
INSTITUTIONALISING ESG FOR SUSTAINABILITY-DRIVEN MERGERS AND CORPORATE RESILIENCE

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ABSTRACT

The integration of Environmental, Social, and Governance (ESG) considerations into Mergers & Acquisitions (M&A) has redefined corporate operations, ushering in intricate challenges linked to regulatory divergence, valuation discrepancies, and greenwashing allegations. Misrepresentations of sustainability commitments, exemplified in *Norwegian Consumer Authority and H&M* (2021) and *CSE v. Coca-Cola India* (2019), expose firms to litigation risks and reputational degradation. Breaches of ESG representations and warranties further exacerbate compliance complexities in cross-border transactions. Arbitration is increasingly preferred for ESG disputes, given its confidentiality and enforceability. Instances such as *Vedanta Sterlite*, *Shell Climate Litigation*, and *ExxonMobil Shareholder Litigation* highlight ESG's direct impact on business viability, underscoring the necessity for comprehensive due diligence, sector-specific contractual safeguards, and robust sustainability commitments to navigate the evolving regulatory terrain and ensure long-term corporate resilience.

Introduction

In an era where the sustainability and ethical governance shape business strategies, Environmental, Social, and Governance (ESG) considerations have become indispensable in corporate transactions, particularly in mergers and acquisitions (M&A). Once viewed as supplementary to financial metrics, ESG factors now play a significant role in determining a company's valuation, risk exposure, and long-term viability and such analytics. As the global regulatory landscape obligates an inclination of investor priorities towards sustainable business models, ESG compliance has been observed to be evolving from a voluntary commitment to a legal and a financial necessity.

ESG is inclusive of a broad spectrum of non-financial criteria that assess a company's environmental footprint, labor practices, stakeholder relationships, and governance integrity, which enhances a company's reputation, attracts long-term investors, and ensures operational resilience. Conversely, weak ESG compliance can lead to regulatory scrutiny, reputational damage, and financial liabilities, impacting merger feasibility and post-merger integration. India's ESG legal framework is focusing non building provisions that mandates corporate responsibility across environmental, social, and governance (ESG) aspects of a business. The most essential legislations are inclusive of the Environment Protection Act, 1986, Air and Water Acts, and the Energy Conservation Act, 2001, regulating pollution and sustainability. Laws related to social governance and welfare, like the Companies Act, 2013 (CSR mandate), Equal Remuneration Act, 1976, and POSH Act, 2013, ensure ethical labor practices. India is experiencing a significant advancement in its ESG regulatory landscape, with the Securities and Exchange Board of India (SEBI) mandating sustainability disclosures under the Business Responsibility and Sustainability Report (BRSR) framework. Globally, regulatory bodies such as the U.S. Securities and Exchange Commission (SEC), EU's Corporate Sustainability Reporting Directive (CSRD), and UK's Green Finance Strategy impose austere requisites for ESG disclosure. As businesses navigate through this advancing legal landscape, integrating ESG into corporate decision-making is essential for ensuring compliance, mitigating risks, and maintaining competitive advantage in an increasingly sustainability-driven market.

Sustainability and M&A

Due diligence is considered to be an excruciatingly valuable process in the operational and

commercial nature of companies, which equips itself with concepts such as mergers and acquisitions (M&A) that permits investors to comprehensively assess a target company before finalising a deal. The process presents in-depth examination of financial, legal, operational, and regulatory factors to assess potential risks and opportunities. By conducting due diligence, buyers verify the accuracy of the target company's financial statements, identify any hidden liabilities, and ensure compliance with relevant laws. Sellers, on the other hand, may conduct pre-due diligence to enhance transparency and strengthen their company's market position. Environmental, Social, and Governance (ESG) factors are rooted in corporate law, as they shape how companies operate, disclose information, and ensure compliance with sustainability standards. In India, ESG is on the path of inclination and is regulated through corporate governance, environmental laws, and disclosure norms under the Companies Act, SEBI regulations, and other statutory frameworks.

Several legal provisions in India, govern the due diligence process to ensure transparency and regulatory compliance¹. The Companies Act, 2013 mandates financial disclosures and corporate governance requirements in business transactions². The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 mostly governs the acquisition of publicly traded companies, ensuring fair practices. In furtherance, The Competition Act, 2002 prevents monopolistic behaviour and ensures fair competition in the market. These regulations cumulatively contribute to an essential role in the mitigation of risks and fostering accountability in M&A transactions³. According to the ruling in *Nirma Industries and Anr v. Securities Exchange Board of India*⁴, the investment business Nirma Industries executed a merger before adopting measures to lessen the risks, even though it had been mindful that the company being merged was the subject of numerous legal actions. The court ruled that, in accordance with Regulation 27(d) of the Securities and Exchange Board of India (SEBI) regulations of 1997, a prospective investor business must properly investigate the desired business prior to completing an investment.

