

The CSDDD, Corporate Governance and Jadar Lithium

by

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This paper is about the types of undertakings that will be subject to CSDDD obligations, the substantive and procedural due diligence requirements applicable to these undertakings, and the consequences thereof for the internal governance of groups of companies. The theoretical framework will be tested against the Rio Tinto project to open a lithium mine in the Serbian Jadar valley, which entails substantial risks for people and the environment. CSDDD obligations relating to this project will, inter alia, apply to the top holdings of Rio Tinto and indirect lithium buyers such as Mercedes-Benz and Stellantis, as well as certain operational subsidiaries thereof.

It will be laid bare that, in terms of substantive due diligence requirements, the CSDDD and the international treaties it refers to include many open norms. This leaves CSDDD undertakings with some room for judgement and balancing interests. Much of the legal focus will be on the procedural due diligence mandated by the CSDDD. This provides a corporate governance character to the CSDDD. The required ‘meaningful engagement’ with stakeholders will be important. Also, CSDDD undertakings will be held accountable for both their own activities and the activities of their subsidiaries. They control their subsidiaries and will be expected to impose proper CSDDD policies on them. Thus, the CSDDD will contribute to further developing the doctrine of intragroup governance.

Technically, the CSDDD is a fine piece of work. Whether it will actually move the needle for people, the environment and climate will remain to be seen. The Omnibus-proposal presented by the European Commission on 26 February 2025, including some proposed changes to the CSDDD, is not discussed and has no material impact on the findings in this paper.

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1. Introduction

The Corporate Sustainability Due Diligence Directive (CSDDD) is a fact.¹ The dust of the difficult realization has settled. Will it move the needle? Now the question arises as to what the undertakings, stakeholders and governments involved will actually do. Which adverse impacts for people and the environment will really be prevented? What contribution to achieving climate neutrality in 2050 can be expected? To gain some insight into this, I will include a current case in this discussion. Based on this, I hope to make it clear that the CSDDD has the potential to become a game changer. Much will depend on the interpretation that undertakings, supervisory authorities, courts and stakeholders give to the new rules. In the run-up to the CSDDD, the Corporate Sustainability Reporting Directive (CSRD) has already come into effect, elaborated in the European Sustainability Reporting Standards (ESRS).² There, the focus is on reporting obligations. The CSDDD goes beyond this. The Omnibus-proposal presented by the European Commission on 26 February 2025,³ including some proposed changes to the CSDDD, is not discussed and has no material impact on the findings in this paper.

As will become clear, the CSDDD is more focused on procedural care than on imposing strict substantive policy requirements on undertakings. This approach allows for case-specific weighing of interests and increasingly strict substantive thresholds. The emphasis on procedural care gives the CSDDD a strong corporate governance character.

Below it is discussed which undertakings will be subject to CSDDD obligations (section 3), which substantive and procedural due diligence requirements will apply to these undertakings (sections 4 and 5), and what consequences this has for the governance within the group in which the undertaking concerned operates (section 6). But now first, I will introduce the Jadar project, a first important touchstone for the CSDDD (section 2), in order to make the rules to be scrutinized concrete.

1 Directive (EU) 2024/1740 of 13 June 2024.

2 Directive (EU) 2022/2464 (CSRD) and Delegated Regulation (EU) 2023/2772 (ESRS).

3 Proposal for a Directive amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements (2025/0045 (COD)).

The CSDDD is a European directive and as such addressed to the EU Member States.⁴ Each EU Member State is now obliged to transpose the directive into national implementing legislation. ‘CSDDD provisions applicable to undertakings’ hereinafter refers to undertakings being bound by such national implementing legislation.

2. Jadar lithium as a touchstone

In July 2024, not only the CSDDD came into force.⁵ The European Union also signed an agreement with the Republic of Serbia. This should lead to mining company Rio Tinto receiving a permit for lithium extraction in the Jadar valley in western Serbia.⁶ Lithium is an important raw material for batteries for electric vehicles and is therefore crucial for the transition to a CO₂ neutral society by 2050. The transition to climate neutrality is an ambition of the EU to which the CSDDD aims to contribute. With the lithium project in Jadar, the EU also wants to achieve more strategic independence from China. At the same time, however, extraction of Jadar lithium is associated with serious adverse effects and risks for people and the environment, which the CSDDD aims to protect against. In Serbia there is massive opposition to the project among the population.

If the project goes ahead, Rio Tinto will sell the Jadar lithium mainly to (European) battery manufacturers, who will then supply the batteries to (European) car manufacturers. Stellantis and Mercedes-Benz were present at the signing of the agreement between the EU and Serbia and also signed agreements with Serbia, but these are not public.⁷ It is also relevant that Stellantis, Mercedes-Benz and energy company Total started a joint venture for battery production several years ago, under the name Automotive Cells Company (ACC). All mentioned undertakings will have to comply with the CSDDD regulations (see par. 3). Given the expected risks for people and the environment, the question arises whether Rio Tinto should continue with the project, and whether ACC, Stellantis and Mercedes-Benz should become involved, and if so, under what conditions. Based on these questions, various aspects of the CSDDD will be discussed

4 Article 39 CSDDD. In articles 18, 19, 21 and 28 (see also articles 34 and 35), the CSDDD also assigns some tasks to the European Commission.

5 The CSDDD was published in EU OJ L of 5 July 2024 and thus entered into force on 25 July 2024 (article 38 CSDDD).

6 Memorandum of Understanding dated 19 July 2024.

7 <https://www.politico.eu/article/serbia-president-aleksandar-vucic-win-west-promise-white-gold-lose-people> (last accessed: 7 February 2025).

