The Regulatory Challenges of Environment Social Governance in India

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Abstract. Environment Social Governance (ESG) is an intangible key assessing parameter in evaluating the performance of companies by socially aware investors and screening their investments across different sectors. India, being a developing country, heavily relies on foreign investment and competes in global markets for products and services. ESG investing, also known as sustainable investing, is therefore extremely important for India. However, despite being a market-driven phenomenon, there are several legal and regulatory hurdles hindering the smooth implementation of ESG in India. Although regulatory bodies such as the SEBI and the Ministry of Corporate Affairs have introduced guidelines, the lack of a unified disclosure mechanism leads to ambiguity in ESG disclosures. Additionally, the absence of suitable enforcement mechanisms weakens the efficacy of the existing regulations. This paper aims to critically examine the regulatory framework around ESG, analyzing the Company Law, and the SEBI regulations and seeks to offer insights into the challenges and opportunities that are associated with its implementation as well as offering some solutions for the effective implementation of ESG in India.

Keywords: ESG, SEBI, Investors, Investment, Implementation, Legal, Regulator.

1 Introduction

The Environment Social and Governance [ESG] is a framework which is used by the stakeholders to assess the performance of the companies based on the various pillars of sustainability. It is crucial to understand how a company manages opportunities and risks associated with governance, social, and environmental issues. The ESG parameters have been an important metric for the global investors to screen their investments across the different sectors. (Lagasio & Cucari, 2019a)

ESG investing also known as sustainable investing has been an important parameter for the financial performance of different global companies.

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Socially-Responsible-Investing-and-ESG-Investing.Pdf, n.d.). In India, businesses must behave responsibly towards their stakeholders as it not only attracts outsiders to invest in India but also helps them compete to compete worldwide. The Indian legal and commercial environment accommodates both ESG practices and CSR.

The 2013 Act provides detailed guidelines for corporations to engage in philanthropy and CSR for the betterment of society. However, it fails to address the negative impacts that may arise from a company's regular business operations. This has led to a growing interest in the ESG trend, which is gaining significance due to concerns about the limitations of “CSR in India”. This essay seeks to delve into the regulatory challenges of ESG implementation in India, exploring the intricate interplay between regulatory frameworks, market dynamics, cultural nuances, and institutional capacities. At the heart of the matter lies the need for robust and effective regulation that not only incentivizes ESG integration but also ensures accountability, transparency, and compliance across diverse sectors and stakeholders.

2 ESG and the Indian Company Law - Mapping the transition

The ESG framework has been used by the stakeholders to evaluate the production of the companies on myriad metrics of sustainability and has been a key factor in attracting investments in a company. In a country like India ESG is of great significance since Indian companies not only attract foreign investment but many of them compete in the global market for products and services(Lagasio & Cucari, 2019b). The Indian company law is very elaborate about the concept of CSR, yet the Companies Act is not very clear about the considerations relating to ESG(Corporate Social Responsibility Under Section 135 of Companies Act 2013, n.d.).

The concept of CSR is ensconced in the notion of voluntary spending by companies for the targeted benefit of society. It was considered a game-changing provision signalling a commendable step towards responsible business practices(Sharma, 2009). It was believed that the CSR spending would be instrumental in bringing about a transformative change in the lives of the different communities many of whom live in poverty and penury. The mandatory spending of two per cent of its annual profits by the companies in CSR-specific activities- a first of its kind in the world- was aimed at directing a large pool of corporate profits towards the benefit of society(Debnath & Chellasamy, 2022).

Although CSR was incorporated into the statute with a very noble intention, however, there were a lot of challenges in its implementation which hurt its effectiveness. As CSR was an individualized compliance-driven approach by the companies, the legal regime of CSR witnessed a silo-based implementation approach in which every company pursued its objectives independently. The lack of transparency, inefficient resource utilization coupled with improper coordination, and inadequate monitoring hindered the ground-level implementation of CSR. For many

companies, CSR became just checkbox compliance without any link between their CSR activities and genuine social impact. In addition, the company's charitable approach to CSR did not consider the negative impacts that resulted from its regular operations. As a result of the shortcomings of CSR and dissatisfaction with its concept, there has been a gradual shift towards ESG (Umakanth Varottil, 2023.' "The Legal and Regulatory Impetus towards ESG in India: Developments and Challenges. NUS Working Paper Series 2003/003" - Google Search, n.d.)

