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## BETWEEN DISCRETION AND DISCIPLINE: RETHINKING ENFORCEMENT DESIGN IN INDIAN ECONOMIC REGULATION

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### ABSTRACT

*Indian economic regulation has a capacity problem, but not the one most reformers focus on. The past two decades produced a wave of institutional upgrades — specialized agencies, sharper mandates, more technical staff. What they did not produce is any coherent thinking about how enforcement should be designed. This article examines three frameworks where that gap is hardest to ignore: the Deal Value Threshold under competition law, SEBI's settlement mechanism, and SFIO-led fraud enforcement under the Companies Act, 2013. The DVT sets thresholds that miss economically significant transactions. SEBI's settlement process is discretionary in ways that resist scrutiny. SFIO's model concentrates enforcement authority so tightly that most stakeholders have no meaningful point of entry. These are distinct problems with distinct causes. But they produce the same result: a regulatory environment that behaves inconsistently, and not in ways anyone can easily predict or challenge. The comparison to EU, German, Austrian, American, and British practice is not meant to suggest that India's difficulties are unusual. Similar structural tensions exist elsewhere. They are more acute here partly because there is no cross-sectoral framework for catching design failures before they get embedded in practice. Three directions for reform follow from this. Enforcement triggers should reflect regulatory objectives rather than administrative defaults. Discretionary decisions should be explainable enough that affected parties can understand the basis, even if full transparency is not possible. And processes that currently exclude stakeholders should include structured access points. Whether regulation shapes market behavior depends less on the rules themselves than on how enforcement around them is organized. That is the part India has not yet worked out.*

**Key Words:** - Algorithmic Governance, Administrative Law, Procedural Fairness, Non-Delegation Doctrine, Human Oversight

## I. INTRODUCTION

Over the past decade, enforcement authority in Indian economic regulation has moved from courts to specialized institutions — the Competition Commission of India, Securities and Exchange Board of India, the Serious Fraud Investigation Office.<sup>1</sup> The rationale is familiar: expert bodies handle complex economic conduct better than generalist courts<sup>2</sup> constrained by adversarial procedure. This is broadly true, and the shift has produced real improvements in regulatory capacity.

But institutionalization doesn't resolve the design questions — it displaces them. As enforcement becomes more concentrated in administrative bodies, the important questions shift from who enforces to how enforcement is structured. When does intervention trigger? How is discretion exercised? Who has access to enforcement processes? These questions don't answer themselves, and the architecture built around them shapes how regulated actors behave as much as the substantive rules do.

Indian regulatory design answers these questions inconsistently across domains. Some frameworks set thresholds that miss economically significant conduct. Others exercise discretion without intelligible reasoning. Others centralize enforcement so tightly that affected parties have no practical entry point. These are different structural failures operating simultaneously in different sectors — and they suggest that enforcement design, as a distinct regulatory problem, hasn't been addressed coherently.

This isn't purely an Indian problem. Administrative enforcement bodies in most jurisdictions accumulate discretion faster than accountability mechanisms develop around them. What makes the Indian case worth examining closely is that the failures are traceable not to institutional incompetence but to design choices — choices about thresholds, transparency, and access — that were made without a framework to discipline them.

This article works through three frameworks: the Deal Value Threshold in competition law, SEBI's settlement mechanism, and SFIO-led fraud enforcement under the Companies Act, 2013.

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<sup>1</sup> The Competition Act, 2002; The Securities and Exchange Board of India Act, 1992; The Companies Act, 2013.

<sup>2</sup> Organisation for Economic Co-operation and Development (OECD), *Regulatory Enforcement and Inspections* (OECD Publishing, 2014).

The argument isn't that any single framework is broken. It's that each reflects a design choice made in isolation, calibrated to immediate sectoral concerns, without reference to principles that could apply across regulatory systems.

## II. THRESHOLD DESIGN AND THE PROBLEM OF UNDER-ENFORCEMENT

The Competition (Amendment) Act, 2023 introduced a Deal Value Threshold<sup>3</sup> to address a gap that had become difficult to ignore in digital markets. Traditional merger notification requirements depend on asset and turnover figures<sup>4</sup> under the Competition Act, 2002. In digital markets, these metrics don't capture competitive significance.<sup>5</sup> A company can be worth billions to an acquirer precisely because it holds valuable data, network effects, or technological capacity — none of which shows up reliably on a balance sheet. The DVT requires notification for transactions exceeding INR 2,000 crore<sup>6</sup> where the target has substantial operations in India. It catches what the turnover-based test misses.