The expected local impact of lithium mining in the Jadar Valley is significant. According to scientific research, this would be the first lithium mine in an inhabited and agricultural area in the world. The exploitation is associated with potentially devastating effects on groundwater, soil and water use, as well as large amounts of toxic waste and loss of biodiversity. Exploratory drilling has already caused significant environmental damage, with crops that no longer want to grow and increased concentrations of toxic substances such as boron and arsenic in groundwater and rivers. The consequences of exploitation for the environment and human health would be irreversible, especially due to the extensive use of sulfuric acid. The proposed lithium mine would also mean the end of existing sustainable and profitable agricultural activities in the area.⁸ There is uncertainty about the expected benefits of the project for the region and Serbia as a whole.

The discussion about Jadar has been going on for years. Based on scientific objections and after strong protests from citizens, the Serbian government decided in 2022 to revoke the permits already granted to Rio Tinto. On 11 July 2024, the Serbian Constitutional Court declared that withdrawal unconstitutional. It was subsequently agreed that the project will be subject to stringent environmental requirements, including an “extended phase” of legal, environmental and permitting procedures and public consultations, prior to implementation.⁹ According to the cabinet minister involved, it will take until mid-2026, at least, before all permits are finalized. It depends on the environmental impact study that Rio Tinto has commissioned and which needs to be assessed.¹⁰ Rio Tinto and the EU have stated that the Jadar project will be subject to strict environmental requirements.¹¹

8 Dragana Đorđević et al., ‘The influence of exploration activities of a potential lithium mine to the environment in: Western Serbia, *Nature Portfolio, Scientific Reports* (2024) 14:17090, available at [The influence of exploration activities of a potential lithium mine to the environment in Western Serbia | Scientific Reports \(nature.com\)](https://www.nature.com/articles/s41598-024-57090-0) (open access). See also: Author Correction: The influence of exploration activities of a potential lithium mine to the environment in Western Serbia | *Scientific Reports* (nature.com) (open access).

9 <https://www.reuters.com/markets/commodities/rio-tinto-welcomes-serbias-reinstatement-jadar-lithium-project-licence-2024-07-16/>; <https://www.euronews.com/2024/06/17/serbia-puts-the-jadar-lithium-mining-project-back-on-the-table> (both last accessed: 7 February 2025).

10 <https://www.reuters.com/markets/commodities/rio-tintos-serbia-lithium-project-could-take-two-years-approve-minister-says-2024-08-09/> (last accessed: 7 February 2025).

11 <https://www.ft.com/content/91bf1365-daba-406d-86e8-15b595f485f3> (last accessed: 7 February 2025).

The agreement concluded between the EU and Serbia in July 2024 highlights the contribution that cooperation will make to achieving climate goals and the Serbian economy, and ensures:

‘Both Sides will apply high sustainability standards in raw materials, battery, and EVs sectors. The Partnership aims to facilitate exchange and alignment of best practices in this area. Moreover, both sides see an opportunity to further strengthen the sustainability agenda, including through the application of increased due diligence and traceability for the battery value chain where ambitions for sustainable mining and challenges related to environmental, economic and social justice are comprehensively addressed across the battery value chain.’

Many citizens in Serbia have little confidence in the matter. In addition to the above concerns, there are questions in Serbia regarding the legitimacy of the government, the functioning of the rule of law and the quality of the administrative bodies charged with decision-making regarding the project.¹² Since the Jadar project was reactivated in the summer of 2024, the mass protests have also returned.¹³

A relevant question is what weight the CSDDD places on this project.

3. CSDDD undertakings

EU Member States must adopt CSDDD implementing legislation by mid-2026 at the latest and then apply it in phases from mid-2027 to 2029. The largest undertakings will be the first to be eligible, from 26 July 2027.¹⁴ The CSDDD regulations only apply to very large undertakings. This mainly concerns EU undertakings with more than 1000 employees and a worldwide net turnover of more than EUR 450 million, and non-EU undertakings with an EU net turnover of more than EUR 450 million.¹⁵ Within a ‘group’, the scheme applies to each subsidiary that independently meets the threshold, as well as to the ultimate parent company that meets it on a consolidated basis.¹⁶

12 In Le Figaro of 12 August 2024, Florian Bieber, professor at the University of Graz, says: To stay in power, President Vučić of Serbia is playing the lithium card. His autocratic streak and the last elections, which involved so much voter fraud, have been accepted by the EU and Germany, which does not want to mine its own lithium reserves.

13 <https://www.politico.eu/article/huge-lithium-mining-protest-triggers-crisis-meeting-in-serbia> (last accessed: 7 February 2025).

14 Article 37 CSDDD.

15 Those non-EU CSDDD undertakings must appoint an authorized representative within the EU; article 23 CSDDD.

16 Article 2(1) and (2) CSDDD. The CSDDD aims at more types of ‘undertaking’; see the definition in article 3(1)(a) CSDDD.

EEA-countries outside of the EU (Liechtenstein, Norway and Iceland) will also be bound by the CSDDD.¹⁷ How exactly, is not entirely clear yet. Many references in the CSDDD (and this contribution) to the EU will have to be read as references to the EEA. This is not further discussed herein.