The transition from CSR to ESG represents a marked departure from just a singular philanthropic approach to a more strategic one. The ESG parameters integrate environmental sustainability, the responsibility of the company towards society as well as effective corporate governance into the core of corporate decision-making (Mahajan, 2022). The shift is catalysed by the changing landscape of investor expectations since global funds and institutional investors are favouring companies which align themselves with ESG principles. The companies which align with ESG principles are perceived by the investors as robust and resilient to any future economic shocks or business cycles. As a result, there has been a realignment of the corporate strategy to embrace the ESG norms in their decision-making processes.

In response to the changing corporate and regulatory landscape, the Indian regulatory bodies like the SEBI have been re-calibrating their focus towards the ESG. In line with its commitment to regulating the capital markets and protecting the investors, the SEBI has not only emphasized the integration of ESG guidelines but also has put forward strictures on corporate disclosure and transparency. The introduction of BRSR ("Business Responsibility and Sustainability Reporting") by the SEBI for the "top 1000 listed companies" is a step in this direction. The BRSR goes beyond the conventional CSR reporting requiring the companies to disclose their ESG practices and adopts a standardized approach thereby embracing a more strategic approach and addressing the shortcomings of the erstwhile CSR regime. The Companies Act while having and retaining its CSR provisions is increasingly emphasizing a broad spectrum of ESG considerations. The Act read with the SEBI (BRSR). (ESG Reporting: Environmental Dimension Disclosures by Large Energy Sector Companies in India | European Journal of Theoretical and Applied Sciences, n.d.) Guidelines encourage the Companies to embrace a wide spectrum of ESG considerations.

3 ESG with the framework of SEBI

Over the past five years, there has been a remarkable universal upsurge in ESG investment, with COVID-19 being seen as the primary driver of this movement. This expansion is also explained by mounting data and research indicating that companies that prioritize ESG issues have better management teams and generate higher profits. Investors ranked delivering on ESG criteria as one of the top 5 priorities for businesses in PwC's Global Investor Survey, 2022(Global Investor Survey 2022 |

ESG Execution Gap | PwC, n.d.). Universally, ESG assets are expected to be over "$50 trillion by 2025", accounting for over one-third of all assets under management. ("ESG Assets Rising to $50 Trillion Will Reshape $140.5 Trillion of Global AUM by 2025, Finds Bloomberg Intelligence | Press | Bloomberg LP," n.d.)

The level of scrutiny that ESG investing is subject to is increasing as it gains traction, not only from investors and firms but also from international regulators. The scarcity of trustworthy and consistent ESG data as well as the absence of regulations governing ESG rating companies (ERPs) are two issues that need to be addressed. Another problem is that there isn't a common understanding of what an ESG rating looks at, be it the company's effect on the world or the world's effect on the company's financial future. For example, despite "McDonald's producing more greenhouse gas emissions than other entire countries, MSCI raised McDonald's Corp.'s ratings", noting that the corporation had strong environmental practices. This choice was made considering MSCI's assessment that McDonald's is not at financial risk from climate change. This, however, runs counter to the common discourse's association of ESG investing with "sustainable investment."

The IOSCO recognized the necessity for ERP regulation and emphasized in its final report(IOSCOPD690.Pdf, n.d.) on the subject in 2021 that regulators should pay more attention to the actions of "ESG rating" and data product suppliers operating under their purview. The SEBI released a consultation paper(Law Journal Library - HeinOnline.Org, n.d.-a) on January 24, 2022, in response to the release of the IOSCO report. In it, the agency outlined concerns regarding the unregulated ESG rating industry and suggested the development of a more dependable, comparable, and understandable ESG rating system that complies with emerging global practices. As a result, on February 22, 2023(Gupta & Chanchal, 2022), a draft framework was made public, and on March 29, 2023(Law Journal Library - HeinOnline.Org, n.d.-b), the SEBI board approved it.

