing with securities while in possession of unpublished information and engaging in other forms of insider trading activities. The Act further permits SEBI to undertake required investigations, issue directions to prevent further violations, impose monetary sanctions and initiate criminal prosecution which could potentially lead to imprisonment. Further in 2015, the Prohibition of Insider Trading Regulations came into force which was enacted with the aim of broadening the regulations of insider trading to make it a more comprehensive legislation. The regulations are not only with respect to listed securities but also those that are ‘proposed to be listed’,⁷ which enables control on trading based on insider information even on those securities which have the potential to affect the prices in the market and gaining undue advantage. The Regulations have also provided detailed breakdown of what forms of UPSI possession would conviction of the said crime. It also provides for certain defenses like for instance, in the case of *Rakesh Agrawal v SEBI*⁸, the courts held that trading while in possession of UPSI would be permitted if done while takeover process was underway and if done in the best interest of the company. Another leeway is created through Regulation 5 which allows insider to deal in securities by formulating a trading plan, however, the compliance officer has the obligation to ensure that any UPSI in possession of such persons must be converted to Generally Available Information (GAI).⁹ This regulation establishes a transparent framework that enables insiders, who are continually in possession of UPSI, to engage in securities transactions without contravening insider trading prohibitions. Thus, it can be concluded that the present regulations are designed to incorporate a wide range of

⁵ Ayan Roy, ‘Project Report on Insider Trading in India’ (2010) SSRN <
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1620386 > date accessed 8 May 2025.

⁶ The Securities and Exchange Board of India Act 1992, s 12A.

⁷ SECURITIES AND EXCHANGE BOARD OF INDIA (PROHIBITION OF INSIDER TRADING) REGULATIONS 2015, Chapter II Regulation 3.

⁸ *Rakesh Agrawal v. SEBI* (2004) 49 SCL 351 (SAT).

⁹ SECURITIES AND EXCHANGE BOARD OF INDIA (PROHIBITION OF INSIDER TRADING) REGULATIONS 2015, Chapter II Regulation 5.

possibilities to make it a successful legislation in the domestic realm.

Now, imagine a scenario where X, a US individual and Y, an entity listed on the Bombay Stock Exchange (BSE). X learns that Y would announce a major contract, raising its stock price. Before this announcement is made public, X tips their friend who then buys Y's shares by trading on the BSE and gains huge profits. This is an example of cross-border insider trading. The following section will examine the Indian legal framework to determine whether it contains provisions capable of addressing such cases.

III. Lacunae present in the legislation:

Our main concern commences when we try to find any provision concerning prosecution of foreign nationals for cross-border insider trading concerning Indian securities. The very fact that there are no provisions under the *Companies Act 2013* or under any of the SEBI regulations is alarming considering the increased number of transnational transactions. No domestic legislation has made the mention of extraterritorial application of any of the rules, which implies that there is no protection available for the security of domestic financial market and investors from the conduct of outsiders.

Moving a step further to examine the ancillary legislations, I would like to delve into the IPC, CrPC and the IEA to assess whether they provide a legal basis for prosecuting foreign nationals engaged in such offences. The IPC¹⁰ which has now been replaced by the Bharatiya Nyaya Sanhita (BNS), has no explicit provisions to criminalize insider trading, however, sections relating to offenses such as cheating¹¹, criminal breach of trust¹² or criminal conspiracy¹³ may be invoked given their broad ambit. Given that IPC does have extraterritorial application, this could act as a possible avenue to address cross-border cases, however, its application would attract foreseeable complexities for not meeting the specific requirements to constitute insider trading. Similarly, the CrPC¹⁴, now the Bharatiya Nagrik Suraksha Sanhita (BNSS), which governs criminal investigations and trial proceedings contains provisions for offences committed outside Indian under S.188 and S.189. However, their application in this domain is

¹⁰ Indian Penal Code 1860.

¹¹ Indian Penal Code 1860, s 415.

¹² Indian Penal Code 1860, s 405.

¹³ Indian Penal Code 1860, s 120B.

