

THE SHORTCOMINGS OF THE CORPORATE SUSTAINABILITY DUE DILIGENCE PROPOSAL IN THE INFORMATION, COMMUNICATIONS, AND TECHNOLOGY SECTOR

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EXECUTIVE SUMMARY

On 23 February 2022, the European Commission published its proposal for a directive on Corporate Sustainability Due Diligence (CSDD). The Directive represents a long overdue first step toward the EU establishing a mandatory corporate accountability system for human rights and environmental due diligence (mHReDD). After decades of largely ineffective voluntary efforts, the EU could use the Directive to finally hold companies legally accountable for respecting human rights and reducing the environmental impact of their global operations.

Yet the European Commission's current proposal does not go far enough. The Directive—a potential watershed moment in the corporate accountability movement—is marked by a lack of foresight. The upcoming negotiation phase is a crucial opportunity to implement substantial improvements that will give the Directive an effective, long-term impact.

This report sheds light on several overlooked flaws in the Directive and provides legal arguments and empirical data to show that the current proposal would do little to prevent or minimise human rights abuses and environmental destruction. Our analysis and conclusions focus on the Information,

Communications, and Technology (ICT) sector, which is continually expanding inside and outside of the EU. The ICT sector plays a significant role in creating pervasive socio-economic impacts that fuel human rights abuses, damage the environment, and shatter people's lives. Start-up companies in the ICT sector are developing and manufacturing technologies for mass surveillance that can be used for illegal surveillance that violates personal privacy, censors political dissent, restricts freedom of expression, and discriminates against vulnerable groups. Unfortunately, the Directive takes a partial and selective risk-based approach that disregards the role that economic sectors such as the ICT play in human rights abuses and environmental destruction. In fact, the ICT sector is excluded from the high-risk categories identified by the European Commission, while being subject to scope limitations. This exemption is in stark contrast to the comprehensive approach taken by the OECD¹ and the UN².

Drawing upon the legal and empirical analysis on the ICT sector, this report addresses key issues that constitute lack of foresight: a limited scope; the overlooked notion of 'groups'; disregard for stakeholder consultation; and the risks of restricted and expensive access to companies' data.

1 OECD Due Diligence Guidance for Responsible Business Conduct <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>

2 UN Guiding Principles on Business and Human Rights https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

The extremely **limited scope** of the proposal needs to be reviewed and broadened by the European Parliament, EU member states, and the European Commission. Only a very small minority of EU companies would be subject to the Directive as it is now, due to a weak thresholds mechanism and a narrow interpretation of what constitutes a high-risk sector. As part of the same rationale, the proposal should consider **company groups** in order to stop multinational enterprises fragmenting their organisational structure to escape due diligence obligations and civil liability. Our empirical analysis of the proposal's limited scope reveals how easily ICT companies can avoid being held accountable and liable for their actions. In fact, our research shows that fewer than 0.01 percent of companies fulfil the threshold outlined in the Proposal: out of the over 6 million companies active in the ICT sector, **only 675 of those located in the EU would fall within the scope**³. In other words, it is easier to guess three winning lottery numbers⁴ than to find an ICT company required to respect the due diligence obligations.

‘Out of the over 6 million companies active in the ICT sector, only 675 of those located in the EU would fall within the scope.’

Additionally, the current CSDD Proposal **disregards unions and stakeholders**. As demonstrated by our empirical research, all internal value chain managing processes examined ignore stakeholder consultation and the rights of trade union workers and representatives.

Finally, our research shows how **difficult it is to find data and information about companies**. The database used (Orbis), like almost all national business registers, is not open access. The proprietary controls on the databases make it extremely expensive for many accountability groups to check if a company falls within the scope of the Directive. In any case, figures are often not fully available even on these databases, making it practically impossible to know if a company is obliged to respect the Directive.

Complementing the useful recommendations that watchdog organisations have made to EU decisionmakers, this analysis provides data and information which, although nominally accessible, comes at a high cost in money, time, and effort.

3 See Appendix I, table 1

4 https://en.wikipedia.org/wiki/Lottery_mathematics

RECOMMENDATIONS

Drawing upon this empirical data, we make the following set of **recommendations** to the EU bodies engaged in the legislative and negotiation process of the Proposal.

1. Broadening the **scope** of the CSDD proposal and revising its key concepts:

- To significantly lower the thresholds on annual turnover and number of employees established by Article 2 of the Proposal, to bring many more companies into the scope of the Directive.
- To review and expand the definition of high-risk sectors to include ICT, a sector responsible for numerous human rights and environmental violations.
- To include all relationships, regardless of their intensity or duration, in the scope of the value chain to respect the risk-based approach adopted in the UN and OECD standards.

2. Strengthening the relevance of the **'group of companies'** in the Proposal:

- To consider the group of companies when defining the scope of the proposal, to avoid the possibility that, should they be minded to do so, multinational enterprises could restructure themselves so that none of their companies falls within the scope of the Directive, or delegate risky business relationships to subsidiaries that are not obliged to fulfil due diligence obligations.
- To revise the rules on civil liability to introduce strict liability for the parent company in the event of an adverse impact that a subsidiary causes or contributes to.

3. Ensuring national **supervisory authorities** provide access to information and data:

- Member states shall oblige the competent national supervisory authorities to publish yearly an updated list of companies falling within the scope of the Directive, to make it clear which companies must respect the due diligence obligations.
- Competent national supervisory authorities must be given the power to order companies to communicate any required information to relevant stakeholders, such as trade unions, worker representatives, NGOs, and human rights and environment defenders.

4. Ensuring fair **stakeholder engagement** throughout all the phases of the due diligence process:

- To strengthen trade union rights and stakeholders' consultation in all the phases of the due diligence process to avoid them being restricted to the existing codes of conduct, which have proved ineffective.

These recommendations complement those made by civil society groups that actively advocate for an improved CSDD Directive, such as the Business and Human Rights Resource Center (BHRRC)⁵, the European Coalition for Corporate Justice (ECCJ)⁶, and the European Trade Union Confederation (ETUC)⁷.

5 See, BHRRC briefing *Buffering rights: How Europe's new due diligence regulation can help reverse tech rights risks* https://media.business-humanrights.org/media/documents/2022_Buffering_rights.pdf

6 See, ECCJ *Comprehensive analysis of EU Commission's proposal for a directive on due diligence* <https://corporatejustice.org/publications/analysis-of-eu-proposal-for-a-directive-on-due-diligence/>

7 <https://www.etuc.org/en/document/etuc-initial-analysis-commissions-proposal-directive-corporate-sustainability-due>

1. INTRODUCTION

In February 2022, the European Commission presented its long-awaited Proposal on Corporate Sustainability Due Diligence (CSDD).

The Proposal ‘aims to ensure that companies active in the internal market contribute to sustainable development and the sustainability transition of economies and societies through the identification, prevention and mitigation, bringing to an end and minimisation of potential or actual adverse human rights and environmental impacts connected with companies’ own operations, subsidiaries and value chains’ (recital n. 14).

However, this core objective is in jeopardy. The proposal needs substantial improvement—which we hope to see implemented in the negotiation phase. To enable the CSDD proposal to lead the way in the paradigm shift the EU is aiming for, this report addresses the following concerns, providing legal and empirical analysis to back its final recommendations to EU decision makers.

Problem 1: Limited scope due to a high thresholds mechanism

The Proposal has a high thresholds mechanism, limiting its obligations to companies with more than 500 employees and a net turnover of 150 million

euros. Lower thresholds have been set for companies operating in specified ‘high-impact sectors’, with a minimum of 250 employees and a net turnover of 40 million euros. According to our research on the ICT sector, which has been the source of human rights violations and environmental damage, fewer than 0.01 percent of companies fulfil the threshold outlining the scope of the Proposal. In other words, in this sector it is easier to guess three winning lottery numbers⁸ than to find a company that is obliged to respect the due diligence obligations.

Problem 2: High-impact sectors exclude the ICT sector and its tech-related harms

The high-risk sectors have been selected based on the existing sectorial OECD due diligence guidance, except for the financial sector. The four sets of guidance considered by the Commission were adopted between 2016 and 2018⁹ and concern only those sectors traditionally identified as responsible for widespread human rights violations and environmental damage¹⁰. By taking a partial and selective risk-based approach, the Directive completely ignores other sectors, such as ICT, which currently has some of the most pervasive impacts. In the ICT sector many start-ups are currently developing and manufacturing technologies such as drones or other tools for mass surveillance that

8 https://en.wikipedia.org/wiki/Lottery_mathematics

9 In 2019 OECD adopted a fifth guidance (OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises*, 2019) that, however, is not considered by the CSDD Proposal as a high-impact sector.