The term ‘undertakings’ refers (in addition to regulated financial undertakings regardless of legal form) to entities referred to in Annex I or II to the Annual Accounts Directive and comparable legal forms under the laws of third countries.¹⁸

An undertaking that meets the size requirements (hereinafter: a CSDDD undertaking) is subject to the implementing legislation of the Member State of its registered office. For a non-EU undertaking, the implementing legislation of the Member State with which it has the strongest connection applies (measured by branch or net turnover).¹⁹

The terms ‘group’, ‘parent company’, ‘ultimate parent company’ and ‘subsidiary’ in the CSDDD are closely aligned with those in the Annual Accounts Directive.²⁰ A parent/subsidiary relationship exists when one undertaking has control over the other. The term ‘subsidiary’ also includes indirect subsidiaries. A parent company and all its subsidiaries together form a ‘group’.

The CSDDD allows a CSDDD parent company to comply with certain regulations (also) on behalf of a CSDDD subsidiary. This can help to keep compliance with regulations regarding due diligence and climate transition plans manageable within a group. The subsidiary concerned must then provide all necessary information to the parent company and comply with the parent company’s CSDDD policy. Moreover, the subsidiary remains obliged to fulfill certain of its own CSDDD obligations, including the obligation of meaningful engagement with stakeholders.²¹ Stricter national legislation for a subsidiary, if any, and the powers of the supervisory authority for the subsidiary remain intact.²²

17 EEA refers to the European Economic Area.

18 See the definition of ‘undertaking’ in article 3(1)(a) CSDDD in conjunction with the annexes to Directive (EU) 2013/34 (Annual Accounts Directive).

19 Article 2(6) and (7) CSDDD. For an undertaking with its registered office outside and head office within the EU, the location of the head office will, in my opinion, be decisive (as if it were a branch).

20 See the descriptions in article 3 CSDDD and articles 2 and 22 Annual Accounts Directive.

21 Articles 6 and 13 CSDDD. Please note that article 6(1) does not include a reference to articles 12 through 16, whereas the opening words of article 6(2) do. Article 6(2)(d) explicitly refers to article 13.

22 Articles 4 and 6 CSDDD.

The option to sue the subsidiary under civil law in its own Member State for damage (partly) caused by it is not limited either.²³

The Jadar project will involve several CSDDD undertakings, which will have to account for themselves in various EU Member States. To clarify this, I will limit myself to Rio Tinto, ACC and Stellantis. Mercedes-Benz is in a position similar to Stellantis, but for the sake of readability it is not further mentioned.

Rio Tinto will meet the EU turnover threshold from its existing global activities.²⁴ As a result, its listed top holding companies (the English Rio Tinto plc and the Australian Rio Tinto Ltd) will be CSDDD undertakings.²⁵ For CSDDD purposes, they will be subject to the EU Member State with which they have the strongest connection (measured by branch or net turnover). Their Serbian subsidiary for the Jadar project does not yet generate any turnover in the EU. In the long term, it will also become a CSDDD undertaking, as the Jadar mine is expected to yield more than half a billion euros' worth of lithium annually.²⁶ Suppose the sale to the EU is made by a Serbian distribution company that is a sister company of the production company. Then that distribution company becomes the CSDDD undertaking, rather than the production company. After all, for non-EU undertakings, it is the legal person realizing the net turnover (of more than 450 million euros) in the EU that matters. The Rio Tinto subsidiaries involved, regardless of whether they qualify as CSDDD undertakings, are (intended) business partners in the activity chain of ACC (direct) and Stellantis (indirect). Within Rio Tinto (in the example mentioned), the production company becomes a business partner in the distribution company's chain of activities.

In ACC, the business that will buy lithium to produce batteries, Stellantis holds the largest share, but not a majority.²⁷ ACC is still building battery factories. Presumably, employee numbers and net sales thresholds will be met

23 Compare article 29 CSDDD.

24 The Rio Tinto Annual Report 2023 (at www.riotinto.com) reports global sales of USD 54 billion, without geographical breakdown. I assume that net sales in the EU are at least 1.5 billion euros.

25 These companies form a *dual listed companies structure* and together act as group heads; see *Rio Tinto*, annual report, 2023, p. 158 and 347. I will not discuss any special CSDDD implications for this dual structure.

26 It is estimated that 58,000 tons of lithium carbonate will be produced annually for 40 years <https://riotintoserbia.com/en/jadar-project>; (last accessed: 7 February 2025). The price of a ton of lithium is fluctuating and may currently be around or below EUR 10,000.

27 In ACC, Stellantis holds 44%, and Total and Mercedes-Benz each hold 27.8%. According to the Stellantis 2023 annual report, p. 307 and 377.

when they are operational.²⁸ In any case, the Paris-based parent company, ACC Holding SE, will then become a CSDDD undertaking.²⁹ The same can be expected for some of its subsidiaries (in France, Germany and/or Italy, where the battery factories will be located). Since ACC does not yet meet the size criteria, I am ignoring it as a CSDDD undertaking hereafter.³⁰

Stellantis companies will buy batteries from ACC to put them into electric cars from brands such as Peugeot, Citroën, Fiat and Opel. The ultimate parent company of Stellantis is a Dutch NV. This and several of its subsidiaries in various EU Member States already meet the CSDDD size criteria.³¹

The listed top holdings of Rio Tinto and Stellantis are already among the largest category of CSDDD undertakings. They must meet the requirements from July 2027 onwards. I think this future obligation casts its shadow ahead for two reasons. On the one hand, these companies will be self-motivated to anticipate. After all, there is no point in making large investments now or entering into long-term obligations that will soon no longer prove acceptable. On the other hand, the law in several EU Member States anticipates the CSDDD, with similar legislation and general civil law due diligence obligations.³² In this light, I assume that Rio Tinto and Stellantis will apply their upcoming CSDDD obligations for the Jadar project in advance, especially where the substantive due diligence requirements (see section 4) and meaningful engagement with stakeholders (see section 5) are involved.