What it simultaneously creates is a gap at the other end of the market. A uniform INR 2,000 crore floor means acquisitions involving MSMEs fall outside notification requirements regardless of their competitive significance. This isn't a marginal concern. In sectors like auto components, textiles, and manufacturing clusters, small suppliers are often strategically indispensable in ways their valuations don't reflect. Vertical integration of such a supplier can enable input foreclosure — restricting rivals' access to critical inputs. Firms running systematic "roll-up" strategies acquire multiple sub-threshold targets sequentially, consolidating market power without any individual transaction reaching the notification floor. Each deal is invisible to the DVT; the accumulated effect is not.

It's worth being precise about why this is a design problem rather than just an enforcement gap. The DVT's logic — that deal value proxies for competitive significance in markets where assets don't — holds well for digital acquisitions. The problem is that this logic doesn't extend to sectors where competitive significance derives from structural position rather than strategic value

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<sup>3</sup> The Competition (Amendment) Act, 2023.

<sup>4</sup> The Competition Act, 2002, §§ 5–6.

<sup>5</sup> Ministry of Corporate Affairs, Notification S.O. 988(E), dated 7 March 2024.

<sup>6</sup> Organisation for Economic Co-operation and Development (OECD), *Start-ups, Killer Acquisitions and Merger Control* (2020).

to an acquirer. A textile supplier critical to a regional production cluster may transact at a fraction of INR 2,000 crore. Its acquisition is not strategically neutral simply because the price tag is low. The DVT's threshold, well-calibrated for digital markets, is blind to this category of harm by design.

Comparative experience is instructive here. The European Commission's referral mechanism under Article 22 of the EU Merger Regulation<sup>7</sup> allows member states to refer below-threshold transactions for review where they affect trade between member states. Germany and Austria introduced transaction value thresholds as early as 2017.<sup>8</sup> These aren't arguments for importing foreign models wholesale — but they illustrate that regulators elsewhere have confronted the same structural mismatch and developed workable responses. India's competition law framework has the institutional sophistication to do the same; what it lacks is the threshold design to operationalize it.

This is what purely financial triggers produce in structurally heterogeneous markets. The DVT addresses the digital acquisitions problem competently. It doesn't resolve the mismatch between financial metrics and competitive significance that affects the rest of the market.

### **III. DISCRETION WITHOUT TRANSPARENCY: THE SEBI SETTLEMENT MECHANISM**

SEBI's settlement framework reaches the conduct it targets. The concern lies in how it processes that conduct. The SEBI (Settlement Proceedings) Regulations, 2018<sup>9</sup> allow parties to resolve enforcement proceedings without adjudication on merits. Settlement amounts are calculated against an Indicative Amount,<sup>10</sup> accounting for violation type, stage of proceedings, and regulatory history. Settlement is concluded without admission of guilt.<sup>11</sup> This model is recognizable across jurisdictions — the U.S. Securities and Exchange Commission consent order

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<sup>7</sup> Council Regulation (EC) No. 139/2004, art. 22 (EU Merger Regulation).

<sup>8</sup> German Act Against Restraints of Competition (GWB), § 35(1a) (as amended, 2017).

<sup>9</sup> Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018.

<sup>10</sup> *Id.*, Regulation 6 read with Schedule II.

<sup>11</sup> *Id.*, Regulation 5.

framework and the UK Financial Conduct Authority settlement discount regime operate on similar premises.<sup>12</sup>

The regulations also permit departure from the Indicative Amount. SEBI's decision-making bodies aren't bound by it, and settlement orders don't say whether a departure occurred or why. The regulatory framework is visible; the settlement order is visible; the reasoning between them is not.

This matters for a reason that goes beyond formal accountability. Enforcement communicates. Firms that observe how SEBI responds to specific violations update their expectations about regulatory risk. When settlement orders don't explain their reasoning, the communication function degrades — firms have less to work with, and compliance signals become harder to read. Over time, this creates a market in speculation about SEBI's actual enforcement priorities, which tends to benefit repeat players with better institutional access and disadvantage first-time respondents.

There is a related problem of comparability. Without disclosure of how the Indicative Amount was applied or departed from, parties in different proceedings have no reliable basis for assessing whether their settlements are proportionate to those of similarly situated respondents. This isn't just an accountability concern — it affects the integrity of the settlement process itself. Parties who suspect outcomes are inconsistent have incentives to contest rather than settle, which undermines the efficiency that makes the mechanism worth having.

The obvious counterargument is that transparency requirements could undermine the efficiency that makes settlement worthwhile. That's a real tension. But it doesn't follow that the only options are full adjudicatory disclosure or none at all. Categorical disclosure — identifying which factors drove a departure from the indicative amount, without exposing the full deliberative process — would make outcomes legible without converting settlement into something it isn't meant to be. The FCA's decision notices, which explain penalty calculations at a categorical level without exposing internal deliberation, offer a workable model.<sup>13</sup> The

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<sup>12</sup> U.S. Securities and Exchange Commission, *Enforcement Manual*; UK Financial Conduct Authority, *Decision Procedure and Penalties Manual (DEPP)*.