10 ECCJ *Comprehensive analysis of EU Commission’s proposal for a directive on due diligence*, 2022, p. 8 <https://corporatejustice.org/publications/analysis-of-eu-proposal-for-a-directive-on-due-diligence/>

can cause severe tech-related harms, such as illegal surveillance resulting in loss of privacy, censorship of political dissent impeding freedom of expression, and discrimination against vulnerable groups¹¹. As start-ups, these companies usually have a small number of employees and a low turnover, so would fall outside the current scope of the Proposal. Consequently, the ICT sector shows that the size of a company's operations is no indicator of the environmental or human rights damage it can do.

Problem 3: the 'volatility' of tech companies' value chains does not fit in established business relationships

The CSDD Proposal requires due diligence obligations to be fulfilled only with regards to established business relationships. Consequently, business relationships that are not lasting, because of their intensity or duration, fall outside the scope. This approach is highly problematic in the ICT sector where digital technologies and AI systems are extensively used to micro-fragment the outsourced tasks, as it is demonstrated by the widespread use of crowd employment¹².

This increases the volatility of the tech companies' value chains since they can easily allocate micro-tasks to many suppliers worldwide and replace them according to their needs.

Problem 4: the notion of 'group' is disregarded, and companies will be able to easily bypass mandatory due diligence obligations and civil liability

The Commission has underestimated the importance of the notion of 'group of companies'—an issue currently overlooked in the Proposal. Most of the

multinational enterprises that operate worldwide conglomerate thousands of companies that do not have enough employees or a high enough turnover to be included in the current scope of the Proposal. Our research shows that the selected ICT groups are structured in such a way that allows them to widely circumvent due diligence obligations, since their companies' size excludes them from the Directive. This means that groups could escape due diligence obligations allocating risky business relationships to subsidiaries not falling within the Directive's scope. Groups of companies are also overlooked in the rules on civil liability established by the proposal. Even if subsidiaries can have business relationships with the parent company, they are part of a corporate structure; consequently, a strict liability should apply in case of any adverse impacts they cause or contribute to.

Problem 5: Disregard of trade union rights and stakeholder consultation

The current CSDD Proposal disregards trade union rights as well as stakeholder consultation. Potentially affected groups (including workers) and other stakeholders are to be consulted 'where relevant'; therefore, it is for the company to decide whether to fulfil such consultations¹³. As demonstrated by our empirical research, all internal value chain managing processes examined here ignore stakeholder consultation and trade union and workers' representatives' rights. Indeed, all the documents we consulted provide unilateral descriptions of a company's due diligence process—i.e. a due diligence process formulated and approved by the company management alone—which have not proved effective due to severe and ongoing human rights violations. The company provides its own public audit, without it having to be approved by any relevant stakeholder

11 See, for example: <http://mass-surveillance.odhe.cat/>

12 According to Eurofund definition, Crowd employment is a new form of employment, defined in a 2015 Eurofound report on the subject as employment that 'uses an online platform to enable organisations or individuals to access an indefinite and unknown group of other organisations or individuals to solve specific problems or to provide specific services or products in exchange for payment'.

13 Vogt J., Subasinghe R., Danquah P., *A Missed Opportunity to Improve Workers' Rights in Global Supply Chains*, 2022, <http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/>

involved in the company's value chain. The current formulation of the Proposal, overlooking trade union rights and stakeholder consultation, could entrench current bad practices, reducing due diligence obligations to a mere box-ticking exercise.

Problem 6: Arduous data and information hunt on companies

Another crucial problem was identified during the collecting and processing of data for this report.

It concerns the lack of access to company information. The existing databases are not freely accessible and consulting them is expensive and time-consuming. The information available is sometimes missing or incomplete. Consequently, it can be extremely difficult to check whether a company meets the minimum thresholds of net turnover and employees established in Article 2. Furthermore, the reports and documents published

by the multinational enterprises we investigated do not provide a full and complete description of the due diligence process. Access to information and lack of transparency can become crucial obstacles both for civil society, and potentially for EU decision-makers themselves. Civil society is prevented from exercising its role as a human rights defender, by monitoring and reporting companies' compliance with EU law. And EU institutions, alongside member states, have to deploy extra capacity to access and analyse data to monitor and implement due diligence compliance, while ensuring impactful legislative frameworks are in place.

The problems analysed here add to those already considered by civil society actors that actively advocate for an improved CSDD Directive, such as the Business and Human Rights Resource Center (BHRRRC)¹⁴, the European Coalition for Corporate Justice (ECCJ)¹⁵, and the European Trade Union Confederation (ETUC)¹⁶.

14 See, BHRRC briefing *Buffering rights: How Europe's new due diligence regulation can help reverse tech rights risks* https://media.business-humanrights.org/media/documents/2022_Buffering_rights.pdf

15 See, ECCJ *Comprehensive analysis of EU Commission's proposal for a directive on due diligence* <https://corporatejustice.org/publications/analysis-of-eu-proposal-for-a-directive-on-due-diligence/>

16 <https://www.etuc.org/en/document/etuc-initial-analysis-commissions-proposal-directive-corporate-sustainability-due>

2. LEGAL ANALYSIS: OVERLOOKED LIMITATIONS OF SCOPE AND OTHER SHORTCOMINGS OF THE CSDD PROPOSAL

2.1 PROBLEM 1: THE CURRENT SCOPE OF THE PROPOSAL

EXPLAINER BOX:

Scope (Article 2)

Article 2 of the CSDD Proposal distinguishes between companies formed in accordance with the legislation of a member state and those formed in accordance with the legislation of a third country.

The former fall within the scope if they (Art. 2.1):

- a. have more than 500 employees on average and have a net worldwide turnover of more than 150 million euros in the last financial year for which annual financial statements have been prepared, or;
- b. have more than 250 employees on average and have a net worldwide turnover of more than 40 million euros in the last financial year for which annual financial statements have been prepared, provided that at least 50 percent of this net turnover was generated in the sectors considered 'at risk' (see section 3).

Differently, companies formed in accordance with the legislation of a third country fall within the scope of the Proposal if they (Art. 2.2):

- a. generate a net turnover of more than 150 million euros in the EU in the financial year preceding the last financial year, or;
- b. generate a net turnover of more than 40 million euros but not more than 150 million euros in the EU in the financial year preceding the last financial year, provided that at least 50 percent of their net worldwide turnover was generated in the sectors considered 'at risk' (see section 3).

EXPLAINER BOX:

Adverse human rights impact and workers' rights (Article 3)

Article 3 offers definitions of the most important notions of the CSDD proposal, including human rights adverse impacts.

'Adverse human rights impact' means an adverse impact on protected persons resulting from the violation of one of the rights or prohibitions listed in the Annex, Part I Section 1, as enshrined in the international conventions listed in the Annex, Part I Section 2.'

EXPLAINER BOX:

What is due diligence (Article 4)

Article 4 of the CSDD Proposal lays down the definition of due diligence.

Member states shall ensure that companies conduct human rights and environmental due diligence as laid down in Articles 5 to 11 ('due diligence') by carrying out the following actions:

- (a) Integrating due diligence into their policies in accordance with Article 5.
- (b) Identifying actual or potential adverse impacts in accordance with Article 6.
- (c) Preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent in accordance with Articles 7 and 8.
- (d) Establishing and maintaining a complaints procedure in accordance with Article 9.
- (e) Monitoring the effectiveness of their due diligence policy and measures in accordance with Article 10.
- (f) Publicly communicating on due diligence in accordance with Article 11.

Member states shall ensure that, for the purposes of due diligence, companies are entitled to share resources and information within their respective groups of companies and with other legal entities in compliance with applicable competition law.

As we will show, the current thresholds end up severely reducing the number of companies included into the Directive. In the ICT sector, fewer than 0.01 percent of companies would be subject to the due diligence obligations (see section 3). This sector demonstrates that ‘staff size and annual turnover are not reliable indicators of a company’s impacts and influence over its value chain’¹⁷.

The Proposal uses the term ‘employees’ instead of ‘workers’, further reducing its scope. Indeed, according to the current text, it is debatable whether the notion of ‘worker’ set out by the Court of Justice and mentioned by several recent Directives¹⁸ could be used to interpret and apply the thresholds established by Article 2. The use of the notion set out by the Court of Justice is of paramount importance because it respects the principle of primacy of fact according to which ‘the determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and not by the parties’ description of the relationship’ (recital n. 8 of the Directive 2019/1152). Moreover, the Court of Justice has established

‘It is worth recalling that none of the international standards on responsible business conduct on which the Proposal is grounded limit its scope depending on the number of employees or the company net turnover’

broad criteria for determining the status of ‘worker’; consequently, provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher-based workers, platform workers, trainees and apprentices fall within the notion of ‘worker’. However, these workers, as well as temporary agency workers that the Proposal obliges the user company to include in the calculation of its number of employees, do not appear in yearly financial statements and consequently it is extremely difficult to obtain information on them.