4. Substantive due diligence regarding people, environment and climate

CSDDD undertakings are primarily required to identify, prevent and mitigate adverse environmental impacts and adverse impacts on human rights and provide remediation for actual adverse impacts.³³ This concerns adverse impacts of

28 See <https://www.acc-emotion.com/about-acc> (last accessed: 7 February 2025).

29 The SE is also covered by the scheme. See Regulation (EC) No. 2157/2001 on the Statute for a European company (SE), article 9(1) opening words and (c-ii), and article 10.

30 If the Jadar project goes ahead, ACC will also be fully involved as a CSDDD undertaking for the exploitation of the mine.

31 The Stellantis group has a net turnover of EUR 190 billion and 250,000 employees worldwide. See the 2023 Stellantis CSR report, p. 14 (available at www.stellantis.com).

32 Compare the German Lieferkettengesetz and the French Loi de vigilance. See also the Dutch courts in among others the Court of Appeals of The Hague 12 November 2024, ECLI:NL:GHDHA:2024:2099 (*Milieudefensie/Shell*), sections 7.18 and further and 7.53-7.57, referring to the indirect horizontal effect of human rights.

33 Article 3 (various definitions), and articles 5, 8, 10, 11 and 12 CSDDD. See also article 9 about prioritizing if necessary.

their own activities, those of their subsidiaries and those of (direct and indirect) business partners in their ‘chain of activities’.³⁴ The latter term refers to the activities of upstream business partners, such as suppliers. Certain distribution activities of downstream business partners who work on behalf of a CSDDD undertaking or subsidiary thereof are also covered by the chain of activities.³⁵ The CSDDD undertaking must “address adverse impacts effectively in a manner proportionate to the severity and likelihood of the adverse impacts” (these are “appropriate measures”).³⁶

An ‘adverse environmental impact’ means an adverse impact on the environment resulting from the violation of certain prohibitions and obligations listed in the annex to the CSDDD.³⁷ The concept of ‘adverse impact on human rights’ includes an impact on individuals resulting from a violation of human rights listed in the same annex. The accountability of the CSDDD undertaking for some of those human rights depends on further criteria, including whether an undertaking is capable of the violation at all and whether the violation was foreseeable for the undertaking.³⁸ The annex to the CSDDD is divided into two parts and contains a long list of references to provisions from international treaties. All these specific definitions and references strongly frame the scope of the CSDDD. This contributes to legal certainty. Undeniably, there is also scope a limitation here.

The annex to the CSDDD includes many references to two 1966 United Nations treaties, which are abbreviated in English as the ICCPR and the ICESCR. These treaties, together with the Universal Declaration of Human Rights, are also referred to as the *International Bill of Human Rights*. Let me give a brief introduction to these two important treaties:

- ICESCR. This is the *International Covenant on Economic, Social and Cultural Rights*. This is an elaboration of article 22 of the Universal Declaration of Human Rights. Monitoring the implementation of the treaty lies with the UN Committee on Economic, Social and Cultural Rights.³⁹ The ICESCR is based on the principle of gradual but steady implementation, seeks ‘continuous improvement of living conditions’, and calls for ‘the highest attainable standard of physical and mental health’.⁴⁰

34 Article 8(1) CSDDD. Business partner (article 3(1)(f) CSDDD) covers direct and indirect business partners.

35 Article 3(1)(g) CSDDD.

36 Articles 3(1)(o) and 10 CSDDD.

37 Articles 3(1)(b) CSDDD.

38 Articles 3(1)(c) CSDDD.

39 This UN committee has also issued various ‘General Comments’ for the implementation of the ICESCR.

40 Articles 2(1), 11 and 12 ICESCR.

- ICCPR. This is the *International Covenant on Civil and Political Rights*). Compliance with it is monitored by the United Nations Human Rights Committee. The ICCPR establishes, among other things, the right to self-determination of peoples, the right to life and rights for minorities (culture, religion, language).⁴¹ In many situations, the European Convention on Human Rights (ECHR) provides citizens with the same or a broader protection.⁴²

These are interstate treaties that bind governments. The options for citizens to invoke such treaties directly against the government are limited.⁴³ Pursuant to the CSDDD, CSDDD undertakings, i.e. private parties, will bear responsibility for achieving the treaties' objectives as well. The substance of this is about much more than the case outlined in section 2, which only serves to give an idea.

For the Jadar project, various references to the ICESCR and the ICCPR are relevant, such as the right to fair and favorable employment conditions, with safe and healthy working conditions. I also mention the prohibition of causing measurable environmental damage, such as harmful land change, water or air pollution, harmful emissions, excessive water use, land degradation or other impacts on natural resources, such as deforestation, that (a) significantly impair the natural bases for food conservation and production; (b) deny persons access to safe and pure drinking water; (c) (...); (d) are prejudicial to the health, safety, normal use of land or lawfully acquired property of any person; (e) have significant adverse impacts on ecosystem services through which an ecosystem contributes directly or indirectly to human well-being. Furthermore, it is forbidden to deprive persons, groups and communities with rights to land and resources of livelihoods.⁴⁴ Other international treaties to which the annex to the CSDDD refers and which may be relevant to Jadar relate, for example, to the protection of biodiversity.

Considering this, the ICESCR and the ICCPR contain ambitious, but also open standards (fair, healthy, harmful, etc.). The CSDDD adds some open standards to these (due diligence, serious adverse impact, appropriate measures, etc.). In their context, these are direction-giving open standards, towards

41 Articles 1, 6 and 27 ICCPR.

42 https://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights (last accessed: 7 February 2025).