3.1 Navigating the regulatory landscape about ESG

In India, regulatory organizations like the MCA and the SEBI are vital to the advancement of Integrating ESG reporting into business operations. As the principal regulator of the Indian securities industry, SEBI has launched several programmes to encourage publicly traded companies to report and comply with environmental standards. For instance, SEBI mandated the filing of Business Responsibility and Sustainability Reports (BRSRs) "for the top 1,000 listed firms" in India based on market capitalization for the FY2022-23, which concluded on March 31, 2023. A circular that was released in May 20211 established this condition. These businesses must outline their ESG performance and initiatives in a BRSR, which must be included in their annual reports. Furthermore, SEBI advises businesses to carry out due diligence to guarantee that they concentrate on ESG concerns that are significant for their industry and operations. doing a materiality study to determine which ESG issues are most pertinent to their line of business. With this method, an organized

framework for ESG reporting and integration is guaranteed, along with recommendations for the BRSR's content, format, and disclosure criteria.
The validation and assessment of ESG disclosures by specific ESG rating organizations, as recognized by SEBI, enhances the dependability, lucidity, and consistency of ESG data. This increases investors' trust in the reliability and correctness of ESG data, which can affect investment choices and, as a result, motivate businesses to enhance their ESG output. However, the MCA has also contributed to the advancement of ESG standards.

The Companies Act of 2013 requirement states that businesses that reach certain revenue thresholds are required to contribute a certain percentage of their earnings to CSR initiatives. Although they are not the same as ESG, CSR and ESG are closely related. This mandate has made businesses take their social and governance duties more seriously. Additionally, the MCA released "National Guidelines on Responsible Business Conduct" to motivate businesses to integrate ESG factors into decision-making and match their strategy with sustainable development goals.

Companies can be encouraged to adopt ESG standards by providing them with a comprehensive framework for integration, instead of just asking them to report on their activities. By mandating businesses to include information about their "CSR expenses and initiatives in their annual reports", "the accountability and transparency" of their social programs can be enhanced. This requirement makes it easier for stakeholders to understand the companies' social initiatives and ensures that businesses fulfil their CSR commitments. Lastly, the MCA's Corporate Governance guidelines, which place a strong emphasis on board diversity, openness, and moral behaviour, have an indirect impact on the implementation of ESG. These factors are essential to ESG considerations and are strongly related to governance.

3.2 Analyzing the Regulatory Framework for the ESG Rating Agencies

Strict qualifying requirements have been outlined in the Regulation for ESG rating agencies requesting SEBI registration. Among other things, Regulation 28E requires them to present a thorough business plan for their ESG rating activities in India. Furthermore, the goals outlined in the business strategy ought to be reasonable and directly tied to the way they want to operate in the Indian securities market. The transparency and governance components of ESG rating agencies have been given more weight by SEBI in the Regulation. They must keep up a website and reveal relevant information about the ESG grading procedure by the Regulation. They must reveal their grading procedures while acknowledging the sensitive nature of these approaches. The ESG rating agencies must also provide an explanation of any modifications to the rating methodology on their website. Conflict of interest policies must be developed and disclosed on the website by the Regulation. Rating organizations associated with the promoter of the ESG rating agency are subject to a general prohibition. The appointment of a compliance officer by the ESG rating agencies is also necessary to guarantee adherence to the relevant legal requirements.

The compliance officer is required to report to SEBI promptly and independently in the event of any non-compliance. By taking such steps, the different investment classes would be guaranteed information symmetry regarding how ESG rating agencies operate. Shareholding limits have been added by SEBI to the Regulation to prevent shareholding interlocks in the ESG rating industry. An ESG rating agency is not permitted to own directly or indirectly more than 10% of any other ESG rating agency. Any ESG rating agency that wants to purchase shares or voting rights that exceed 10% in any other ESG rating agency must have SEBI's approval. Moreover, an ESG rating agency is not permitted to have representation on the board of directors of any other ESG rating agency to avoid director interlocks. A few groups of companies—MSCI ESG, Sustainalytics, RepRisk, and ISS Environmental & Social Quality Score—dominate the global market for ESG rating agencies. Such consolidation in this emerging business would be prevented by the shareholding restrictions.