It is worth recalling that none of the international standards on responsible business conduct¹⁹ on which the Proposal is grounded limit its scope depending on the number of employees or the company net turnover²⁰. Indeed, ‘human and environmental negative impacts do not primarily depend on the size of the enterprise, but rather depend on the conduct of the operations and the precautionary measures taken’²¹. Similarly, the number of employees and net turnover do not affect EU health and safety legislation, as well as the Conflict Minerals Regulation, the Employers’ Sanctions Directive, and the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (all of which are recalled in the *Explanatory Memorandum* of the CSDD Proposal).

Furthermore, the recent agreement reached by the Council and European Parliament on the Corporate Sustainability Reporting Directive (CSRD) has amended the Non-Financial Report Directive, broadening the scope of the obligation to publish

17 ECCJ *Comprehensive analysis of EU Commission’s proposal for a directive on due diligence*, 2022, p. 7 <https://corporatejustice.org/publications/analysis-of-eu-proposal-for-a-directive-on-due-diligence/>

18 See Articles 1.2 of the Directive 2019/1152 and 2 Directive 2019/1158.

19 UN Guiding Principles on Business and Human Rights; OECD Guidelines for Multinational Enterprises; ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

20 On this point see: METHVEN O’BRIEN C., MARTIN-ORTEGA O., *Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective*, European Parliament Policy Department for External Relations, Directorate General for External Policies of the Union, 2022, p. 19; Vogt J., Subasinghe R., Danquah P., *A Missed Opportunity to Improve Workers’ Rights in Global Supply Chains*, 2022, <http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/>

21 FIDH, *Europe can do better: How EU policy makers can strengthen the Corporate sustainability due diligence directive*, 2022, p. 4 available on <https://www.fidh.org/en/issues/globalisation-human-rights/european-union-corporate-due-diligence>

a sustainability report for large undertakings²². Reporting obligations have also been extended to small²³ and medium-sized²⁴ undertakings that are governed by the law of a member state and whose transferable securities are admitted to trading on a regulated market of any member state (Article 19a.1 of the trilogy agreement on the CSRD).

As far as it concerns non-EU companies, we should recall that it is extremely difficult (sometimes impossible) using the data on existing databases to calculate the net turnover generated in the EU by a company formed in accordance with the legislation of a third country. To solve this problem, the Proposal requires non-EU companies to inform the supervisory authority whether they fall within the meaning of Article 2, in the member state where their authorised representative is domiciled or established and, where it is different, the supervisory authority in the member state in which the company generated most of its net turnover in the Union in the financial year preceding the last financial year (Article 16.3). This means that according to the Proposal, companies should ‘turn themselves over’ and declare to the supervisory authority whether they fall within the scope or not. However, this self-declaration approach risks being quite weak, especially if it is expected of third-country companies. In fact, States can sanction companies that infringe this reporting obligation, but still they do not know which companies are obliged to provide information. And

even if States decide to introduce a general duty to report on company’s turnover, it is extremely difficult with the current database to verify what has been declared by third-country companies.

2.2 PROBLEM 2: THE BACKWARD-LOOKING DEFINITION OF HIGH-IMPACT SECTORS

As mentioned above, the CSDD Proposal identifies several high-impact sectors which require lower thresholds to fall within scope (Article 2.1.b) and 2.2.b)²⁵. Companies operating in high-impact sectors are required to identify only severe adverse impact (Article 6.2)²⁶. Furthermore, Article 15 on combatting climate change does not apply to them.

The *Explanatory Memorandum* clarifies that these sectors are the ones covered by existing sectoral OECD due diligence guidance²⁷, except the financial sector, where the Commission considers it too costly to impose due diligence obligations (p. 15).

This way of defining high-risk sectors is quite backward-looking. Much research has demonstrated that human rights and environmental adverse impacts are also widespread in other sectors²⁸. In particular, our analyses focus on the ICT sector, for

22 i.e. undertakings which exceed at least two of the following criteria: (a) balance sheet total: 20 million euros; (b) net turnover: 40 million euros (c) average number of employees: 250.

23 i.e. undertakings which do not exceed the limits of at least two of the following criteria: (a) balance sheet total: 4 million euros (b) net turnover: 8 million euros; (c) average number of employees: 50.

24 i.e. undertakings which are not micro-undertakings or small undertakings and which do not exceed the limits of at least two of the following criteria: (a) balance sheet total: 20 million; (b) net turnover: 40 million euros; (c) average number of employees: 250.

25 The list of high-impact sectors includes: (i) the manufacture of textiles, leather and related products and the wholesale trade of textiles, clothing and footwear; (ii) agriculture, forestry, fisheries, the manufacture of food products and the wholesale trade of agricultural raw materials, live animals, wood, food and beverages; and (iii) the extraction of mineral resources (Article 2.1.b).

26 According to the Commentary to the UN Guiding Principles, the severity of a human rights impact should be evaluated on the basis of its scale (how grave the impact is), its scope (how many people are or will be affected), and its irremediable nature (whether it will be difficult or impossible to recompense people impacted by a situation).

27 The list of the sectoral guidance documents is available here: <http://mneguidelines.oecd.org/sectors/>

28 FIDH, *Europe can do better: How EU policy makers can strengthen the Corporate sustainability due diligence directive*, 2022, p. 5 available on <https://www.fidh.org/en/issues/globalisation-human-rights/european-union-corporate-due-diligence>

which the European Commission has provided an *ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*²⁹ and the United Nations High Commissioner for Human Rights has published a report on *The practical application of the Guiding Principles on Business and Human Rights to the activities of technology companies*³⁰ with a specific call for inputs³¹. Both documents emphasise that ‘the use and misuse of technologies can have online and offline impacts on a wide range of other human rights’³². Consequently, they recommend that ‘all sizes of ICT companies’³³ develop a policy commitment and embed respect for human rights. In its Guide, the Commission underlines that ‘even small ICT companies can have a large and diverse customer or end-user base with potential for a variety of impacts to occur’ (p. 16). The UN document invites also all the member states to ‘adopt appropriate measures mandating effective human rights due diligence by technology companies’ (§ 82).

Indeed, many technologies can have negative impacts on environment and human rights. As demonstrated by our empirical analysis (see section

3), the ‘dark side of technologies’³⁴ can especially affect privacy and data protection, freedom of opinion, thought and expression, elections, public and political discourse, equality, and vulnerable groups³⁵.

2.3 PROBLEM 3: THE ESTABLISHED BUSINESS RELATIONSHIPS AND THE VOLATILITY OF TECH COMPANIES’ VALUE CHAINS

Many studies of the platform economy³⁶ and digital transition³⁷ have underlined how the increasing exploitation of digital technologies allows a company to further fragment its value chain. Artificial intelligence techniques can increase the main company’s control over and surveillance of its subsidiaries, contractors, and subcontractors, as well as their workers (including their behaviour and performance). Consequently, the value chain can be micro-fragmented among workers active

29 <https://op.europa.eu/en/publication-detail/-/publication/ab151420-d60a-40a7-b264-adce304e138b>

30 <https://reliefweb.int/report/world/summary-consultation-practical-application-guiding-principles-business-and-human-rights-activities-technology-companies-report-office-united-nations-high-commissioner-human-rights-ahrc5056add1>

31 <https://www.ohchr.org/en/calls-for-input/2022/call-input-high-commissioner-report-practical-application-ungps-tech-sector>

32 United Nations High Commissioner for Human Rights, *The practical application of the Guiding Principles on Business and Human Rights to the activities of technology companies*, § 37; see also EC, *ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, p. 10.

33 EC, *ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, p. 6. See also United Nations High Commissioner for Human Rights, *The practical application of the Guiding Principles on Business and Human Rights to the activities of technology companies*, § 84.

34 This expression is used in the Business & Human Right Resource Centre’s Report, *Buffering rights. HOW EUROPE’S NEW DUE DILIGENCE REGULATION CAN HELP REVERSE TECH RIGHTS RISKS*, <https://www.business-humanrights.org/en/from-us/briefings/buffering-rights-how-europes-new-due-diligence-regulation-can-help-reverse-tech-rights-risks/>

35 O’Brien M., Jørgensen C., Rikke F., Finlay H.B., *Tech Giants: Human Rights Risks and Frameworks*, 2020. Available at SSRN: <https://ssrn.com/abstract=3768813>

36 ILO, *Working from home. From invisibility to decent work*, 2021; ILO, *World Employment and Social Outlook 2021: The role of digital labour platforms in transforming the world of work*, 2021.