43 For the Netherlands, see for example the criteria formulated in Dutch Supreme Court decisions HR 10 October 2014, ECLI:NL:HR:2014:2928. Compare also Dutch Supreme Court decisions HR 1 April 2011, ECLI:NL:HR:2011:BP3044 and HR 9 April 2010, ECLI:NL:HR:2010:BK4549.

44 Annex to CSDDD, part I.1 under (6), (15) and (16).

continuous improvements for people and the environment. Eventually, much will boil down to a weighing of interests. The appropriate measures to prevent potential adverse impact on people and the environment that a CSDDD undertaking must take, will also depend on who is causing the hazard: the undertaking itself, a subsidiary or a business partner. Business partners can be put under pressure to take improvement measures; in extreme cases, the relationship with the business partner will have to be terminated.⁴⁵ If necessary, own activities can of course be stopped or canceled prior to the start.

All in all, it is not very clear from the directive what exactly CSDDD undertakings must achieve for people and the environment. The CSDDD does not provide a concrete list of substantive prohibitions and result obligations. In terms of substance, it leaves room in many aspects for weighing of interests. What is the most important should carry the most weight. The interests of people and the environment are given an important place by the CSDDD, but they do not have an absolute character. CSDDD undertakings retain some room for weighing.

CSDDD undertakings are further expected to draw up and implement a transition plan to contribute to climate change mitigation. They must do their utmost to align their business model and strategy with the transition to a sustainable economy and limiting global warming to 1.5 °C on the one hand and the undertaking's exposure to coal, oil and gas-related activities on the other hand. The climate transition plan includes concrete objectives and actions, and a description of the involvement of their management bodies. The transition plan is to be updated annually and must contain a description of the progress made.⁴⁶ CSDDD undertakings heading a group or division must examine the business model and strategy of their group or division.

Can Rio Tinto allow the Jadar project to proceed, and can Stellantis engage itself with it, in light of the substantive CSDDD due diligence requirements regarding people and the environment? When answering these questions, the procedural due diligence requirements are relevant (see below). Whether the Serbian government will issue the necessary permits, and even whether the EU will continue to support the project, is not necessarily decisive.⁴⁷ If it turns out that the risks of the project are manageable to such an extent that it can go ahead under strict conditions, Rio Tinto and Stellantis will be able to report positives and negatives in the field of climate. On the one hand, the construc-

45 Article 10 CSDDD.

46 Article 22 CSDDD.

47 This is clearly stated in the 2011 UN Guiding Principles on Business and Human Rights, under II.A.11. The CSDDD partly elaborates on those UN Guiding Principles (see considerations 5 and 14 in the CSDDD).

tion and exploitation of the mine will result in significant CO₂ emissions, which Rio Tinto will have to limit as much as possible. On the other hand, when the mine becomes operational, it will contribute to CO₂ reduction by contributing to the transition to electric driving.

5. Procedural due diligence regarding people, environment and climate

In addition to the substantive weighing framework discussed, the CSDDD prescribes procedural due diligence requirements. CSDDD undertakings must integrate due diligence regarding people and the environment into all their relevant policies and risk management systems.⁴⁸ If the CSDDD undertaking is a parent, this will also concern the policies and systems of subsidiaries.⁴⁹ CSDDD undertakings must assess actual and potential adverse impacts (which requires the use of specific knowledge and expertise),⁵⁰ engage in a meaningful way with stakeholders,⁵¹ and set up a notification mechanism and complaints mechanism.⁵² Moreover, they must monitor the effectiveness of their policies,⁵³ and make an annual report about CSDDD issues public on their website and through a European Single Access Point (ESAP).⁵⁴

Substantive due diligence was discussed in section 4. The distinction with the procedural due diligence discussed here is not always clear. Yet it is important to make this distinction. It is closely aligned with the broader distinction that lawyers make between procedural and substantive justice. Due diligence in making decisions and preparing actions provides a safeguard against unjustified consequences, such as exploitation of people and destruction of their living environment. That in itself is valuable. In addition, procedural due diligence is of independent importance. In national government, citizens not only have the right to be well governed, but also to have access to information and a say (democracy). In court proceedings, in addition to the right to a fair outcome, people are entitled to a fair trial. In addition to combating adverse impacts on people and the environment, stakeholders may expect from CSDDD undertakings to be informed and granted a say in this regard.

48 Article 7 CSDDD.

49 A parent company must not only involve its own employees and their representatives in its policy making (article 7(2) CSDDD), but also those from subsidiaries.

50 Article 8 CSDDD. See also article 13(4) on consulting experts who can provide credible insights.

51 Article 13 CSDDD.

52 Article 14 CSDDD.

53 Article 15 CSDDD.

54 Articles 16 and 17 CSDDD.

The distinction made is also relevant for the legal assessment of corporate policy. When weighing up substantive interests, the undertaking's management is entitled to a certain freedom of assessment. After all, a court should not take the place of the entrepreneur. Nonetheless, a court may, under certain circumstances, rule that the undertaking must tighten its policy. Substantive corporate policy can be viewed more critically if procedural due diligence was lacking during its establishment. An undertaking that generates significant adverse impacts, or the risk thereof, would be well advised to operate very carefully procedurally. This makes substantive policy somewhat less vulnerable, legally.

In my view, the procedural care prescribed by the CSDDD forms part of corporate governance.⁵⁵ After all, as the OECD describes it:⁵⁶

'Corporate governance involves a set of relationships between a company's management, board, shareholders and stakeholders. Corporate governance also provides the structure and systems through which the company is directed and its objectives are set, and the means of attaining those objectives and monitoring performance as determined.'

