SECURITIES MARKET REACH

SILENCE ON JURISDICTION IS NOT NEUTRALITY; THE LAW MUST TRAVEL AS FAR AS THE MARKET IT GOVERNS

The SMC's blind spot

SUMIT AGRAWAL
MS SAHOO

The writers are legal practitioners and former officials of Sebi

THE PROPOSED SECURITIES Market Code (SMC) is a once-in-a-generation consolidation of India's securities laws. By subsuming the Sebi Act, the Securities Contracts (Regulation) Act, 1956, and the Depositories Act, 1996, it promises much-needed coherence in an increasingly complex market. Yet, in seeking to modernise, the Code overlooks a foundational issue: it does not define its own territorial reach.

Countries have borders; markets do not. Securities markets are inherently global, with participants, securities, capital, and information moving seamlessly across jurisdictions. Trading strategies may be executed offshore, derivatives structured abroad, and market-loving inputs, whether research reports or algorithmic signals, can originate anywhere.

Conduct undertaken entirely outside India can, and often does, affect Indian securities markets. In such a setting, the absence of an express territorial provision is a silence of consequence.

Indian constitutional doctrine already accommodates this reality. Article 245(2) makes clear that no law is invalid merely because it has extraterritorial operation. The judicial interpretation has refined this principle. In *GVK Industries Ltd* (2011), the Supreme Court held that Parliament may legislate on extraterritorial aspects that have, or are expected to have, an impact on or nexus with India, or its interests. This position was echoed in *Pan Asia Advisors Ltd* (2015), which upheld Sebi's action against overseas conduct affecting Indian securities markets. The Competition Act, 2002, adopts the same approach, expressly extending jurisdiction to conduct outside India that affects competition within the country.

Against this backdrop, the SMC's silence on territorial jurisdiction creates avoidable uncertainty. Market participants, domestic and foreign alike, rely on the assurance that misconduct affecting Indian markets will attract consequences, regardless of where it originates. When that assurance is unclear, deterrence weakens. The resulting uncertainty can unsettle investors, complicate compliance for intermediaries, and, over time, divert capital towards jurisdictions with clearer and more predictable regulatory frameworks.

This uncertainty is particularly acute in cross-border markets, where misconduct is often structured to exploit jurisdictional gaps. In the absence of statutory clarity, enforcement may appear inconsistent or ad hoc, especially when directed at foreign entities. This can undermine regulatory legitimacy and invite legal challenge. Recognising these concerns, modern securities law frameworks increasingly adopt an effects-based approach, ensuring jurisdiction attaches not to location but market impact.

> **An effects-based framework remains the most practical response to cross-border market misconduct**

This approach is also reflected in academic writing, which has long recognised this approach as both legitimate and necessary in an interconnected economy. The effects doctrine provides a pragmatic basis for jurisdiction where conduct produces substantial consequences within a state, reflecting the simple but central idea that jurisdiction should follow impact rather than formal territorial boundaries.

This principle is well established in practice. In the US, following *Morrison v. National Australia Bank* (2010), the Dodd-Frank Act reaffirmed enforcement jurisdiction on conduct-and-effects grounds. Statutory provisions in the Securities Exchange Act, 1934, and the Securities Act, 1933 explicitly cover (i) significant conduct within the country even where transactions occur abroad or involve only foreign parties, and (ii) foreign conduct that has a foreseeable and substantial domestic effect. The EU adopts a similarly clear position: the Market Abuse Regulation extends to acts and omissions both within the Union and in third countries where EU-traded instruments are concerned.

To be sure, such jurisdiction is not without limits. Its principal constraint lies in enforcement. Regulators do not exercise direct coercive authority over foreign entities or offshore assets; effective action depends on cooperation frameworks and calibrated domestic measures. International cooperation is facilitated through frameworks such as the International Organization of Securities Commissions' Multilateral Memorandum of Understanding (MMoU), introduced in 2002, which enables cross-border information-sharing and coordinated securities enforcement. The enhanced MMoU, adopted in 2016, strengthens this architecture by allowing access to and exchange of a wider range of investigative assistance, including audit papers, compelled testimony, freezing assets, and telecom or internet service data. Sebi is a signatory to these frameworks.

In addition, Sebi has entered into bilateral MoUs with foreign securities regulators across jurisdictions to deepen cooperation and the exchange of information for regulatory and enforcement purposes. India has bilateral civil mutual assistance arrangements, commonly referred to as Mutual Legal Assistance Treaties, to support cross-border cooperation in civil and commercial matters, including service of process, collection of evidence, and enforcement of foreign judgments.

Beyond formal arrangements, regulators rely on a range of practical enforcement levers. These include restricting or conditioning access to Indian markets, directing domestic intermediaries to disengage from identified foreign entities, and issuing public disclosures that affect reputation and market access. Regulators often seek comfort or no objection from the home jurisdiction regulator when processing applications involving foreign entities. Market participation, thus, carries an implicit expectation of adherence to its regulatory standards. Even so, constraints persist. Cooperation from foreign regulators is not always timely or assured. Investigations can be hampered by data access limitations, evidentiary barriers, and differing privacy regimes. Jurisdictional assertions may also create overlaps, raising concerns of duplication, inconsistency, and regulatory comity. The effectiveness of domestic levers ultimately depends on the economic significance of Indian markets to the entity in question.

The limitations, however, do not diminish the case for clarity. An effects-based framework remains the most practical response to cross-border market misconduct. Properly designed, it is not an overreach of sovereign power, but a calibrated, cooperation-driven mechanism. The SMC should, therefore, explicitly define its territorial scope by adopting an effects-based principle, bringing within its ambit conduct outside India that has a direct, substantial, or reasonably foreseeable impact on its securities markets. Anchoring this framework in proportionality, transparency, and due process will strengthen domestic credibility and international acceptance.

This also reflects settled international practice. In a globalised market, silence on jurisdiction is not neutrality: it is a regulatory blind spot. If India aspires to be a leading capital market, it cannot rely on implied powers or judicial reconstruction to define the reach of its securities law. It must say so clearly: a modern market requires certainty of reach, which must extend as far as the market it seeks to govern.