<sup>13</sup> UK Financial Conduct Authority, *Decision Procedure and Penalties Manual (DEPP)*.

framework's current position, which provides no floor of intelligibility, isn't a necessary feature of settlement design.

#### **IV. CENTRALIZED ENFORCEMENT AND THE LIMITS OF ACCESS: THE SFIO MODEL**

Section 212(6) of the Companies Act, 2013<sup>14</sup> requires courts to take cognizance of fraud offences only on a complaint filed by the SFIO or an authorized officer. Private criminal complaints are excluded. The logic is defensible: corporate fraud intersects with complex financial structures and public interest; misuse of criminal proceedings in commercial disputes is a real risk; specialized investigation should precede prosecution.

The Supreme Court's reading reinforces this structure,<sup>15</sup> and it isn't wrong on the merits. Expert investigation before prosecution is appropriate for the type of conduct Section 212 covers.

What this structure creates is enforcement that is entirely contingent on SFIO action. Stakeholders who believe fraud has occurred wait for SFIO to prioritize their matter. SFIO operates under resource constraints, handles a growing caseload, and makes prioritization decisions that aren't made public. These facts, combined, mean that access to enforcement is narrow in practice — and that narrowness falls unevenly.

Institutional investors with the resources to sustain pressure through alternative channels — NCLT applications,<sup>16</sup> MCA complaints, media engagement — are better positioned to get matters before SFIO than retail investors, minority shareholders, or small creditors who lack those resources. Centralized enforcement, in this configuration, doesn't just limit access generally. It limits access differentially. The stakeholders most likely to be harmed by fraud in mid-size companies — employees, trade creditors, retail investors — are often the least equipped to navigate the institutional channels through which enforcement must be initiated.

Alternative routes exist — the National Company Law Tribunal can be approached for investigation orders — but they confirm rather than displace the underlying principle:

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<sup>14</sup> The Companies Act, 2013, § 212(6).

<sup>15</sup> *Serious Fraud Investigation Office v. Rahul Modi*, (2019) 5 SCC 266.

<sup>16</sup> The Companies Act, 2013, §§ 213–216.

enforcement is institutionally filtered. That filtering serves genuine purposes. It also means that stakeholder interests that diverge from SFIO's priorities have limited practical recourse, with no formal mechanism obligating SFIO to explain why particular matters weren't pursued.

## V. A STRUCTURAL SYNTHESIS

What these three frameworks share isn't a common flaw. The DVT under-reaches in sectors where financial metrics misalign with competitive significance. SEBI's settlement mechanism operates through reasoning that isn't disclosed. SFIO's enforcement model is controlled and expert-driven, but that control limits who can meaningfully engage with it.

Different failure modes. But they share an origin: design choices made in isolation, without a cross-cutting framework for what enforcement structure should accomplish. Effective frameworks tend to get three things roughly right.<sup>17</sup> Triggers should align with what the regulation is trying to reach, not just what is easy to measure. Discretionary decisions should be intelligible enough that they function as guidance, not just outcomes. Affected parties should have some meaningful access to enforcement, subject to appropriate safeguards. Each of the examined frameworks is deficient in one of these. None addresses all three.

That's the structural problem. Not that any single framework is poorly designed for its immediate purpose — but that the purposes are being served inconsistently, and the inconsistency reflects the absence of any regulatory theory of enforcement design that cuts across sectors.

It's also worth noting what this pattern produces at the system level. Regulated actors operating across sectors — conglomerates, financial intermediaries, diversified businesses — encounter three different enforcement logics simultaneously. Where their exposure to regulatory risk is diffuse, the inconsistency in enforcement architecture creates asymmetric information: they can't build coherent compliance systems because the rules about how rules are enforced aren't consistent. This isn't a hypothetical concern. It's the predictable output of designing enforcement frameworks sector by sector without a shared framework of principles.

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<sup>17</sup> Julia Black, “Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World”, 54 *Current Legal Problems* 103 (2001).

## VI. TOWARDS A COHERENT ENFORCEMENT FRAMEWORK

The reforms implied here are incremental. They work within existing institutional structures. In competition law, supplementary criteria — turnover concentration in input markets, patterns of sequential acquisition in defined sectors — could extend meaningful coverage to the MSME gap without replacing the DVT. The Competition Commission of India already has the power to conduct market studies;<sup>18</sup> a formal mechanism linking market study findings to threshold calibration would allow the notification framework to adapt to sectors where financial thresholds consistently produce coverage gaps. Sector-specific thresholds calibrated to market structure, alongside the existing financial floor, is an established approach<sup>19</sup> in several jurisdictions.