A comparison with the subject of *good governance* in administrative law points in the same direction. There, good governance is expressed in principles of fairness and human rights (rule of law), transparency and participation (democracy), and increasingly also in terms of effectiveness and accountability.⁵⁷ This effectiveness concerns both the internal organization that must be suitable for achieving set goals, and the degree of goal achievement. As undertakings are increasingly required to take care of public interests, ideas from administrative law are becoming more relevant to corporate law.

Some aspects of corporate governance stand out from the CSDDD. Compared to previous proposals, less emphasis has been placed on the position of directors. For example, specific provisions on board duties from previous proposals did not make it into the final version of the CSDDD. The idea of establishing a mandatory stakeholder council as a sounding board for the board,⁵⁸ did not end up in the CSDDD either.

55 Originally, the CSDDD was to be called the Sustainable Corporate Governance Directive.

56 OECD (2023), G20/OECD Principles of Corporate Governance, OECD Publishing Paris. https://www.oecd.org/en/publications/g20-oecd-principles-of-corporate-governance-2023_ed750b30-en.html (last accessed: 7 February 2025). The same text was already part of the OECD Principles of Corporate Governance 2015, p. 9.

57 Henk Addink, *Good Governance. Concept and Context*, Oxford University Press 2019.

58 EY, Study on directors' duties and sustainable corporate governance, final report (prepared by EU for the European Commission DG Justice and Consumers), EU, July 2020. <https://op.europa.eu/nl/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1> (last accessed: 7 February 2025).

The relationship of companies with their shareholders and stakeholders mentioned in the OECD definition, however, gets much attention in the CSDDD. The relationship with shareholders is discussed in section 6 below when discussing parent/subsidiary relationships and intragroup governance. Here, I will focus in more detail on a CSDDD undertaking's relationship with stakeholders.

'Stakeholders' of a CSDDD undertaking refers to its employees and those of its subsidiaries, relevant trade unions and employee representatives, consumers and other people and groups whose rights or interests are affected by the products, services or activities of the undertaking, its subsidiaries and their business partners, including employees of business partners and human rights and environmental protection organizations.⁵⁹ The CSDDD undertaking must therefore establish communication and consultation structures for relevant CSDDD issues with all these parties, or their representatives. Consultation with employees can take place via works councils,⁶⁰ but also beyond. Strikingly, the shareholders and business partners of an undertaking are not mentioned in the CSDDD-definition of 'stakeholders'. They do not seem to have an interest which the CSDDD specifically seeks to protect. However, shareholders (also minority shareholders) and business partners may certainly have an interest in the CSDDD-related policies and performance of the undertaking, e.g. in the context of their own policies concerning people, environment and climate. I therefore think they are included in the 'other persons' mentioned in the definition of 'stakeholders'.

The obligation of 'meaningful engagement' with stakeholders is set to become an important instrument. For this, the CSDDD undertaking must provide stakeholders with 'relevant and complete information in order to conduct these consultations effectively and transparently'. The undertaking must provide requested information within a reasonable period and in an appropriate and understandable form.⁶¹ It remains to be seen how this transparency obligation will relate to legislation on government transparency, such as the Dutch Open Government Act, which is in part based on the Aarhus⁶² and

59 Articles 13 and 3(1)(n) CSDDD.

60 Compare the Dutch section 28(4) Dutch Works Council Act, which obliges the works council to promote the undertaking's concern for a good environment to the best of its ability.

61 Article 13(2) CSDDD requires this.

62 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. It was signed on 25 June 1998 and entered into force on 30 October 2001.

Tromsø conventions.⁶³ The obligation for a CSDDD undertaking to consult stakeholders applies when gathering information for assessing adverse impacts on people and the environment and prioritizing their approach, developing preventive and corrective action plans, deciding on the possible termination of business relationships, identifying remedial actions, and developing qualitative and quantitative monitoring indicators.⁶⁴

The procedural duty of care in assessing whether it is responsible to start the Jadar project at all lies primarily with Rio Tinto, but also with Stellantis, as an independent CSDDD undertaking. As a downstream business partner, Stellantis is a stakeholder of Rio Tinto, and as such entitled to ‘meaningful engagement’ and ‘relevant and complete information’.

Rio Tinto apparently wants to continue with the project, despite the independent scientific concerns expressed (see section 2). As a matter of procedural care, strict requirements may be imposed on the quality and relevance of the scientific research on which Rio Tinto relies, and on the independence thereof.⁶⁵ The latter is important, given the tension within Rio Tinto between its profit target and its CSDDD obligations. Rio Tinto must avoid the appearance of conflicting interests as much as possible. It will have to provide a substantiated explanation of the possible adverse consequences for people and the environment and the expected positive impacts for the Jadar region and Serbia as a whole. Scientific research relied on by Rio Tinto will have to be verifiable by scientists which stakeholders might wish to involve. Otherwise, ‘meaningful engagement with stakeholders’ will have no substance. Stellantis also needs that information to meet its own CSDDD obligations.

It is worth noting that the CSDDD does not require CSDDD undertakings to publish their climate transition plans (discussed in section 4). However, they will have to report on it in annual CSDDD reports on their websites.⁶⁶ The mandatory description of the role of the undertaking’s management in establishing the transition plan⁶⁷ underlines its importance. The climate transition plan is not part of the mandated ‘meaningful engagement’ with stakeholders. Notwithstanding, they can form an opinion based on the annual report and

63 Council of Europe Convention on Access to Official Documents (VETS no. 205). The Netherlands is not a party.

64 Article 13(3) CSDDD.

65 Rio Tinto states that it has already conducted a lot of research <https://www.riotinto.com/news/releases/2021/Rio-Tinto-commits-funding-for-Jadar-lithium-project>; (last accessed: 7 February 2025), but has made relatively little of it public.