37 OECD Studies on SMEs and Entrepreneurship, *The Digital Transformation of SMEs*, 2021; D. Nikulin, A. Parteka, J. Wolszczak-Derlacz, *Working conditions in Europe. The role of global value chains and advanced digital production-driven technological specialisation*, ETUI WP 2022.12; Business & Human Rights Resource Center, *Fitting a technology lens on the EU mandatory human rights & environmental due diligence Directive*, <https://www.business-humanrights.org/tr/blog/fitting-a-technology-lens-on-the-eu-mandatory-human-rights-environmental-due-diligence-directive/>

EXPLAINER BOX:

‘Established business relationship’ (Article 3)

e): ‘business relationship’ means a relationship with a contractor, subcontractor or any other legal entities (‘partner’)

I. with whom the company has a commercial agreement or to whom the company provides financing, insurance or reinsurance, or

II. that performs business operations related to the products or services of the company for or on behalf of the company;

f): ‘established business relationship’ means a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain.

worldwide who are either self-employed or employed by a partner that performs business operations related to the products or services of the company³⁸. The micro-fragmentation of the outsourced tasks increases the ‘volatility’ of the value chain: in fact, these micro-tasks can be allocated to many suppliers and the suppliers can be easily rotated or replaced according to the client’s needs³⁹. Consequently, the notion of an ‘established business relationship’, extensively used in the CSDD proposal, appears to be particularly problematic in ICT sectors.

As noted by legal experts, the notion of established business relationship ‘contradicts the approach in the UNGPs which calls for HRDD based on the significance of the risk, not the actual or expected length of the relationship with the supplier’⁴⁰. Besides, it ‘allows companies to manage their value chain relationships in such a way as to escape or circumvent the rules’⁴¹.

It is easy for the ICT sector to escape legislation in this way due to the widespread exploitation of digital technologies and AI systems⁴². The use of these technologies for managing suppliers shows the leverage that the lead company can exert on them, regardless of the intensity or duration of the business

38 Casilli A., *En attendant les robots*, Seuil, 2019, p. 146 ff.

39 Chew Kuek S., Paradi-Guilford C.M., Fayomi T, Imaizumi S., Ipeiotis P., *The global opportunity on online outsourcing*, The World Bank Report n. ACS14228, 2015, <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/138371468000900555/the-global-opportunity-in-online-outsourcing>; Lehdonvirta V., Kässi O., Hjorth I., Barnard H., Graham M., *The Global Platform Economy: A New Offshoring Institution Enabling Emerging-Economy Microproviders*, in *Journal of Management*, Vol. 45 No. 2, 2019, p. 567, <https://journals.sagepub.com/doi/full/10.1177/0149206318786781>

40 Vogt J., Subasinghe R., Danquah P., *A Missed Opportunity to Improve Workers’ Rights in Global Supply Chains*, 2022, <http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/>.

41 FIDH, *Europe can do better: How EU policy makers can strengthen the Corporate sustainability due diligence directive*, 2022, p. 4 available on <https://www.fidh.org/en/issues/globalisation-human-rights/european-union-corporate-due-diligence>; ECCJ *Comprehensive analysis of EU Commission’s proposal for a directive on due diligence*, 2022, p. 10 <https://corporatejustice.org/publications/analysis-of-eu-proposal-for-a-directive-on-due-diligence/>

42 See also Business & Human Right Resource Centre’s Report, *Buffering rights. HOW EUROPE’S NEW DUE DILIGENCE REGULATION CAN HELP REVERSE TECH RIGHTS RISKS*, <https://www.business-humanrights.org/en/from-us/briefings/buffering-rights-how-europes-new-due-diligence-regulation-can-help-reverse-tech-rights-risks/>

relationship⁴³. As recognised by the Commission in the Proposal Impact Assessment, ‘digitalisation and new technology tools hold great potential to help companies understand their value chains’⁴⁴ and ‘provide unprecedented solutions to identify, address and eliminate human rights infringements and environmental challenges’⁴⁵.

An example of the digital managing process of the value chains is the Portals of Suppliers set up by several companies (see Telefónica⁴⁶ and Huawei⁴⁷), which require their suppliers to fulfil a registration process that allows them to acquire data which can then be used to better manage their value chain. These systems prove that tech companies can always oversee the activities of their suppliers, even if their business relationships are short or unstable.

2.4 PROBLEM 4: THE OVERLOOKED NOTION OF THE ‘GROUP OF COMPANIES’

EU law extensively adopts the notion of the group, for which it provides different definitions. For example, Directive 2014/95/EU amending Directive 2013/34/EU regards disclosure of non-financial and diversity information and obliges large undertakings and groups⁴⁸ to fulfil reporting obligations (Article 29a). Similarly, Directive 2009/38 requires to establish a European Works Council or a procedure for informing and consulting employees in every Union-scale undertaking and group of undertakings (Article 1)⁴⁹. The links between companies are even more relevant in EU taxation law, which establishes a general anti-abuse rule to fight against fraudulent arrangements (Article 1 § 2 and 3 of the Directive 2011/96; Article 6 of Directive 2016/1164)⁵⁰ and obliges member states to introduce rules on controlled foreign companies to include their income in the parent company’s tax base (Article 7 of the Directive 2016/1164)⁵¹.

43 GLOBAL VALUE CHAIN DEVELOPMENT REPORT 2019, *TECHNOLOGICAL INNOVATION, SUPPLY CHAIN TRADE, AND WORKERS IN A GLOBALIZED WORLD*, <https://www.worldbank.org/en/topic/trade/publication/global-value-chain-development-report-2019> ; GLOBAL VALUE CHAIN DEVELOPMENT REPORT 2021, *BEYOND PRODUCTION*, https://www.wto.org/english/res_e/booksp_e/00_gvc_dev_report_2021_e.pdf

44 Commission Staff Working Document. Impact Assessment Report accompanying the document Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, SWD(2022)42, p. 42.

45 Commission Staff Working Document. Impact Assessment Report. Annexes accompanying the document Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, SWD (2022)42, part 2/2, p. 57.

46 <https://www.telefonica.com/en/about-us/suppliers/access-for-telefonica-group-suppliers/>

47 <https://scs.huawei.com/supplier/register-guide.html>

48 Directive 2013/34/EU defines a ‘group’ as ‘a parent undertaking and all its subsidiary undertakings’ (Article 2(11)).

49 ‘group of undertakings’ means a controlling undertaking and its controlled undertakings’ (Article 2.1.b).

50 ‘For the purposes of calculating the corporate tax liability, a member state shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances’. ‘An arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality’ (Article 6 § 1 and 2).

51 This rule does not apply ‘where the controlled foreign company carries out a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances’ (Article 7 § 2 let. a). In order to monitor groups’ activities, Directive 2016/881 has also introduced an obligation, for the parent company of big multinational groups, to file a country-by-country report (CBCR) where each entity of the group is identified and information on its jurisdiction of tax residence and, where different, the jurisdiction under which it is organised, the nature of its main business activity, the amount of revenue, profit (loss) before income tax, income tax paid, number of employees, and tangible assets, is disclosed (Article 8 aa § 3 Directive 2011/16 introduced by Directive 2016/881).

EXPLAINER BOX:

'Subsidiary' and 'controlled undertaking'

The CSDD proposal defines a 'subsidiary' as 'a legal person through which the activity of a 'controlled undertaking' as defined in Article 2(1), point (f), of Directive 2004/109/EC is exercised' (Article 3.d).

In the latter 'controlled undertaking' 'means any undertaking (i) in which a natural person or legal entity has a majority of the voting rights; or (ii) of which a natural person or legal entity has the right to appoint or remove a majority of the members of the administrative, management or supervisory body and is at the same time a shareholder in, or member of, the undertaking in question; or (iii) of which a natural person or legal entity is a shareholder or member and alone controls a majority of the shareholders' or members' voting rights, respectively, pursuant to an agreement entered into with other shareholders or members of the undertaking in question; or (iv) over which a natural person or legal entity has the power to exercise, or actually exercises, dominant influence or control.'

The CSDD Proposal also mentions the notion of a 'large group' as clarified in Article 3(7) of the Directive 2013/34/EU⁵², in order to exclude the micro, small and medium-sized enterprises that are part of it from the definition of SME set out by Article 3.i. Furthermore, Article 4.2 of the proposal entitles companies, for the purpose of due diligence, 'to share resources and information within their respective groups of companies and with other legal entities in compliance with applicable competition law'.

