

UPDATE

This Update has been prepared by Anwasha S Mukherjee and Arnesh Nag

Inclusivity in the realm of the Corporate: An ESG Perspective from the LGBTQIA+ lens

A. Background

In making sustainable investment decisions, a rational imperative is to comprehend the integration of environmental, social, and governance (ESG) factors into investment mechanisms and decision-making. The elements of ESG, which include, *inter alia*, the response of corporations to factors like climate change, corporate social responsibility initiatives, employee rights (including LGBTQIA+ rights), health and safety protocols, and fostering a corporate culture for building trust and innovation, encompass a plethora of issues which, though not forming part of traditional financial analyses, still hold economic relevance. ESG, with its quantifiable metrics, is an impact driven process aiding investors in taking informed decisions, cognizant of the impact their investments have in the larger environmental and socio-cultural context.

B. Origin and Evolution of ESG

At the core of ESG investing lies the notion of creating strong investor values for stakeholders culminating in stronger returns on investment, with the following facets being the fundamental elements of ESG:

- (i) **Environmental** – Involving the study of an organisation’s footprint and responsibility towards natural environment, pollution control, climate change, waste management, and energy use, and rationalising environmental factors in demand and supply chains of businesses and their interaction with the environment.
- (ii) **Social** – Delving into an organisation’s relationship with its employees, suppliers, stakeholders, customers, and community at large (including the LGBTQIA+ community), inclusive of the management of occupational health and safety of personnel. It also focuses on corporate policies in relation to business ethics, human rights, diversity, and inclusion.
- (iii) **Governance** – Cogitating on the organisation’s management structure, ethics, transparency, shareholder rights, internal controls, decision making techniques, and viable procurement. Thus, it requires businesses to identify laches and ensure receptivity to investors’ queries for determine the overall business efficiency.

The inception of ESG may be traced back to 2004 to the efforts of the then United Nations (UN) Secretary General Kofi Annan who invited major CEOs from around the world to participate in a concerted initiative to find ways to integrate ESG into capital markets, under the augury of the UN

Global Compact and with the aegis of the International Financial Corporation and the Swiss Government.¹ In 2005, Ivo Knoepfel, with the support of the UN Global Compact, facilitated a report titled *Who Cares Wins*, emphasising on ESG to account for ease of business and sustainable investment outcomes.² This, along with the release of the Freshfield Report³ by the UN Environment Program Finance Initiative formed the bedrock of the UN's Principles for Responsible Investment in 2006, followed by the UN's Sustainable Stock Exchange Initiative in 2007, so as to promote sustainable investment through ESG.

In the Indian context, elements of ESG in the business realm can be traced back to 2009 when the Ministry of Corporate Affairs issued the Voluntary Guidelines on Corporate Social Responsibility as the first step towards mainstreaming the concept of corporate social responsibility.⁴ Since then, the reporting landscape has progressed in varied ways with the advent of Business Responsibility Reporting, Corporate Social Responsibility, Integrated Reporting, National Guidelines on Responsible Business Conduct and, more recently, the Business Responsibility and Sustainability Report.⁵

C. *The LGBTQIA+ narrative vis-à-vis ESG*

The onset of unanticipated jeopardies of the pandemic has prompted companies to reconsider and accelerate investments by integrating their businesses in consonance with the principles of ESG. This has resulted in increased employee productivity and inclusivity, minimised volatility as well as reduced organisational costs.⁶

In late 2020, *Reuters* reported growth in the investment of a network of investors funding LGBTQIA+ inclusive firms by ten folds, from USD 5 million in 2018 to around USD 50 million in the first eight months of 2020.⁷ In the wake of the recent Black Lives Matter protests in the United States, ripples were felt in the corporate space owing to investors actively supporting varied resolutions in investee companies to address issues relating to diversity and inclusion, and to usher in more tangible efforts to tackle racial biases.⁸

It is not just investors alone who have been taking the call, but potential clients have begun to review business collaborations through the lenses of social sustainability of target businesses. Chick-fil-A, one of the largest fast food restaurant chains in the United States, lost two lucrative airport contracts after

¹ Kell, Georg. (2018, July 11). The Remarkable Rise of ESG. *Forbes*. <https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=11e247201695>.

