

## The Conundrum of “Unpublished Information” under the Insider Trading Regulations

The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 (“**Insider Trading Regulations**”) prohibit trading in listed securities when in possession of unpublished price-sensitive information (“**UPSI**”). Therefore one question which invariably needs to be addressed in such matters is whether the information that was alleged to be UPSI was “unpublished.”

In a recent order issued by the SEBI in February 2021, Future Corporate Resources Private Limited, Mr. Kishori Biyani and certain other persons (together, the “**Noticees**”) were held to be in violation of the Insider Trading Regulations. It was alleged that the Noticees traded in shares of Future Retail Limited (“**FRL**”) when in the possession of UPSI.

The Noticees argued, *inter alia*, that the information that was alleged to be UPSI was already in the public domain in the form of media reports. This argument was rejected by the SEBI.

It was not the first time that such an argument was made. It will likely not be the last. However, the backdrop is that the original 1992 regulations, and then the amendments in 2002 and 2015, have taken divergent approaches on this point. It has also not helped that the orders of adjudicatory authorities on this point have been inconsistent.

### ORDER IN THE MATTER OF FUTURE RETAIL

On April 20, 2017, FRL announced a scheme of arrangement through which it planned to hive-off its “HomeTown” and “FabFurnish” businesses to a separate listed entity. This announcement had a positive impact on FRL’s stock price (an increase of 4.68%). Prior to such announcement, Mr. Kishore Biyani, the Chairman and Managing Director of FRL, was interviewed by the media regarding such a transaction. In an interview with the Economic Times on February 28, 2017, Mr. Biyani stated that FRL planned to exit several of its specialty retail formats including HomeTown.

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Based on such news reports, the stock exchanges asked FRL to confirm whether any decision had been made by FRL's board. In response, FRL issued a clarification on March 7, 2017 that the board had given its in-principle authority for considering various options with regard to FRL's HomeTown business but was yet to reach any final understanding.

Between March 10 and April 5, 2017, shares of FRL were purchased by the Noticees through several trades. On investigation, the SEBI determined that preliminary discussions regarding the scheme of arrangement had commenced on March 10. Accordingly, the SEBI proceeded against the Noticees for unlawful gains made through the purchase of FRL shares between March 10 and April 20 (the date when the transaction was formally announced).

The Noticees contended that information regarding the scheme of arrangement could not be classified as UPSI since it was widely published and generally available across media platforms. Further, they argued that these reports were based on interviews that Mr. Biyani had himself given.

Rejecting this argument, the SEBI held that the level of detail with which the scheme had been reported by the media was significantly lower compared to FRL's formal announcement. FRL's announcement contained statutorily mandated details including the proposed share-swap ratio, details of the securities that were proposed to be issued, and other particulars. The SEBI held that for information to be considered to be "generally available", it must be disclosed in the form, and along with material particulars, that are required under statutorily mandated filings.

The Noticees have filed an appeal against the SEBI's order before the Securities Appellate Tribunal, which has ordered an interim stay on the operation of the SEBI's order pending disposal of the matter.

## **POSITION UNDER THE 1992 REGULATIONS AND PRIOR RULINGS**

This is not a new issue. In one of the early cases under the 1992 Regulations, Hindustan Lever Limited (now Hindustan Unilever Limited) ("**HLL**") was investigated by the SEBI for the purchase of shares of Brooke Bond Lipton India Limited ("**BBLIL**") in the period leading up to the announcement of a merger between HLL and BBIL in 1996. The SEBI held that since HLL and BBLIL were subsidiaries of Unilever, and were effectively under the same management, HLL and its directors had prior knowledge of the merger at the time when HLL had purchased BBLIL shares. Consequently, they were liable to be punished for insider trading.

In an appeal against the order, it was argued that the transaction had been widely reported in the news even before it had been formally announced. The Appellate Authority

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accepted this contention and found that expectations about the merger were widespread in the market before the transaction actually took place. Accordingly, the Appellate Authority held that the SEBI was not justified in prosecuting HLL and its directors. In arriving at this decision, the Appellate Authority relied on the definition of UPSI under the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 (“**1992 Regulations**”). The regulations at the time stated that information relating to a company was considered unpublished if it was “*not generally known or published by such company for general information.*”

Following the decision of the Appellate Authority, the 1992 Regulations were amended by the SEBI in 2002 to state that the term “unpublished” meant “*information which is not published by the company or its agents and is not specific in nature.*” Further, an explanation was added to state that “*speculative reports in print or electronic media shall not be considered as published information.*”

## **POSITION UNDER THE 2015 REGULATIONS**

Under the Insider Trading Regulations (2015) currently in force, information is considered to be unpublished when it is not “generally available”. “Generally available information” is defined as “*information that is accessible to the public on a non-discriminatory basis*”.

It is relevant that the explanation under the 1992 Regulations (as amended in 2002) which stated that speculative reports would not be considered published information did not find a place under the Insider Trading Regulations (2015). The N.K. Sodhi committee report which formed the basis of the 2015 Regulations states in this regard that: “*Specifically, the suggestion (from some members of the Committee) was that unless information is published on the website of the stock exchange, it would not be regarded as generally available and therefore, if price sensitive in nature, it would be regarded as UPSI. The problem with this approach would be that even if large newspapers and television channels were to have published a piece of news and market participants were already factoring in the news in price discovery, an insider who trades when in possession of such news would be regarded as violating the law merely because the stock exchange website does not carry the news. **The Committee believes that it would be inappropriate to regard information that is widely available in the public domain as UPSI***” (emphasis supplied).

It is apparent that the SEBI’s order in the case of FRL on the point at hand is more in line with the 1992 Regulations (as amended in 2002) rather than the 2015 Regulations currently in force.

A counterview to the SEBI’s order in the FRL matter is the SEBI’s order delivered a few months ago in October 2020 in the matter of *Gopal Vittal* which states in paragraph 34 that: “*...it is noted that information related to the announcement made by the Company*

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on October 12, 2017 on the proposed acquisition of the Consumer Mobile Business of TTSL and TTML by the Company was already in the public domain by way of publication of articles in Economic Times and Live Mint, two newspapers with fairly large subscription. Further, news regarding the said acquisition was also relayed on mainstream business news channels like Zee Business, ET Now and CNBC TV18, all of which have very wide viewership. **This clearly makes the information regarding acquisition of consumer telecom business of TTSL and TTML by BAL as generally available information in the public domain on a non-discriminatory basis.**”

The SEBI’s order in the *Gopal Vittal* matter was placed before the SEBI in the FRL matter. The SEBI, apart from distinguishing the *Gopal Vittal* order on facts, also observed that the earlier order is not binding on it and only has “persuasive value”.

## CONCLUSION

Keeping in mind the intent behind the Insider Trading Regulations which rests on the premise of parity of information, the conclusion of the SEBI in the FRL matter that information should be considered as “generally available” only when all material particulars are disclosed is sound and unimpeachable.

However, the question is whether the current regulations in force support such a view, particularly when considered in the context of the 1992 Regulations (as amended in 2002). After traversing a full circle, it may be time to put this issue to rest – the explanation regarding speculative reports in print or electronic media not constituting published or generally available information (which was included in the regulations in 2002 but omitted in 2015) may be a helpful addition. This would be even more relevant in 2021 in the age of social media where public confidence in the authenticity of media reports may not be at the same level as before.

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