Despite these rules, the notion of 'group of companies' is largely overlooked by the proposal. All the due diligence obligations refer exclusively to companies, i.e. legal persons constituted as one of the legal forms indicated in Article 3.a)⁵³. This formulation creates two problems: firstly, it excludes several legal persons that can operate a business (such as foundations, sole proprietorship); secondly,

it ignores both the notion of *entreprise-ensemble*⁵⁴ set out by the European Court of Justice in the field of EU competition law⁵⁵ and the notion of the 'group' that is widely used in European legislation. Consequently, companies belonging to a group fall within the scope of the Directive only if they meet the threshold established in Article 2. As we will demonstrate in Section 3, this excludes most group companies. For companies that are part of a group, the *Explanatory Memorandum*'s justification for excluding SMEs from the due diligence duty (p. 14) is not satisfactory. These companies often have pre-existing due diligence mechanisms in place (ones set by the group), so 'the financial and administrative burden of setting up and implementing a due diligence process' would not be high for smaller companies belonging to a group and the cost of doing so would not impact them disproportionately (p. 14).

52 'Large groups shall be groups consisting of parent and subsidiary undertakings to be included in a consolidation and which, on a consolidated basis, exceed the limits of at least two of the three following criteria on the balance sheet date of the parent undertaking: (a) balance sheet total: 20 million euros (b) net turnover: 40 million euros; (c) average number of employees during the financial year: 250' (Article 3(7) Directive 2013/34/EU).

53 Article 3.a)(iv) uses the broader term 'undertaking'; however, it then lists the specific entities that fall within the proposal's scope.

54 Supiot A., *Au-delà de l'emploi. Transformations du travail et devenir du droit du travail en Europe*, Paris, 2001, p. 181.

55 ECJ, 10 September 2009, C-97/08, *Akzo Nobel and others v. Commission*.

As other analysis has pointed out⁵⁶, the Proposal's current formulation lets groups easily escape from due diligence obligations and potential organisational restructuring further strengthens the risk that none of subsidiary companies falls within the scope of the Directive. Moreover, these obligations concern only the main company's value chain⁵⁷. A holding can allocate the production of goods or the provision of services to a subsidiary that does not fulfil the thresholds established in Article 2 and thus escape any due diligence obligations related to that production or service provision.

The legal uncertainty generated by overlooking the notion of 'groups'

RISK 1: Group's attempts to exploit the highly problematic notion of an 'established business relationship' can have other negative effects. A **group could easily circumvent due diligence obligations by delegating risky business relationships to subsidiaries**. Article 6 requires companies to 'take appropriate measures to identify actual and potential adverse human rights and adverse environmental impacts arising from their own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships' (see also Article 10). But since it refers only to the 'established business relationships' of the main company, a group can decide to limit its obligations by allocating one or more business relationships to subsidiaries. It

is true that the definition of established business relationships applies to 'direct or indirect' relationships. However, groups can adopt strategies to avoid a 'lasting' business relationship or one that represents a significant part of the main company's value chain.

Finally, the notion of a group is completely ignored in the rules on climate change, directors' duty, and civil liability.

RISK 2: Article 15 on combating climate change obliges companies with more than 500 employees and a net turnover of more than 150 million euros to adopt a plan identifying the impact of their operations on climate change. These **companies are not required to evaluate the environmental consequences of the operations of their subsidiaries and their established business relationships**⁵⁸. Furthermore, large companies must adopt a plan to ensure that their business model and strategy 'are compatible with the transition to a sustainable economy and ... in line with the Paris Agreement', but again the plan refers only to the 'company's operations'⁵⁹.

RISK 3: Similarly, the group's interest is completely ignored in Article 25 on the **directors' duty of care**. Directors are obliged to 'take into account the consequences of their decisions for sustainability matters', but with reference only to the company, regardless of the group's operations.

56 ECCJ *Comprehensive analysis of EU Commission's proposal for a directive on due diligence*, 2022, p. 7 <https://corporatejustice.org/publications/analysis-of-eu-proposal-for-a-directive-on-due-diligence/>

57 "Value chain" means activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company' (Article 3.g).

58 ECCJ *Comprehensive analysis of EU Commission's proposal for a directive on due diligence*, 2022, p. 18 <https://corporatejustice.org/publications/analysis-of-eu-proposal-for-a-directive-on-due-diligence/>

59 On the many loopholes of the CSDD Proposal on environmental harm see Lamy P., Pons G., Garzon I., *GT10 – EU Corporate due diligence proposal: Game changer or paper tiger?*, Europe Jacques Delors, 2022, <https://www.europejacquesdelors.eu/publications/gt10>

RISK 4: In addition, it is not clear how Article 22 on **civil liability** applies to subsidiaries.

EXPLAINER BOX:

Civil liability

According to Article 22, a company is liable for damages if: it failed to comply with the obligations laid down in Article 7 and 8 and, as a result of this failure, an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Article 7 and 8 occurred and led to damage.

Since Articles 7 and 8 do not establish specific due diligence obligations in relation to subsidiaries, **it is not clear when a holding has fulfilled its due diligence obligations and can therefore avoid any liability for damages caused by its subsidiaries**⁶⁰. For example:

- **It is unclear if the rules that allow the termination of a business relationship (Articles 7.5 and 8.6) can be applied to subsidiaries.** It is quite common for a company to have such relationships with its subsidiaries; however, it would be paradoxical to allow these

washout solutions⁶¹ to apply to subsidiaries that continue to be controlled by the company that has decided to terminate a single, specific business relationship.

- It is unclear whether contractual assurances or contracts aimed at achieving compliance with the company's code of conduct or prevention action plan signed by a subsidiary could exempt the parent company from any liability (Articles 7.2.b), 7.3, 8.3.b) and 8.4). These rules concern business partners and have been widely criticised because of the risks of burden-shifting by the lead company onto its suppliers⁶². In this case, too, it would be paradoxical to apply these rules to subsidiaries whose relationship with the main company is not limited to a commercial agreement or to the performance of business operations.

Similarly, Article 22.2 (which excludes liability for damages caused by an adverse impact arising because of the activities of a partner with whom a company has an indirect established business relationship) should not be applied to subsidiaries. In this instance the text is not clear.

- It is highly questionable whether a holding could avoid liability for damages generated by fully owned or fully controlled subsidiaries. Indeed, this contradicts what the European Court of Justice (ECJ) has stated when interpreting EU competition law. (see Explainer box p. 19)

60 The *Explanatory Memorandum* as well mentions civil liability only in relation to 'established business relationships' (p. 16).

61 On the problems generated by the possibility to end a business relationship, see ECCJ *Comprehensive analysis of EU Commission's proposal for a directive on due diligence*, 2022, p. 13 <https://corporatejustice.org/publications/analysis-of-eu-proposal-for-a-directive-on-due-diligence/>

62 METHVEN O'BRIEN C., MARTIN-ORTEGA O., *Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective*, European Parliament Policy Department for External Relations, Directorate General for External Policies of the Union, 2022, p. 26; Vogt J., Subasinghe R., Danquah P., *A Missed Opportunity to Improve Workers' Rights in Global Supply Chains*, 2022, <http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/>; FIDH, *Europe can do better: How EU policy makers can strengthen the Corporate sustainability due diligence directive*, 2022, p. 4 available on <https://www.fidh.org/en/issues/globalisation-human-rights/european-union-corporate-due-diligence>; ECCJ *Comprehensive analysis of EU Commission's proposal for a directive on due diligence*, 2022, p. 11 <https://corporatejustice.org/publications/analysis-of-eu-proposal-for-a-directive-on-due-diligence/>

EXPLAINER BOX:***Termination of a business relationship amid adverse impacts***

According to Article 7.5, as regards potential adverse impacts that could not be prevented or adequately mitigated, the company shall be required to refrain from entering into new or extending existing relations with the partner in connection with or in the value chain of which the impact has arisen and shall, where the law governing their relations so entitles them to, take the following actions:

- a. Temporarily suspend commercial relations with the partner in question, while pursuing prevention and minimisation efforts, if there is reasonable expectation that these efforts will succeed in the short-term.
- b. Terminate the business relationship with respect to the activities concerned if the potential adverse impact is severe.

According to Article 8.6 the company shall refrain from entering into new or extending existing relations with the partner in connection to or in the value chain of which the impact has arisen and shall, where the law governing their relations so entitles them to, take one of the following actions:

- a. Temporarily suspend commercial relationships with the partner in question, while pursuing efforts to bring to an end or minimise the extent of the adverse impact, or
- b. Terminate the business relationship with respect to the activities concerned, if the adverse impact is considered severe.

EXPLAINER BOX:***Liability of the parent company in competition law***

According to the ECJ, if the parent company is part of an economic unit (which may consist of several legal persons), 'the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it' (10 September 2009, C-97/08, *Akzo Nobel and others v. Commission*, § 77). Consequently, when an adverse impact results from a subsidiary's operations, strict liability of the parent company would be much more consistent with EU law.