¹⁴ Code of Criminal Procedure 1973.

extremely limited due to diplomatic restraints. Lastly, the IEA¹⁵ which has been replaced by the Bharatiya Sakshya Adhinyam (BSA), has expanded the scope to include procurement of evidence involving international treaties and agreements. Hence, only in the presence of such agreements can this provision be potentially applied to cross-border cases. Thus, while ancillary legislations may contain provisions for punitive action against foreign nationals, the practical applicability is still ambiguous. The absence of extraterritorial provisions in Indian law remains a key concern that must be addressed at the earliest to safeguard market integrity and investor protection.

IV. Comparative analysis:

In this section I would like to place the Indian framework against the regulatory measures and enforcement mechanisms adopted by other jurisdictions, specifically the United States and the European Union. This would help us understand the similarities in the legislations and also aspects of their statutory framework that we can adapt into our own which could potentially help us navigate the issue of cross-border insider trading. Further, it can help us further dissect the specific shortcomings of our system and ways to address the same.

A. United States of America [USA]-

The United States has been in the forefront in establishing a strong legislative system in regard to insider trading as a whole. The Securities Exchange Act, 1934 along with its various amendments, coupled with the US Securities and Exchange Commission (SEC) has acted as a strong foundation to curb such activities. As early as 1980s, USA started acting on “tipping” and actions of cross-border insider trading.¹⁶ Rule 10b-5 gives the power to the SEC to undertake criminal enforcement actions against fraudulent securities. This is the primary statute that is applicable to place criminal liability on acts of insider trading within the USA, which additionally provides extraterritorial application as permitted through Section 292P(b)(2) of the Dodd-Frank Act, 2010.¹⁷ This essentially implies that the antifraud provisions can be used to prosecute individuals and entities who commit such actions which have occurred outside the

¹⁵ Indian Evidence Act 1872.

¹⁶ Donald C. Langevoort, ‘Cross-Border Insider Trading Cross-Border Insider Trading’ (2000) Vol 19 No.1 Dickinson Journal of International Law <<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1517&context=psilr>> date accessed 8 May 2025.

¹⁷ U.S. Securities and Exchange Commission, ‘Study on the Cross-Border Scope of the Private Rights of Action Under Section 10(b) of the Securities Exchange Act of 1934’ (2012) <<https://www.sec.gov/files/929y-study-cross-border-private-rights.pdf>> date accessed 10 May 2025.

borders but have substantial effects within the nation. The Supreme Court has however cautioned that these provisions do not broadly apply in all cases, and it is left to the courts to use their discretion to apply the provisions extraterritorially. In the landmark case of *Morrison v. National Australia Bank Ltd*¹⁸, the Supreme Court laid down the conduct and effect tests where the former is instances where furtherance of insider information in manipulative or deceptive manner is done within the USA while the latter deals with conduct occurring outside the nation but having substantial effect in the USA. This dual teste ensures the foreign nations are not immune to US laws. An example of this can be seen in the *SEC v. Arnold McClellan and Annabel McClellan*¹⁹ case where non-public information in relation to mergers and acquisitions plans of Deloitte Tax LLP, which is based in the USA, was shared to relatives residing in London. The relatives used this unpublished information to gain huge illegal profits. Subsequently, the SEC charged the relatives with insider trading under the Rule 10b-5. The SEC has proven all the more effective in claiming jurisdiction by engaging in cooperative relation with other nations through bilateral or multilateral Memorandum of Understandings along with cooperative relations with foreign regulatory authorities to undertake investigations and prosecutions proceedings without hinderance to the market players as well as respecting international comity.²⁰ Thus, this proactive approach has strong presence in international capital market, acts as inspiration for other nations to take similar measures.

B. European Union [EU]-

Inside information in Europe was first recognized under the *Market Abuse Directives (MAD)* of 2003 and was defined as ‘precise’ information which has not been made public.²¹ After certain recommendations, this underwent certain changes. Insider trading and market manipulation is now primarily dealt with through the provisions of the *Market Abuse Regulations (MAR)* enacted in 2016 and its ancillary legislations, in the European financial markets.