² Knoepfel, Ivo. (2004, December). *Who Cares Wins – Connecting Financial Markets to a Changing World*. https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf.

³ Freshfields Bruckhaus Deringer. (2005, October). *A legal framework for the integration of environmental, social and governance issues into institutional investment*. https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf.

⁴ Ministry of Corporate Affairs, Government of India. Corporate Social Responsibility Voluntary Guidelines, 2009. https://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf.

⁵ Securities and Exchange Board of India. (2021, May 10). Circular No. SEBI/HO/CFD/CMD-2/P/CIR/2021/562. https://www.sebi.gov.in/legal/circulars/may-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_50096.html.

⁶ Bernoville, Tara. (2021, July 13). *Why is ESG important for companies and investors?*. <https://plana.earth/academy/why-esg-important-companies-investors/>.

⁷ Lopez, Oscar. (2020, September 11). From Wall Street to Silicon Valley, LGBT+ investment on the rise. *Reuters*. <https://www.reuters.com/article/us-usa-lgbt-investment-feature-trfn-idUSKBN2613MR>.

⁸ Temple-West, Patrick. (2020, October 12). Black Lives Matter provokes change on Wall Street. *Financial Times*. <https://www.ft.com/content/d0987e79-624a-4f95-bc0d-89f74efe8380>.

sustained protests and concerns about the company's allegiance to anti-LGBTQIA+ advocacy.⁹ There is thus a growing need for companies to rigorously and actively review their corporate activities, be it donations, business policies, or engagements with clients and employees.

In the Indian context, the events of the last decade were a watershed for LGBTQIA+ rights. In a matter of five years, LGBTQIA+ persons went from being "a miniscule fraction of the country's population" to identities with dignity in whom inhered constitutionally protected rights and liberty.¹⁰ Tracing the evolution of the Supreme Court's jurisprudence, from the days of *Suresh Kumar Koushal*¹¹ through *NALSA*¹² to *Navtej Singh Johar*¹³, one may have overlooked the inclination of the many lower courts to uphold the rights of the LGBTQIA+ population. *Navtej Singh Johar*¹⁴ expressly evinced that the judiciary was willing to usher in a radical shift of perspective on how queer liberty had been judicially perceived, resulting in immensely broadening the ambit for LGBTQIA+ advocacy in the Indian domain.

The Godrej Group has been known for being vocal about LGBTQIA+ issues even prior to the decriminalisation of homosexuality in 2018.¹⁵ In 2017, Godrej Industries also collaborated with the UN Human Rights Office in launching global standards for businesses to tackle discrimination against LGBTQIA+ persons.¹⁶ It also launched Project Rainbow in 2019 to empower LGBTQIA+ people by facilitating them in exploring career opportunities with Godrej.¹⁷ Mahindra Logistics Ltd. has also unveiled a five year plan, starting 2020, focused on hiring LGBTQIA+ people and extending corporate benefits to such employees including adoption leave, bereavement leave, medical insurance benefits, and an inclusive sexual harassment policy.¹⁸ Further on, more recently in February 2022, Tata Steel has also begun to actively employ transgender persons at its plants and mines.¹⁹

D. Afterthought: A Promise of the Offing

It is absolutely essential to note that LGBTQIA+ inclusion through ESG is a strategic imperative rather than just an afterthought. The 'S' of ESG signifying social sustainability is a promising force of innovation and outperformance in all respects, not only limited to finance, but also including

⁹ Lucas, Amelia. (2019, April 2). Chick-fil-A loses two airport deals in less than two weeks. *CNBC*. <https://www.cnbc.com/2019/04/02/chick-fil-a-loses-two-airport-deals-in-less-than-two-weeks.html>.

¹⁰ *Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors.*, (2014) 1 SCC 1; *Navtej Singh Johar and Ors. v. Union of India*, (2018) 10 SCC 1.

¹¹ *Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors.*, (2014) 1 SCC 1.

¹² *National Legal Services Authority v. Union of India and Ors.*, (2014) 5 SCC 438.