66 Article 16 CSDDD. Undertakings under CSRD/ESRS must also report under those regulations, including about the scope of their CO₂ emissions (scopes 1, 2 and 3).

67 Article 22(1)(d) CSDDD.

make that known through generally available channels. As part of its own transition plan, Stellantis can exert its commercial influence on Rio Tinto to promote a climate-neutral construction and exploitation of the mine, to the extent reasonably possible.

6. *Intragroup governance*

Within a large group, only a few companies will qualify as CSDDD undertakings. This only concerns the ultimate parent company and the subsidiary(ies) that meet the relevant legal form and size criteria (see section 3). These CSDDD undertakings are held accountable for their own activities, and also for those of their subsidiaries. The CSDDD thus provides an important impetus to legal thinking about intragroup governance.

The ‘group’ has developed into an important reality,⁶⁸ in which actual cohesion takes central stage. All kinds of arrangements, facts and circumstances contribute to this cohesion. Consider voting rights, articles of association and regulations, internal guidelines, employment contracts with directors and intragroup service level agreements. Also relevant to a group are the functioning of consultation and decision-making structures, divisions, business units and staff departments. Complementarity of economic activities, a common financial policy, the provision of security for debts of group companies and [...] also play a role. In addition, there will be a (more or less) central strategy, with budgeting and key performance indicators in remuneration packages, and instruction lines and reporting lines to and from the group management. The top holding company, where group management is located, bears a certain responsibility for the functioning of the group as a whole.

Such groups arise from a practical need for efficient organization of large businesses.⁶⁹ At the same time, the law attaches more and more responsibilities to control power in parent/subsidiary relationships. The parent company preparing consolidated annual accounts must actually use its powers to be ‘in control’. The obligations vested in CSDDD undertakings represent a further extension of the parent company’s legal responsibility. The law therefore increasingly imposes an efficient and manageable organization of the group.

68 Compare the strongly realistic movement of the *object-oriented ontology* (OOO) within philosophy, which focuses on factual phenomena (‘objects’) with a major influence on the world. Not only people, but also plastic and religion, for example. A nice and easy to read book about this is: *Graham Harman, Object-oriented ontology – a theory of everything*, Penguin Books, 2020.

69 The word ‘business’ has many meanings. In a sense, a group is also a business.

A group has units (such as individual companies) and clusters (such as geographical or product divisions). There are also administrative and organizational lines, and staff departments (such as finance, accounting, legal and compliance). The reporting lines often deviate from the corporate structure. Yet control within the group largely derives from the parent/subsidiary relationships within that corporate structure.

The law grants special autonomy to various actors within a group. A subsidiary board has its own responsibility to serve the subsidiary's interests. For a divisional management, this also includes the divisional interests. Partial interests within a group are sometimes safeguarded with their own governance rules, such as the Dutch mitigated large company regime,⁷⁰ and specific rules for regulated entities such as banks. In addition, certain employees with a professional qualification as an auditor or lawyer have their own (professional) responsibility. Works councils also have their own responsibility exercising their advisory rights.⁷¹ The group management must respect all of this. Good intragroup governance is therefore not only focused on top/down management and bottom-up reporting. It also offers sufficient space for a certain decentralized autonomy and bottom-up input on corporate policy, and room for feedback.

Within a decentralized group organization, the autonomy of a subsidiary board can be substantial. In other cases, the responsibility of the subsidiary board is essentially limited to doing what is ordered from the top, provided this can be justified within the subsidiary's interests. When testing the subsidiary's interests, the subsidiary board may sometimes be dependent on information provided by the parent. In appropriate situations (such as obvious carelessness in the preparation or in the documents submitted), the subsidiary board will not have to accept this. All in all, there is no clear line between a parent's control power and a subsidiary's autonomy, but rather a distinctive tension allowing for those involved to take responsibility.

As a contribution to a coordinated CSDDD approach within the group, the CSDDD allows undertakings to share resources and information within their group and with other legal persons.⁷² These 'other legal persons' include the stakeholders discussed in section 5.

By starting from control in parent/subsidiary relationships, the CSDDD opens the way for holding parents accountable for their subsidiaries. This does

70 Section 2:155/265 Dutch Civil Code.

71 In paragraph 5, reference was already made to section 28(4) Dutch Works Council Act. A Dutch central works council is often established for the entire Dutch group part.

A European works council can be established for the entirety of an international group.
72 Article 5(2) CSDDD.

not prevent a certain diversification (for example regionalization) of policy making within a group, as long as the minimum standards of the CSDDD are met everywhere within the group. At the same time, the subsidiary that is itself a CSDDD undertaking is held accountable for its own CSDDD obligations (which also concern its subsidiaries). It can be expected that parents and subsidiaries that are CSDDD undertakings will mutually coordinate their CSDDD policies.

As to the undertakings involved in the Jadar project, I refer to the 2023 annual reporting of Rio Tinto and Stellantis. These contain some information about how these undertakings have organized their efforts for people, the environment and climate at intragroup level.⁷³ The descriptions mainly concern the organization of corporate management at top holding level. Once these undertakings start publishing an annual CSDDD report, more of the intragroup governance may become visible.