2.5 PROBLEM 5: DISREGARD OF TRADE UNION RIGHTS AND STAKEHOLDER CONSULTATION

The CSDD Proposal widely disregards trade union rights and stakeholder consultation. According to Articles 6.4, 7.2 and 8.3, consultations are to be conducted ‘where relevant’; consequently, companies can decide if and when they consult stakeholders. Besides, the obligation to consult relevant stakeholders does not concern the entire due diligence process but only a limited number of steps. Stakeholders are narrowly defined in Article 3(n) and trade unions, workers’ representatives, NGOs, defenders of human rights and the environment are not expressly included among them. The Proposal also limits trade unions’ role to participation in complaints procedures and includes codes of conduct—but not Global Framework Agreements—among the documents that contain

the company’s due diligence policy. Nor does the Proposal suggest measures to ensure protection for those engaged in the defence of human rights and the environment.

In this way, the Proposal extensively ignores both the rules on stakeholders consultation established by the relevant international regulations and the trade unions and worker representatives’ rights part of the *acquis communautaire* on information, consultation, participation and collective bargaining, which is a fundamental right in several European and international instruments⁶³.

As demonstrated by our empirical analysis, unilateral due diligence practices are currently present in several multinational companies but have proven to be widely ineffective since they have not been able to prevent human rights violations and environmental damage documented along value chains of these companies.

63 FIDH, *Europe can do better: How EU policy makers can strengthen the Corporate sustainability due diligence directive*, 2022, p. 6 available on <https://www.fidh.org/en/issues/globalisation-human-rights/european-union-corporate-due-diligence>; ETUC initial analysis of the Commission’s proposal for a Directive on Corporate Sustainability Due Diligence, 2022, p. 3.

3. EMPIRICAL ANALYSIS: EFFECTS OF THE LIMITED SCOPE OF THE DIRECTIVE

To check the effects of the current limited scope of the Proposal, we carried out two different analyses using the Orbis database⁶⁴:

1. We applied the thresholds established by Article 2.1 of the Proposal to the relevant sectors to find out how many (or rather how few) companies would fall within the scope of the Directive.
2. We selected several companies belonging to the relevant sectors and checked if they would fall into the current scope of the Directive.

‘Fewer than 0.01 percent of the companies active in the sector satisfy the criteria established by Article 2.1.a) of the Proposal (i.e. only 675 out of over 6,795,408 million ICT companies)’

3.1 HOW MANY (OR RATHER HOW FEW) ICT COMPANIES WOULD FALL WITHIN THE SCOPE OF THE DIRECTIVE?

Our research concerns companies located in the European Union, regardless of their legal form. Indeed, the legal forms available on Orbis do not correspond to the ones listed in Article 3.a) of the Proposal so that it is not possible to further filter the companies. Consequently, **our initial set (Table 1, below) includes 15,046 companies, more than the number that, according to the European Commission, should be in the current scope of the Proposal (almost 9,400 companies)**⁶⁵.

⁶⁴ Orbis is a database of the Bureau Van Dijk, which provides data for 319,711,798 companies active worldwide. The database was last consulted on the 8 July 2022.

⁶⁵ Explanatory Memorandum, p. 16.

TABLE 1

Overview of the EU companies

Active companies	55,518,470
Active companies with more than 500 employees *	29,667
Active companies with more than 500 employees and a turnover of more than 150 million euros *	15,046

Tables setting out how many companies in the relevant NACE, U.S. SIC and NAICS 2017 codes would be liable under the Article 2.1 criteria appear in Appendix I.

A first analysis (Table 2, below) concerns NACE Rev. 2 Main Section J - Information and communication that combines activities involving production and distribution of information and cultural products,

provision of the means to transmit or distribute these products, as well as data or communications, information technology activities and the processing of data and other information service activities. Section J gathers divisions 58-63, among which there are telecommunications activities (division 61) and information technology activities (division 62) and other information service activities (division 63)⁶⁶.

TABLE 2

Overview of EU companies active in the ICT sector⁶⁷

Active companies in the sector	6,795,408
Active companies in the sector with more than 500 employees *	6,123
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	2,754
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	675

* Last available year, excluding companies with no recent financial data and public authorities/states/governments.

66 Appendix I

67 Appendix I, Table 1

From this first analysis, it is clear how few companies would fall within the current scope of the Directive.

Fewer than 0.01 percent of the companies active in the sector satisfy the criteria established by Article 2.1.a)⁶⁸ of the Proposal (i.e. only 675 out of over 6,795,408 million ICT companies).

We obtain similar results if we consider specific NACE Rev. 2 sectors. For example, fewer than 0.015 percent of the companies in telecommunications fall under the current scope of the Proposal (Appendix I - Table 2). This percentage is even lower for computer programming, consultancy, and related activities (Appendix I - Table 3) and information service activities (Appendix I - Table 4): respectively, only 0.016 percent and 0.006 percent of the companies in these sectors meet all the requirements for falling within the scope of the Proposal.

To complete our analysis, we also took into consideration other NACE Rev. 2 sectors relating to manufacture of computer, electronic and optical products (Appendix I - Table 5), manufacture of electrical equipment (Appendix I - Table 6) and repair of computers and personal and household goods (Appendix I - Table 7). The percentage of companies falling within the scope of the Proposal in these sectors remains extremely low, being slightly more than 0.04 percent, 0.045 percent, and 0.0014 percent respectively.

Even if NACE is the relevant code in Europe, in this report we have also taken into consideration the U.S. SIC code and checked if the number of companies falling within the scope of the Proposal would be different according to this code. Our analysis shows that if we consider the U.S. SIC code, the percentage of companies that would be in the scope of the Proposal remains extremely low: slightly more than 0.03 percent for industrial and commercial machinery and computer equipment (Appendix I - Table 8); 0.043 percent for electronic and other electrical equipment and components, except

computer equipment (Appendix I - Table 9); 0.016 percent for communications (Appendix I - Table 10).

We obtained similar results when considering NAICS 2017 codes and BvD sectors (that is, a combination of the former). In the case of NAICS 2017, the percentages of companies entering the current scope of the Proposal are: slightly more than 0.04 percent for computer and electronic product manufacturing (Appendix I - Table 11) and for electrical equipment, appliance, and component manufacturing (Appendix I - Table 12); slightly more than 0.008 percent for information (Appendix I - Table 13).

Similarly, for the BvD sectors, the percentages are: 0.036 percent for industrial, electric and electronic machinery (Appendix I - Table 14); 0.02 percent for computer hardware (Appendix I - Table 15); 0.014 percent for communications (Appendix I - Table 16); 0.01 percent for computer software (Appendix I - Table 17); 0.003 percent for information services (Appendix I - Table 18).

In summary, it is easier to guess three winning lottery numbers correctly⁶⁹ than to find a company that, in the ICT sectors we considered, falls within the current scope of the Proposal. In other words, a worker who has experienced a human rights violation has more likelihood of winning a lottery prize than being compensated for harm caused by the companies participating in the value chain.

3.2 SOME EXAMPLES FROM THE RELEVANT SECTORS

Another way to explore what the effects of the current scope of the Proposal would be likely to be in practice is to look at whether specific prominent companies operating in different ICT sectors would, in our assessment and on the basis of the information we have been able to obtain, be caught by its provisions.

68 See Explainer Box 'scope', in section 2. *Legal Analysis*

69 https://en.wikipedia.org/wiki/Lottery_mathematics

The companies selected for analysis are prominent in the industry and at some time or another have faced concerns over some aspects of their business practices. These concerns somehow relate to due diligence obligations for companies regarding actual and potential human rights adverse impacts, as the CSDD proposal lays down⁷⁰.

These range from relatively minor or historic concerns to more serious or recent compliance failures or allegations relating to the supply of technologies to repressive regimes.

Whilst in some cases the concerns and allegations are denied and/or the company may have since taken appropriate action to rectify the issue, it is nonetheless important when assessing the likely impact of the new legislation to consider whether or not these prominent ICT companies would be caught by the Proposal in order to assess the extent to which the Proposal is likely to affect or improve compliance in practice.

As we will set out, some of the selected companies have been accused of selling their technologies to private or public bodies which are allegedly committing human rights abuses. Such cases are covered by the CSDD Proposal that concerns both ‘the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company’ (Article 3 letter g).

We used the most recent data available on Orbis, which is usually from 2020. In some cases, Orbis does not provide figures on the company’s turnover or on the number of employees, either because this company is established in a country where it is not mandatory to insert these figures in the financial statement, or the financial statement is not compulsory, or the financial statement was inaccurate. Furthermore, parent companies usually publish the consolidated financial statement (i.e. they present figures on the entire group so that we do not have data on the parent company’s turnover and employees).

As already mentioned, our analysis does not concern Article 2.2 of the Proposal since the data available on Orbis is insufficient to calculate these thresholds. However, we have included in the report some groups (such as Hikvision, Huawei and NSO) which are headquartered in a third country but have European subsidiaries that sometimes (very rarely) exceed the thresholds established by Article 2.1⁷¹.