A significant example of due diligence in M&A is Tata Steel's acquisition of Corus Group in

1 Agrud Partners, Conducting Legal Due Diligence in India: A Special Focus, AGRUD PARTNERS, <https://agrudpartners.com/legal-due-diligence-guide-in-india> (last visited Feb. 10, 2025).

2 Section 135 of the Companies Act, 2013 read with Companies (CSR Policy) Rules, 2014.

3 Vijay Shrimali, Karunesh Saxena

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Indian Journal of Accounting, volume jou_vol[1].xmlText, issue 1 Posted: 2004-12

4 (2013) 8 SCC 20

2007 for \$12.1 billion. Tata Steel conducted extensive financial assessments, examined Corus's manufacturing capabilities, and analyzed supply chain operations before proceeding with the deal⁵. Despite the comprehensive due diligence, economic downturns and high operational costs post-merger posed significant challenges, highlighting the importance of assessing long-term risks. This case underscores the critical role of due diligence in making informed investment decisions, ensuring legal compliance, and maximizing deal success.

The *Business Responsibility and Sustainability Report (BRSR)* is a mandatory ESG disclosure framework introduced by SEBI in May 2021, replacing the voluntary *Business Responsibility Report (BRR)*. In July 2023, SEBI introduced BRSR Core. The BRSR framework is based on nine principles, covering ethical governance, environmental protection, stakeholder engagement, human rights, sustainable production, and inclusive growth. Companies must report on environmental impact, social responsibility, and governance structures, as per India's National Guidelines on Responsible Business Conduct (NGRBC)⁶. BRSR compliance is inevitable essential for due diligence, valuation, and post-merger ESG integration. It ensures adherence to the Companies Act, SEBI's Takeover Regulations, mitigating legal risks and strengthening corporate accountability in transactions. In Mergers and Acquisitions (M&A), the Board of Directors plays a critical role in ensuring ESG (Environmental, Social, and Governance) compliance post-merger. Governed by The Companies Act, 2013, particularly Sections 134, 149(6), and 166, and SEBI's Listing Obligations and Disclosure Requirements (LODR) Regulations, 2015, the board ensures adherence to BRSR (Business Responsibility and Sustainability Reporting) guidelines. The board ensures transparent disclosures, sustainable business integration, and stakeholder trust to strengthen corporate responsibility and long-term sustainability in M&A transactions, fostering compliance with global ESG frameworks.

Successor liability and environmental compliance

In Mergers and Acquisitions (M&A), successor liability ensures that acquiring companies do not evade responsibility for past environmental violations of the target company. This principle prevents corporations from escaping liability by restructuring, thereby reinforcing corporate

5 Ramakanta Prusty et al., Are Mergers and Acquisitions Beneficial? The Case of Tata's Corus Buy, 1 Int'l J. Fin. Mgmt. 63 (2011).

6 Ministry of Corporate Affairs, National Guidelines on Responsible Business Conduct, Gov't of India (Mar. 2019), https://www.mca.gov.in/Ministry/pdf/NationalGuideline_15032019.pdf.

accountability under Environmental, Social, and Governance (ESG) compliance⁷. Courts assess continuity of operations, intent to evade liability, and awareness of environmental risks during transactions, furthermore in order to mitigate risks, companies must conduct a thorough ESG due diligence, integrate contractual safeguards, and obtain environmental insurance. The protection principle, a key component of environmental law, mandates that businesses must take responsibility for preventing harm to the environment, further strengthening successor liability⁸. In India, the Companies Act, 2013, the Water and Air Acts, and SEBI's BRSR framework⁹ uphold environmental accountability. In *McLeod Russel India Ltd v. Regional Provident Fund Commissioner* (2022)¹⁰, the Supreme Court recognized successor liability for historical non-compliance, highlighting the ESG governance in M&A transactions as the need of the hour.

The Bhopal gas tragedy¹¹ establishes the role of Environmental, Social, and Governance (ESG) factors in M&A transactions, particularly in high-risk industries. Union Carbide Corporation (UCC) and its subsidiary, Union Carbide India Limited (UCIL), had failed comply with ESG principles, resulting in severe environmental damage, loss of lives, and regulatory violations. Weak governance and inadequate risk management led to poor industrial safety standards, violating sustainability principles. In M&A, ESG due diligence is essential to assess risks related to environmental impact, worker safety, and regulatory compliance, ensuring that the companies prioritize ethical responsibilities and vitiate long-term liabilities before acquiring or merging with entities in hazardous industries.