For SEBI's settlement mechanism, the target is a minimum intelligibility standard. Categorical disclosure of factors driving departures from the Indicative Amount — published in anonymized form, aggregated across settlements over a reporting period — would make enforcement outcomes more predictable without exposing individual deliberations. Comparative data of this kind also creates an internal accountability mechanism: SEBI's own decision-making panels would face implicit scrutiny of outlier settlements, improving consistency without regulatory intervention. (*Institution: Securities and Exchange Board of India*)

In corporate fraud enforcement, the centralization of prosecutorial authority is probably worth preserving. But structured access points — mandatory acknowledgment and response timelines when stakeholders formally place matters before SFIO, combined with a public register of matters received and disposed — would reduce the practical access gap without the risks that open private prosecution would create. Transparency about institutional prioritization, even without disclosure of investigation content, changes the incentive structure for agencies managing constrained resources. (*Administered under the Ministry of Corporate Affairs and the Serious Fraud Investigation Office*)

None of this requires a new institutional layer or a statutory overhaul. It requires that the design choices already embedded in these frameworks be made more self-conscious — and that the connections between them be drawn explicitly.

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<sup>18</sup> The Competition Act, 2002, § 49.

<sup>19</sup> Organisation for Economic Co-operation and Development (OECD), *Merger Control in Dynamic Markets* (2020).

## VII. CONCLUSION

Indian economic regulation has built capable enforcement institutions. The Competition Commission of India, Securities and Exchange Board of India, and the Serious Fraud Investigation Office are better equipped for their purposes than the courts they supplement. That capacity is genuine and shouldn't be understated.

What hasn't developed at the same pace is a framework for how those institutions structure enforcement — when they act, on what basis, with what degree of transparency, and who can access the process. The gaps identified here follow predictably from design choices made in isolation: each framework optimized for its own sectoral context, without a shared understanding of what enforcement design should accomplish.

This matters beyond individual cases. Enforcement architecture shapes how regulated actors calibrate their behavior. Unclear triggers, opaque processes, and inaccessible mechanisms don't just produce inconsistent outcomes — they degrade the information that regulatory systems are supposed to generate, and that degradation compounds. A company that cannot predict how the CCI will treat its acquisitions, cannot extract usable guidance from SEBI's settlement orders, and has no reliable route to initiate fraud enforcement, faces a regulatory environment where compliance is partly guesswork. That isn't a failure of substantive law. It's a failure of enforcement design. Regulatory effectiveness, in the long run, depends not just on whether rules exist but on whether enforcement is structured well enough to make those rules legible. Getting the architecture right is not a secondary concern — it's what determines whether the primary one succeeds.

Enforcement design is ultimately a legitimacy question, not just an efficiency one. When enforcement structures are opaque or effectively closed to most affected parties, the damage is not only to outcomes — it is to trust in the institutions themselves. In India, that is a live concern. Regulatory agencies have grown considerably in scope and authority. The accountability mechanisms that should accompany that growth have not.

A coherent enforcement framework is what separates regulatory authority from regulatory power. It is what makes decisions contestable, reasoning visible, and outcomes something other

than arbitrary. That is not a peripheral concern — it is what gives regulation its normative footing in the first place.

Embedding these design principles across sectors would mean something more than adding capacity when a crisis demands it. It would mean that enforcement choices follow from stated objectives, that departures from those choices can be identified and challenged, and that the system over time becomes more consistent rather than just larger.

## References

1. The Competition Act, 2002.
2. The Competition (Amendment) Act, 2023.
3. The Securities and Exchange Board of India Act, 1992.
4. Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018.
5. The Companies Act, 2013.
6. Ministry of Corporate Affairs, Notification S.O. 988(E), 7 March 2024.
7. *Serious Fraud Investigation Office v. Rahul Modi*, (2019) 5 SCC 266.
8. Council Regulation (EC) No. 139/2004 (EU Merger Regulation).
9. German Act Against Restraints of Competition (GWB), § 35(1a) (as amended, 2017).
10. Organisation for Economic Co-operation and Development, *Regulatory Enforcement and Inspections* (OECD Publishing, 2014).
11. Organisation for Economic Co-operation and Development, *Start-ups, Killer Acquisitions and Merger Control* (2020).
12. Organisation for Economic Co-operation and Development, *Merger Control in Dynamic Markets* (2020).
13. U.S. Securities and Exchange Commission, *Enforcement Manual*.
14. UK Financial Conduct Authority, *Decision Procedure and Penalties Manual (DEPP)*.
15. Julia Black, “Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World”, 54 *Current Legal Problems* 103 (2001).