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In summary, the regulatory structure overseeing ESG rating agencies in India now includes corporate governance standards and strict compliance requirements enforced by SEBI. The fundamental tenets of the regulation are responsibility and transparency on the part of the ESG rating firms. However, because ESG statements are not audited, the Regulation remains mute on the possibility of greenwashing. Furthermore, the absence of consistency in the ESG rating systems may enable misleading reporting, since the top 1000 listed, businesses are required to file BRSR(Business Responsibility and Sustainability Reporting by Listed entitiesAnnexure2_p.Pdf, n.d.) beginning with the financial year 2022–2023.

4 Criteria and importance of regulatory reporting of ESG

4.1 BRSR Core – “Framework for assurance and ESG disclosures for value chain”

The current BRSR format, which was approved by SEBI in 2021, is intended to be a subtype of the “Business Responsibility and Sustainability Reporting” Core, as recommended in the BRSR Circular. The listed companies are assessed using the nine

Key Performance Indicators (KPI) that comprise the current BRSR framework. Among these are the provision of sustainable goods and services, the defence and promotion of human rights, efforts to preserve and improve the environment, the promotion of inclusive growth and equitable development, and the morally responsible provision of value to customers. The BRSR Core modified the KPIs listed in Annexure I of the BRSR Circular to incorporate several new attributes. Trash management, worker safety and well-being encouraging gender diversity, inclusive growth, and the carbon, water, and energy footprint are a few of them.

4.2 Significance of Assurance and Assurance Provider

The discipline of business responsibility and sustainability reporting, or BRSR, is developing because of growing regulatory, investor, and stakeholder scrutiny. The SEBI recently mandated that starting in FY 2023–2024, the top 150 listed businesses must get reasonable assurance on their BRSR Core disclosures. (SEBI | BRSR Core - Framework for Assurance and ESG Disclosures for Value Chain, n.d.)

One component of the larger assurance landscape is seen as a reasonable assurance of BRSR. However, the reported data must be extremely accurate and consistent. An impartial evaluation of the accuracy and completeness of a company's BRSR disclosures conducted by a certified third-party assurance provider is known as reasonable assurance. It will guarantee that stakeholders have faith in a company's “ESG performance”, both in terms of transparency and credibility.

4.3 Value Chain Partners: Obligations and Challenges

A value chain is a group of businesses or other key players who collaborate to meet consumer demands for a single, well-defined good or service.
A value chain makes it easier for businesses to employ important resources at every stage of the production of their goods and services, giving them a competitive advantage and cutting down on waste. This can involve a variety of support-related tasks as well as operations, marketing, sales, and inbound and outbound logistics (see out how Starbucks successfully implemented this value chain concept here). The value chain's overarching goal is, in particular, to add value and increase the worth of goods and services by doing so at every level, increasing their profitability.

4.4 Timeline for Applicability of Various Disclosures

The most recent LODR Amendment Regulations, which mandate assurance and emphasize ESG disclosures by listed businesses according to the timeline mentioned below:

Disclosures	FY 2022-23	FY 2023-24	FY 2024-25	FY 2025-26	FY 2026-27
BRSR	Top 1000 (Mandatory)	Top 1000* (Mandatory)	Top 1000* (Mandatory)	Top 1000* (Mandatory)	Top 1000* (Mandatory)
BRSR Core + Reasonable Assurance	NA	Top 150	Top 250	Top 500	Top 1000
	NA	Top 150	Top 250	Top 500	Top 1000
Value Chain + Limited Assurance	NA	NA	To 250 (Comply or Explain)	Top 250 (Mandatory)	To be* prescribed
	NA	NA	NA	Top 250 (Comply or Explain)	To be* prescribed

5 Enforcement conundrum and enforcement challenges of ESG in India

ESG in India is a niche concept and is slowly taking root in the corporate consciousness. In India, the concept of ESG is evolving and presents a unique set of challenges and problems in enforcement.
The primary challenge of enforcement of ESG considerations lies in the lack of legal mandate in the existing Company Law Statute. While Section 135 of the Companies Act talks about corporate philanthropy through CSR, it falls short of explicitly addressing a broad spectrum of ESG considerations(Business Responsibility and Sustainability Reporting by Listed entitiesAnnexure2_p.Pdf, n.d.). This provision of CSR does not explicitly mention the integration of sustainability, responsibility and governance which are the crucial components of ESG. The lack of integration of the principles of Environmental Law into Indian company law and the absence of clear guidelines on sustainable practices leaves much room for interpretation and thereby hinders the establishment of a standardized approach towards environmental responsibility.