Contemporary comparison

The legal machinery set up in India's ESG and M&A sector is witnessing an evolution, aligning with global trends but differing in regulatory approaches. India's SEBI mandates ESG disclosures through BRSR Core, while corporate governance laws under the Companies Act,

7 Understanding Successor Liability in Mergers & Acquisitions, Visual Compliance Blog (Feb. 9, 2025), <https://www.visualcompliance.com/blog/export-compliance-due-diligence-why-its-essential-in-mergers-and-acquisitions>.

8 The Precautionary Principle: A Deep Dive, Int'l Inst. for Sustainable Dev. (IISD) (Feb. 09, 2025), <https://www.iisd.org/articles/deep-dive/precautionary-principle>.

9 Unlocking the Role of ESG and the BRSR Core in Transforming Indian Corporate Sustainability, CXO Today (Feb. 09, 2025), <https://cxotoday.com/interviews/unlocking-the-role-of-esg-and-the-brsr-core-in-transforming-the-indian-corporate-sustainability>.

10 2014 (8) SCALE 272.

11 1990 AIR 273

2013 impose CSR and sustainability reporting. Environmental laws, like the Environment Protection Act, 1986, govern compliance.

M&A transactions have been facing ESG challenges related to incorporating the relevant provisions, particularly relating to the successor liability in environmental compliance¹². Contrastingly, it has been observed in the U.S., that it follows SEC-led ESG disclosure requirements, emphasising climate risk and corporate liability. The EU's Corporate Sustainability Reporting Directive (CSRD) enforces stricter ESG due diligence in M&A, requiring companies to assess supply chain sustainability. The UK mandates ESG impact assessments in business transactions, integrating Net-Zero commitments.

The Norwegian Consumer Authority's investigation into H&M¹³ a highlight greenwashing risks in ESG compliance within M&A transactions¹⁴. In Norway, H&M's misleading *sustainability style* claims led to stricter regulations on corporate transparency, aligning with the EU's greenwashing laws. Meanwhile, India's Coca-Cola case¹⁵, adjudicated by the National Green Tribunal (NGT), exposed environmental violations under Indian water laws, reinforcing ESG due diligence in corporate deals. Norwegian laws emphasize upon consumer protection provisions. These cases conceptualise M&A transactions, affirming that they require ESG verification, as misleading claims can lead to legal penalties and reputational damage all across the world. Mergers and acquisitions (M&A) are shaped by environmental, social, and governance (ESG) considerations, which have an impact on deal valuations and investment choices. ESG compliance lowers risks, increases operational effectiveness, and promotes corporate sustainability. ESG diligence is given top priority by investors, who incorporate regulations on legal compliance, workplace ethics, and waste management. Strong ESG credentials increase a company's valuation, yet misalignment may lead to divestitures. ESG is growing essential for long-term business success and investment appeal, despite

12 The role of ESG factors in shaping M&A deal value and reputation | International Bar Association (ibanet.org)

13 The Sustainable Fashion Forum, *H&M Is Being Sued for Misleading Sustainability Marketing—What Does This Mean for the Future of Greenwashing?*, <https://www.thesustainablefashionforum.com/pages/hm-is-being-sued-for-misleading-sustainability-marketing-what-does-this-mean-for-the-future-of-greenwashing> (last visited Feb. 12, 2025).

14 Foroudi, Pantea & Nazarian, Alireza & Aziz, Ulfat. (2020). The Effect of Fashion e-Blogs on Women's Intention to Use. 10.1007/978-3-030-24374-6_2.

15 *Hindustan Coca-Cola Beverages Pvt. Ltd. v. CE & CGST Noida*, Excise Appeal No. 70678 of 2019, Customs, Excise & Serv. Tax Appellate Trib. (Allahabad), July 31, 2024.

standardization and governance issues.

Challenges and disputes

The integration of Environmental, Social, and Governance (ESG) considerations in Mergers & Acquisitions (M&A) has paved way for multifaceted challenges, including greenwashing risks, valuation disputes, compliance complexities, and contractual uncertainties, particularly as regulatory scrutiny intensifies and stakeholders demand a greater scale of transparency. Greenwashing is where companies misrepresent or exaggerate sustainability efforts resulting in legal and reputational consequences¹⁶, as seen in *Norwegian Consumer Authority v. H&M (2021)*, where vague sustainability claims violated the Norwegian Marketing Act¹⁷, and *CSE v. Coca-Cola India*, where the National Green Tribunal (NGT) penalized Coca-Cola for unverified "water positivity" claims. ESG-driven acquisitions often result in breach of representations and warranties when undisclosed risks emerge post-transaction, necessitating sector-specific contractual protections covering climate commitments, supply chain ethics, and environmental liabilities.