Appendices II, III and IV list details of the employees and turnover of hardware producers, telecoms providers and digital companies.

3.2.1 Examples of hardware producers

Ericsson is ‘a leading provider of mobile connectivity solutions to telecom operators and to enterprise customers in various sectors’⁷². More recently, Ericsson was suspected of paying bribes

70 See Section 2.1, Article 4 for the definition of Due diligence (Explainer Box), Human Rights Adverse impact (Explainer box) and Annex 1 Part for the list what constitute violation of human rights https://ec.europa.eu/info/sites/default/files/1_2_183888_annex_dir_susta_en.pdf

71 see Explainer Box ‘scope’, in section 2. *Legal Analysis*

72 *Ericsson Annual Report 2021*, p. 1.

to Islamic State to sustain its business in Iraq⁷³. An investigation by Ericsson found serious breaches of compliance rules and the Code of Business Ethics, as a result of which several employees were exited from the company and ‘multiple other disciplinary and remedial actions were taken.’

In its most recent *Sustainability and Corporate Responsibility Report* Ericsson points out that it ‘requires its suppliers to comply with principles set forth in the Code of Conduct for Business Partners’⁷⁴. Ericsson also supports the UN Global Compact and the UN Guiding Principles on Business and Human Rights. ‘In order to assess, prevent and mitigate potential misuse of Ericsson’s technology, the Company has integrated human rights due diligence into its sales process through the Sensitive Business Framework. This framework aims to ensure that business opportunities and engagements are conducted in accordance with international human rights standards’⁷⁵. As a result of these due diligence measures, Ericsson can decide to approve, with or without conditions, or to reject the sales engagement; conditional approvals include technical and contractual mitigations, as applicable. However, every year Ericsson only performs a risk assessment on its largest suppliers, representing approximately 2,000 of its almost 18,000 Tier 1 suppliers⁷⁶.

It should also be pointed out that the *Sustainability and Corporate Responsibility Report 2021* does not mention whether and how trade unions workers’ representatives are involved in the due diligence process. The Report specifies only that

three employee representatives and two deputies, appointed by the trade unions participating in the Board of Directors (p. 143) and that ‘Ericsson provides employees and other external stakeholders a dedicated communication channel for reporting compliance concerns’ (p. 197). The Report also presents examples of sustainability-related engagements and Ericsson’s stakeholder engagement model (p. 207-208) that, however, are not integrated in the company’s due diligence process.

The group has 101,322 employees worldwide and a turnover of 22,726 million euros. The parent company (TELEFONAKTIEBOLAGET LM ERICSSON AB) whose business consists mainly of corporate management, generally fully owns the 216 subsidiaries.

However, in the Ericsson group, only 11 EU subsidiary companies out of 216 fall within the scope of the Proposal⁷⁷.

Nokia is a Finnish multinational telecommunications, information technology, and consumer electronics group.

In 2015, Nokia was accused by a civil society coalition composed of the GoodElectronics Network, Cividep India, Cereal and Somo of systematically disregarding workers’ rights⁷⁸ between 1998 and 2014. Recently, the group alleged to have helped

73 <https://www.business-humanrights.org/en/latest-news/swedish-telecom-giant-ericsson-allegedly-paid-bribes-to-islamic-state-to-sustain-its-business-in-iraq-leaked-documents-show-incl-co-comments/>

For an overview on Ericsson’s alleged HR violations see <https://www.business-humanrights.org/en/companies/ericsson/>

74 *Sustainability and Corporate Responsibility Report 2021*, p. 20.

75 *Idem*

76 *Idem*, p. 26.

77 See Appendix II.1

78 <https://www.business-humanrights.org/en/latest-news/nokia-lawsuit-re-hbv-discrimination-in-china/>

enable the Russian SORM surveillance system⁷⁹. Nokia has denied this allegation and following the invasion of Ukraine, it announced it would cease most of its operations in Russia⁸⁰

According to the Report *Nokia in 2021*, Nokia is committed to the principles of the Universal Declaration of Human Rights, the United Nations Global Compact, the Organisation for the Economic Co-operation and Development (OECD) guidelines for Multinational Enterprises, and the United Nations Guiding Principles on Business and Human Rights. Nokia's Code of Conduct, together with its Human Rights Policy, sets out its human rights processes that cover the whole value chain. Furthermore, the Nokia Human Rights Due Diligence (HRDD) process obliges the company to identify the level of possible risk to human rights through potential misuse of its technology before any sale is made, and to provide mitigation if any risk is identified. However, in this case too, the role of trade unions and workers' representatives (if it exists) is never mentioned. The *Nokia in 2021* Report just mentions the company's 'regular engagement with various stakeholders', including customers and investors, without any further details (p. 91).

The group has 87,927 employees (of which 37,696 are in Europe) and net sales of 22,579 million euros (of which 6,635 million euros are in Europe). 447 companies belong to the group, the majority of which are fully owned by the parent company, Nokia OYJ.

However, in the Nokia group, only six EU subsidiary companies of 447 fall within the scope of the Proposal⁸¹.

Cisco is a U.S.-based multinational technology group headquartered in San Jose, California.

In 2011 this group was accused in legal proceedings brought by the Human Rights Law Foundation of enabling the Chinese government to conduct internet surveillance and censorship of its citizens⁸². The case was dismissed by the US court⁸³.

In 2016 a coalition of NGOs led by Electronic Frontier Foundation (EFF) asked the United States Court of Appeals for the Ninth Circuit to reinstate the lawsuit, in which it was alleged that Cisco provided the Chinese government with a system that Cisco officials knew was intended to identify—and facilitate the capture and torture of—members of the Falun Gong religious minority⁸⁴. The case is currently pending before the Ninth Circuit⁸⁵ and contingent on the outcome of a separate case involving different parties.

CISCO has always assiduously denied the allegations, stating that it has done no more than sell stock standard technology to the regime⁸⁶.

79 <https://www.business-humanrights.org/en/latest-news/nokia-allegedly-helped-enable-russian-surveillance-system/> For an overview on Nokia's alleged HR violations see <https://www.business-humanrights.org/en/companies/nokia/>

80 <https://www.networkworld.com/article/3657629/nokia-pulls-most-of-its-business-from-russia.html>

81 See Appendix II.2

82 <https://www.business-humanrights.org/en/latest-news/new-evidence-links-cisco-to-jailing-and-torture-of-chinese/>

83 <https://www.business-humanrights.org/en/latest-news/us-court-dismisses-lawsuit-against-cisco-over-allegations-of-abetting-torture-of-falun-gong-practitioners-in-china/>

84 <https://www.business-humanrights.org/en/latest-news/eff-to-court-cisco-must-be-held-accountable-for-aiding-chinas-human-rights-abuses/>

85 https://www.supremecourt.gov/DocketPDF/19/19-416/158434/20201021172033931_19-416%20and%2019-453%20Brief.pdf

86 <https://www.sanjoseinside.com/news/lawsuit-accuses-cisco-of-complicity-in-oppression-abroad/>

As a founding member of the Responsible Business Alliance (RBA), Cisco has adopted the RBA Code of Conduct as its supplier code of conduct⁸⁷ and is committed to respecting the UN Guiding Principles on Business and Human Rights. In addition, Cisco regularly conducts due diligence processes on suppliers around the world to assess compliance with the Code using audits and assessments. The list of suppliers is available online⁸⁸ but it only mentions the names of corporations involved in the supply chain, without specifying the Cisco company with which they have business relationships. Additionally, the group's documents do not specify the role of trade unions and workers' representatives in the due diligence process. The *Cisco 2021 Annual Report* says only that Cisco Corporate Affairs engages with internal and external stakeholders (p. 12).

The group has 79,500 employees and a turnover of 43,986 million euros. A total of 600 companies belong to the group, the majority of which are fully owned by the Cisco Systems INC, the parent company.

However, in the Cisco group, only four EU subsidiary companies of 600 fall within the scope of the Proposal⁸⁹.

3.2.2 Examples of telecoms providers

Deutsche Telekom (DT) is a German telecommunications group of 304 companies, headquartered in Bonn⁹⁰. In 2010 the group was accused by Human Rights Watch of violating workers' rights in the U.S. by carrying out aggressive campaigns to keep workers from organising and bargaining⁹¹. In 2015, T-Mobile US (the main DT American subsidiary) was accused by its main trade union, the Communications Workers of America (CWA), of flouting employees' rights⁹² and in 2021 was found to have engaged in illegal work practices, by the U.S. Court of Appeals for the D.C Circuit⁹³. While major investors in Deutsche Telekom had expressed concern to the company about the treatment of T-Mobile employees, the group declined to comment. It also had a low score in the Ranking Digital Rights' 2020 Corporate Accountability Index and did not reply to the actions requested by NGOs⁹⁴.