¹³ *Navtej Singh Johar and Ors. v. Union of India*, (2018) 10 SCC 1.

¹⁴ *Ibid.*

¹⁵ ET Bureau. (2015, April 3). Equality at work, Godrej group promotes LGBT inclusivity. *The Economic Times*. <https://economictimes.indiatimes.com/equality-at-work-godrej-group-promotes-lgbt-inclusivity/articleshow/46783760.cms?from=mdr>.

¹⁶ Tripathi, Salil et al. (2017). *Tackling Discrimination against Lesbian, Gay, Bi, Trans and Intersex People - Standards of Conduct for Business*. <https://www.unfe.org/wp-content/uploads/2017/09/UN-Standards-of-Conduct.pdf>; Godrej Group and the Office of the High Commissioner for Human Rights. (2017, October 12). Godrej Industries partners with the United Nations Human Rights office to launch global standards for business to tackle discrimination against LGBTI people. https://www.godrejagrovet.com/public/uploads/press_release/PressReleaseGodrejIndustriesthewiththeUnitedNationsHumanRightsOffice.pdf.

¹⁷ Godrej Consumer Products. (2021) Annual & Integrated Report 2020-21. <https://www.godrejcp.com/annual-report/2020-21/management-discussion-and-analysis/our-strategic-pillars/pillar-06>.

¹⁸ Rosario, Kenneth. (2020, June 4). Mahindra Logistics launches queer inclusion policy. *The Hindu*. <https://www.thehindu.com/news/cities/mumbai/mahindra-logistics-launches-queer-inclusion-policy/article31743540.ece>.

¹⁹ ET Bureau. (2022, February 21). Tata Steel Kalinganagar onboards 12 transgender employees as Crane Operator Trainees. *The Economic Times*. <https://economictimes.indiatimes.com/industry/indl-goods/svs/steel/tata-steel-kalinganagar-onboards-12-transgender-employees-as-crane-operator-trainees/articleshow/89718960.cms?from=mdr>.

elimination of social biases. LGBTQIA+ inclusion, being seen as an ‘icebreaker approach’ to altering the corporate culture, will not only lead to receptivity but also social intersectionality. In a society where LGBTQIA+ persons are being demonstrated to have a growing ability to influence investor decisions, it is undoubted that businesses sensitive to equitability and sustainability, including commitment to address LGBTQIA+ concerns, will be able to gain substantial advantage over their competitors. However, a possible pushback may be in the form of a ‘siloed’ approach on resource allocation and management awareness such as gender *versus* LGBTQIA+. ²⁰ In the absence of codified laws governing the legal rights of LGBTQIA+ persons, tangible efforts by businesses and potential employers to address LGBTQIA+ concerns is the need of the hour. The jurisprudence of the apex court has further revitalised hopes of a more promising future for LGBTQIA+ persons of the nation.

Recent efforts by Indian business conglomerates also reveal the realisation by business houses that being inclusive and diverse is not limited to token efforts of launching a rainbow themed logo or hosting a few feel-good corporate events, but also taking palpable steps to becoming measurably inclusive. As has also been put forth by the India Workplace Equality Index²¹, India requires exhaustive and substantial LGBTQIA+ inclusion to achieve social sustainability. In short, the problems of the present can be minimised in the future by recognising today the needs of different groups, including the LGBTQIA+ community, in consonance with the principles of ESG metrics, so as to maximise the benefits of the quest for diversity and inclusivity, in terms of overall corporate performance of business organisations.

This Update has been prepared by Anwesha S Mukherjee and Arnesh Nag who can be reached at anwesha.saha@aquilaw.com and arnesh.nag@aquilaw.com. This Update is only for informational purposes and is not intended for solicitation of any work. The research contained in this Update is based on data and information obtained from secondary sources. Nothing in this Update constitutes legal advice and should not be acted upon in any circumstance.

²⁰ Pemberton, Hephzi. (2020, July 23). Why investors need to embrace an LGBT+ Lens. *ESG Clarity*. <https://esgclarity.com/why-investors-need-to-embrace-an-lgbt-lens/>.

²¹ India Workplace Equality Index. <https://workplaceequalityindex.in/>.