Valuation disputes often arise as ESG factors that directly impact the businesses, particularly in carbon-intensive industries, as examined in the Berkeley Research Group's report on ESG-related M&A litigation¹⁸. Regulatory and compliance challenges are exacerbated in cross-border deals due to fragmented frameworks such as the EU's Corporate Sustainability Due Diligence Directive (CSDDD), which obligates compliance of strict ESG disclosures, whereas India's ESG reporting remains sector-specific and evolving under frameworks like the Business Responsibility and Sustainability Reporting (BRSR) norms by SEBI.

Environmental due diligence is a critical element in the sphere of manufacturing and energy, where inadequate assessments of pollution risks and regulatory violations can lead to liability under the Absolute Liability doctrine of India, which is reinforced in *MC Mehta v. Union of*

16 Tarabieh, Saeed. (2020). The impact of greenwash practices over green purchase intention: The mediating effects of green confusion, Green perceived risk, and green trust. *Management Science Letters*. 10.5267/j.msl.2020.9.022.

17 *H&M Case Study: Sustainability Concerns*, <https://www.meritshot.com/hm-case-study/> (last visited Feb. 10, 2025)

18 Berkeley Research Group, LLC, *M&A Disputes Report 2024* (Feb. 2024).

India¹⁹ (1987), in turn imposing unlimited liability for hazardous activities²⁰. Similarly, labor and human rights violations, including instances of poor working conditions and exploitative supply chains, which have tendency of triggering legal disputes, with frameworks like the UN Guiding Principles on Business and Human Rights (*Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 (2011)) and India's Factories Act, 1948, imposing obligations on corporate conduct to prevent events like, Tesla's acquisition of a German battery maker faced scrutiny due to worker rights violations, in 2021²¹. For the illustration of the growing influence of ESG in the sphere of corporate governance, Vedanta Sterlite (India) saw environmental violations and mass protests lead to the closure of Tuticorin copper plants²², moreover, the Shell Climate Litigation²³ in Netherlands, resulted in a court-mandated 45% emission reduction by 2030, setting a precedent for climate accountability²⁴ that should be considered and inculcated as a binding provision. With expanding ESG litigation, companies must proactively incorporate comprehensive due diligence, robust contractual protections, and regulatory compliance measures to mitigate M&A risks, ensuring alignment with global sustainability mandates and long-term business resilience.

Conclusion

The phenomenon of amalgamation of ESG measures with the M&A transactions leads to the affirmative development from a peripheral consideration to an imperative paradigm of the merger feasibility, having a great impactful value for regulatory compliance and apt monetary facilitation, along with their reputational fortitude. The progression of sustainability provisions obligates transparency, by inclusion of compulsory provisions for enterprises to inculcate exhaustive ESG-related data and information. This significant shift enables the acquirers to

19 1987 AIR 1086

20 Tyagi Himanni, "Emerging Strategies Of Green Marketing In India", Bookman International Journal of Accounts,

Economics & Business Management; 2013, Vol 2 (2),

21 <https://www.reuters.com/business/autos-transportation/german-labour-court-finds-tesla-broke-union-election-rules-2024-02-13/>

22 Setback for Vedanta: SC Says Sterlite Copper's Tuticorin Plant to Remain Shut Due to Repeated Violations, *The Economic Times* (Feb. 11, 2025), <https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/setback-for-vedanta-sc-says-sterlite-coppers-tuticorin-plan-to-remain-shut-due-to-repeated-violations/articleshow/108106773.cms?from=mdr>.

23 Milieudefensie et al. v. Royal Dutch Shell plc, Gerechtshof Den Haag [Court of Appeal of The Hague], (pending), Netherlands Civil Code & European Convention on Human Rights.

24 Implications for Climate Change Litigation in New Zealand, *Dentons* (Dec. 12, 2024),

<https://www.dentons.co.nz/en/insights/articles/2024/december/12/implications-for-climate-change-litigation-in-new-zealand>.

perform forensic-level due diligence, discerning the latent risks and also making accessible avenues for sustainable value accretion. The prevalence of all the greenwashing allegations, contractual violations, and valuation turbulence highlights the urgent need for the scrutiny of ESG related provisions. A strategic diligence model which incorporates the red-flag risk assessments for expedient insights and exhaustive sustainability audits for the in-depth evaluations, also fortifies the resilience of investment. In order to derive a conclusion, the ESG-centric compliance strategies aim at enhancing exit preparedness, mitigate and minimise post-acquisition disputes, along with reinforcing adherence to evolving jurisdictional mandates.