7. Conclusions

This paper discusses which undertakings will be subject to CSDDD obligations, which substantive and procedural due diligence requirements will apply to these undertakings, and what consequences this has for the governance within the group in which the undertaking in question operates. Theory was tested against Rio Tinto's project to open a lithium mine in the Serbian Jadar valley, with significant risks for people and the environment. The national legislation of EU Member States to implement the CSDDD will be applied in phases from mid-2027. It is casting its shadow ahead. If opening the Jadar mine proves irresponsible for people and the environment, and CSDDD rules would later force its closure, it is better not to start this project. That would be a waste of investment and unethical.⁷⁴

The top holding companies of the English/Australian Rio Tinto and of intended indirect customer Stellantis (a Dutch NV) already meet the legal form and size criteria for CSDDD undertakings. Operating subsidiaries of Rio Tinto and Stellantis will also be CSDDD undertakings if the Jadar project goes ahead. This also applies to one or more companies of battery manufacturer

73 See amongst others the *Rio Tinto*, annual report, 2023, p. 18/19 (governance, social license), p. 76–77 (governance performance), p. 103–112 (governance framework); and the Stellantis annual report 2023, p. 129 (ESG committee) and p. 200–210 (challenges and internal organization, management transformation and social dialogue).

74 The legal domain forms part of the larger domain of ethics. For a beautiful discussion of this, see: *Scott Hershovitz*, *Law is a Moral Practice*, Cambridge, Massachusetts: Harvard University Press, 2023.

ACC, which would purchase lithium from Rio Tinto and sell batteries to Stellantis. All these CSDDD undertakings in various EU countries can be held accountable for the Jadar project.⁷⁵

It is not exactly clear from the CSDDD what CSDDD undertakings must achieve for people, the environment and the climate. The treaties to which the CSDDD refers stipulate direction-giving open standards and the CSDDD itself adds a few more. This offers undertakings some room for case-specific weighing of interests, but also allows courts to raise substantive thresholds where social developments justify this. From a legal point of view, there will be a strong emphasis on the procedural care mandated by the CSDDD. This gives the CSDDD a strong corporate governance character.

The *meaningful engagement* with stakeholders will become important. To support it, the CSDDD undertaking must provide stakeholders with ‘relevant and complete information in order to conduct these consultations effectively and transparently’. Scientific research that Rio Tinto relies on will have to be independent and verifiable by fellow scientists. Otherwise, ‘meaningful engagement with stakeholders’ would be a sham. Stakeholders who could hold Rio Tinto and Stellantis to account for the Jadar project include residents and businesses in the Jadar region, environmental protection organizations, trade unions and employees. Stellantis is also a stakeholder and needs the information to be provided by Rio Tinto to comply with its own CSDDD obligations. In my opinion, the obligation of meaningful engagement of Rio Tinto and Stellantis with their stakeholders provides the latter with a significant opportunity to influence further decision-making on the project. This could lead to stricter precautions for people and the environment than would otherwise be required, and perhaps even to cancellation of the project.

CSDDD undertakings are not only held accountable for their own activities, but also for those of their subsidiaries. CSDDD undertakings are expected to use their control over subsidiaries. The CSDDD thus provides an important impetus to the further development of the intragroup governance doctrine. The law increasingly imposes an efficient and manageable organization of the group. Regardless of formal instructional powers, reasonableness and fairness provides the parent company with a certain claim to the subsidiary’s obedience.⁷⁶ The parent company’s control also gives it the actual instructional power to enforce this. In addition, subsidiaries have their own responsibility not to settle for substandard CSDDD policies.

75 Formally, holding non-EU companies (such as the relevant Rio Tinto companies) accountable within the EU will only be possible after implementation of the CSDDD.

76 At least, where the parent/subsidiary relationship is governed by Dutch law.

I would briefly like to point out CSDDD provisions that were not discussed above. The European Commission will draw up model clauses for business contracts, provide guidance on the application of the CSDDD and set up a central help desk.⁷⁷ The EU Member States will set up information websites.⁷⁸ They will also appoint national authorities to monitor compliance with CSDDD obligations. These can, on their own initiative or in response to reasoned objections, request information from a CSDDD undertaking, where necessary initiate investigations and carry out inspections and impose sanctions. These national supervisory authorities will collaborate in a European network, supported by the European Commission.⁷⁹ All this does not form part of the corporate governance of CSDDD undertakings, but it does support it. These rules will only come into play upon implementation of the CSDDD, which may only be after a final decision has been made on the continuation of the Jadar project.

The CSDDD further stipulates minimum rules for the civil liability of CSDDD undertakings under the national law that applies to them.⁸⁰ Ultimately, civil liability is of course a good way to keep them on track. Even without the CSDDD, this is developing and may be relevant to the Jadar project. A significant civil liability risk, in addition to the remedial actions and penalties that supervisory authorities may impose,⁸¹ can help align the financial interests of CSDDD undertakings (and their shareholders) with the CSDDD objectives.

The CSDDD is a fine piece of work. Technically, it is well-considered. In terms of content, no static high bar is set, but an infrastructure is prescribed in which ambitions in the areas of people, the environment and climate can flourish. The European cooperation has led to a great result! Now let us see if the potential comes true, and whether the CSDDD will actually move the needle.

77 Articles 18, 19 and 21 CSDDD.

78 Articles 20 CSDDD.

79 Articles 24, 25, 26, 27 and 28 CSDDD. See article 34 and 35 CSDDD on delegated powers of the European Commission.

80 Article 29 CSDDD.

81 Articles 12, 25(4) and 27 CSDDD.