The social factor of ESG places major emphasis on social responsibility and stakeholder engagement. Although the company's act hints at the importance of the stakeholders in the process of governance, however, the current company law does

not explicitly mandate the companies to engage with the stakeholders during its decision-making process thereby creating a significant gap in enforcement.

The crucial challenge of enforcement is the governance considerations. The board composition is a crucial factor in a well-governed enterprise. The literature on corporate governance states that a well-diversified board with independent directors is crucial for the proper management and functioning of the company(The Impact of Corporate Governance Measures on Firm Performance: The Influences of Managerial Overconfidence | Future Business Journal | Full Text, n.d.). However, in India, most of the businesses are promoter-driven in which the promoter family controls significant stakes in the corporation. In the absence of well-defined directives, the companies have wide discretion in choosing their board members and shaping its formation. It poses a significant challenge to the idea of inclusivity and diversity of Boards in the Companies.

As the Board of Directors plays a crucial role in administering the company, they owe significant duties towards the company and its various stakeholders. “Section 166(2) of the Companies Act” provides that the directors must act in the best interest of the company and promote the interest of the company as a whole(ESG Paper by Umakanth Varottil, n.d.). The responsibilities of the directors extend beyond mere financial considerations and extend to encompass the broader principles of responsible business including ESG. However, there have been extensive legal lacunae relating to the enforcement of directors’ duties under ESG. “Section 166(2) of the Companies Act 2013” mandates the directors to be concerned about the members of the company, particularly the shareholders. The shareholder-centrist approach envisaged in the Section ignores the stakeholders which include the employees as well as the environment. The emphasis on traditional governance principles like the duty of care and good faith fails to align itself with the wider goals of ESG. The primary legal challenge is the lack of any penalties for non-compliance with the ESG principles.

The Companies Act 2013 lacks any stringent enforcement procedures for the breach of directors’ duties. While the shareholders may initiate derivative action or bring an action for “oppression and mismanagement” against the Board of Directors, such allegations are quite difficult to prove in a Court of Law. Thus, in the context of ESG, without a clear incentive on the part of the directors to enforce and prioritize ESG considerations, the enforcement of ESG norms into actionable outcomes bears considerable uncertainty.

The limited focus of the Companies Act on the stakeholder's interest, the absence of specific ESG guidelines and a traditional governance-centred approach of the law have given rise to enforcement conundrums requiring the need for a more robust reporting framework for ensuring that the directors actively incorporate ESG into the decision making of a company.

6 Conclusion

The regulatory challenges of ESG in India highlight the importance of integrating sustainability and ethical considerations into the country's business landscape. Despite the difficulties posed by fragmented frameworks, enforcement gaps, cultural diversity, and institutional constraints, there is a clear need for proactive and collaborative action. Addressing these challenges requires a multifaceted approach that combines regulatory reform, industry innovation, stakeholder engagement, and capacity-building initiatives. Policymakers should prioritize the harmonization of ESG standards, the strengthening of enforcement mechanisms, and the promotion of transparency and accountability across sectors.

By embracing ESG as a driver of innovation, resilience, and competitiveness, companies can not only reduce risks and enhance their reputations but also contribute to achieving broader societal and environmental goals. India, with its rich cultural heritage, entrepreneurial spirit, and growing momentum for change, has the potential to become a global leader in responsible investing and sustainable business practices. However, achieving this potential will require bold leadership, collaborative partnerships, and a steadfast commitment to balancing economic growth with social and environmental stewardship. By doing so, India can pave the way for a more equitable, inclusive, and resilient future for generations to come.

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