Article 8 of the MAR defines the scope of its applicability, explicitly stating that it extends to

¹⁸ *Morrison v. National Australia Bank Ltd* [2010] US 561 U.S. 247 (2010).

¹⁹ *SEC v. Arnold McClellan and Annabel McClellan* [2010] US ND Cal (2010).

²⁰ Brandy L. Fulkerson, ‘Extraterritorial Jurisdiction and U.S. Securities Law: Seeking Extraterritorial Jurisdiction and U.S. Securities Law: Seeking Limits for Application of the 10(b) and 10b-5 Antifraud Provisions Limits for Application of the 10(b) and 10b-5 Antifraud Provisions’ (2004) Vol 92 Issue 4 Kentucky Law Journal < <https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1418&context=klj>> date accessed 10 May 2025.

²¹ Marco Ventoruzzo, ‘Comparing Insider Trading in the United States and in the European Union: History and Recent Developments’ (2014) MPILux Working Paper 5 < <https://www.mpi.lu>> date accessed 10 May 2025.

any individual who uses inside information, regardless of their location, provided that the misuse has an effect within the European Union.²² Thus, extraterritoriality is upheld even in the EU attracting liability for actions occurring outside the EU but affecting their financial markets. The regulation of enforcement of these provisions are overseen by the European Securities and Market Authority (ESMA). This body also facilitates cross-border application by undertaking a coordinating role between the members of the EU and third countries. This body facilitates coordination among National competent authorities as well as non-EU regulating authorities. They also induce multilateral MOUs similar to the US, to facilitate cross-border transactions.²³ The EU Listing Act 2024 has made key changes to the MAR to make it more stringent, by increasing the obligations on issuers with respect to disclosure obligations and record-keeping. Another aspect is that it has urged the collaboration of ESMA with other authorities that oversee market activity, to make it more seamless to collect data when serious concerns are raised with regards to disruption to market integrity.²⁴ Since the requirement to prosecute a case using EU laws is to merely show an effect on their financial markets, the threshold is placed lower than that of the US, making it more feasible to prosecute foreign nationals committing insider trading. However, this can also act as a disadvantage since other nations have much more stringent definitions and standards for prosecution for this crime. Additionally, since heavy reliance is placed on the efficient coordination with other authorities, enforcement problems may arise creating gaps in resolving complex cross-border cases.

V. Conclusion:

In an era where capital markets are becoming more dynamic in nature across borders, greater importance must be placed on treating insider trading as a global crime. Taking into consideration Indian's international footing, we can categorically state that Indian legal framework is inadequate in comparison to the rigorous efforts made by other nations to protect their stakeholders from exploitation from foreign nationals. The current loopholes and limited jurisdictional reach expose the vulnerabilities of the regulatory regime. Though there is

²² Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) [2014] OJ L173/1, art 8.

²³ Noam Noked, 'U.S. Insider Trading Enforcement Goes Global' (Harvard Law School Forum on Corporate Governance) (26 May 2013) <https://corpgov.law.harvard.edu/2013/05/26/u-s-insider-trading-enforcement-goes-global/> date accessed 10 May 2025.

²⁴ Cleary Gottlieb Steen & Hamilton LLP, 'The EU Listing Act: Important Changes to MAR' (2024) <<https://www.clearygottlieb.com/-/media/files/alert-memos-2024/the-eu-listing-act-important-changes-to-mar.pdf>> date accessed 10 May 2025.

potential for some statutes to be made applicable to punish cross-border insider trading, further contemplation is necessary to shift India's status from being an under-equipped nation. Seamless transnational transactions can be facilitated only once our legal system is levelled with the global set practices. Collaboration with foreign authorities is imperative to ensure proper prosecution process. The extraterritorial application of Indian laws presents a forward-looking opportunity to significantly limit insider trading and uphold the integrity of capital markets, thereby enhancing India's reputation as a reliable player in the global economy. A deeper examination of the primary as well as the ancillary domestic statutes will help us understand the ways in which we can expand the provisions to adjust to the global platform. Streamlined procedural regulations and enforcement mechanisms are required to penalize foreign nationals committing insider trading. Policing of insider trading is now an international concern, and significant strides should be made to create a conducive trading environment.