According to its website, DT has a trusted relationship with more than 30,000 suppliers and service providers in over 80 countries⁹⁵. Deutsche Telekom AG and its affiliates (DTAG) should act in accordance with the group's *Code of Conduct, Code of Human Rights & Social Principles*⁹⁶ and AI Guidelines (Artificial Intelligence)⁹⁷. However, according to

87 <https://www.cisco.com/c/en/us/about/csr/impact/environment/supplier-code-of-conduct.html>

88 https://www.cisco.com/c/dam/en_us/about/supply-chain/cisco-supplier-list.pdf

89 See Appendix II.3

90 A list of the main subsidiaries is available on the DT website: <https://www.telekom.com/en/company/worldwide>

91 https://cwa-union.org/news/entry/Human_Rights_Watch_Hits_Deutsche_Telekom_Other_Firms_for_Hypocrisy

See also Daley T., Abuse at the workplace: Deutsche Telekom in the United States, *International Union Rights*, Vol. 20, No. 4, Unions in the workplace: recognition and bargaining (2013), pp. 3-5, 12, here available: https://www.jstor.org/stable/10.14213/inteunionigh.20.4.0003#metadata_info_tab_contents

92 <https://www.reuters.com/article/us-deutsche-telekom-usa-idUSKBN0UL0LL20160107>

93 <https://cwa-union.org/news/federal-court-rules-t-mobile-illegally-prevented-cwa-member-emailing-co-workers>

94 <https://www.business-humanrights.org/en/latest-news/access-now-ranking-digital-rights-ask-26-ict-companies-improvements-2020-benchmark/>

95 <https://www.telekom.com/en/corporate-responsibility/assume-responsibility/assume-responsibility/supply-chain-management-355304>

96 These Codes are available here: <https://www.telekom.com/en/corporate-responsibility/assume-responsibility/assume-responsibility/supply-chain-management-355304>

97 All these documents are available here: <https://www.telekom.com/en/company/digital-responsibility>

*Human Rights & Social Performance Report 2021*⁹⁸, only 111 subsidiaries and five joint ventures have declared compliance with the *Code of Human Rights & Social Principles* for the year 2021. DTAG should also require their suppliers to adhere to the *DT Supplier Code of Conduct* which is usually attached to the contract between them. The suppliers should implement this Code through their whole value chain. However, the list of suppliers is not publicly available. Moreover, the *Human Rights & Social Performance Report 2021* does not explain whether and how trade unions and worker representatives are involved in the value chain management process. The Report only mentions that ‘Deutsche Telekom is committed to sharing its progress on the observation and implementation of the Human Rights & Social Principles on a regular basis with both internal and external stakeholders’ (p. 7).

DT is the largest telecommunications provider in Europe by revenue. The group has 216,528 employees (among which 85,160 in Germany and 35,319 in other European countries) and a turnover of 109,978 million euros. The parent company (DEUTSCHE TELEKOM AG) fully owns many of the 304 subsidiaries.

However, in the DT group, only 10 EU subsidiary companies of 304 would fall within the scope of the Proposal⁹⁹.

Telefónica is a Spanish multinational telecommunications group headquartered in Madrid. It is one of the largest telephone operators and mobile network providers in the world. In 2019 Telefónica was found guilty of slave labour during the construction of a tower in Brazil in 2014¹⁰⁰. Like DT, Telefónica scored only 49 percent in the Ranking Digital Rights’ 2020 Corporate Accountability Index (although this was higher than the other 11 telecommunications companies ranked)¹⁰¹.

The group has replied to these allegations by referring to its *Global Human Rights Policy*¹⁰². According to the latter, Telefónica should ask its suppliers to accept the *Supply Chain Sustainability Policy*, the *General conditions for the supply of goods and services* and the *Anti-corruption policy*¹⁰³ when registering on the Supplier Portal¹⁰⁴. The *Supply Chain Sustainability Policy* binds all companies belonging to Telefónica group, i.e. to all companies ‘in whose share capital Telefónica S.A. directly or indirectly holds a majority of the shares, holdings or voting rights or in whose governing body it has appointed or has the power to appoint a majority of its members, in such a way that it effectively controls the company [...]. Telefónica S.A. in its role as parent company in the Group, is responsible for establishing the fundamentals, instruments and mechanisms needed for an appropriate and efficient coordination between this Company and the other group companies’ (*Supply Chain Sustainability Policy*, p. 3).

98 <https://www.telekom.com/en/corporate-responsibility/news-corporate-responsibility/human-rights-and-social-performance-report-2021-649562>

99 See Appendix III.1

100 <https://www.business-humanrights.org/en/latest-news/brazil-telefonica-found-guilty-of-slave-labour-during-construction-of-building-tower/>

101 <https://www.business-humanrights.org/en/latest-news/access-now-ranking-digital-rights-ask-26-ict-companies-improvements-2020-benchmark/>

102 <https://www.telefonica.com/en/sustainability-innovation/society/human-rights/>

103 <https://www.telefonica.com/en/about-us/suppliers/contracting-policies-and-conditions/>

104 <https://www.telefonica.com/en/about-us/suppliers/how-to-be-a-telefonica-supplier/>

The *Supply Chain Sustainability Policy* applies to all purchases of products and services for the Telefónica Group, regardless of its operations and geography, and refers to both direct and indirect suppliers¹⁰⁵ of the entire Telefónica supply chain¹⁰⁶.

According to the *Consolidated Annual Report 2021* (p. 248), Telefónica's supply chain management goes beyond direct suppliers. At the end of 2021, Telefónica launched the *Integral Prevention and Sustainability Project* in Spain, aimed at 95 Tier 2 suppliers. In the same year, 62 percent of the audits were conducted at Tier 2 or 3 suppliers.

The *Consolidated Annual Report 2021* also refers to trade union activity (p. 106). However, neither trade unions nor worker representatives are involved in the due diligence process (p. 154 ff.) where stakeholders consultation is just mentioned without further explanation.

The group has 104,150 employees and a turnover of 39,277 million euros and it is present in 12 countries. The vast majority of the 307 companies of the group are fully owned by the parent company (Telefónica S.A.).

However, in the Telefónica group, only seven EU subsidiary companies of 307 would fall within the scope of the Proposal¹⁰⁷.

A1 Telekom Austria Group is a provider of a range of fixed-line, broadband internet, multimedia services, data, and IT systems, wholesale, and mobile payment services.

A1 Telekom Austria Group, together with its subsidiary A1 Belarus, sporadically shut off access to its mobile internet networks in Belarus between August and November 2020, when ordered by Alexander Lukashenko's government in the aftermath of the country's contested and highly irregular presidential elections, thereby facilitating repression and other human rights violations¹⁰⁸.

According to its *2021 Combined Annual Report*, 'having joined the UN Global Compact, the A1 Telekom Austria Group is committed to implementing fundamental requirements in the areas of human rights, labour, the environment and combating corruption. This commitment has been acknowledged by being integrated into the *Austrian subsidiary's Terms and Conditions*' (p. 164). Besides, the *A1 Group Code of Conduct*¹⁰⁹ states that the group's suppliers 'are committed that they and the entire supply chain will comply with the provisions of the International Labour Organisation regarding the rights of workers and their working conditions' (p. 11). No information on the trade unions and worker representatives' involvement (if any) is available on the *2021 Combined Annual Report* that just refers to a stakeholder engagement (p. 18) disentangled from a due diligence process, not implemented in the group.

In 2021, A1 Telekom Austria Group employed 17,856 employees and had a turnover of 5.38 billion U.S. dollars. The vast majority of its 45 subsidiaries are fully owned by Telekom Austria AG, which is controlled by the Mexican telecommunications group América Móvil (a group of 888 companies).

However, in the A1 Telekom Austria Group, only five EU subsidiary companies of 45 would fall within the scope of the Proposal¹¹⁰.

105 'For the purposes of this Policy, the term 'supplier' means any company, entity, business partner - such as franchises and other marketing channels - or legal person, that provides any service and/or product to Telefónica' (*Supply Chain Sustainability Policy*, p. 12).

106 *Supply Chain Sustainability Policy*, p. 3.

107 See Appendix III.2

108 <https://www.justiceinitiative.org/litigation/open-society-justice-initiative-v-telekom-austria>

109 <https://cdn1.a1.group/final/en/media/pdf/code-of-conduct-en.pdf>

110 See Appendix III.3

3.3 EXAMPLES FROM THE DIGITAL SECTOR

Our examples in this sector range from producers of mass surveillance tools (such as IDEMIA, Hikvision, Huawei, NSO, and Thales) to software companies specialising in data analytics (Palantir, Cellebrite).

IDEMIA is a multinational technology group headquartered in Courbevoie (France). It provides identity-related security services and sells facial recognition and other biometric identification products and software to private companies and governments.

In 2020, an investigation by Amnesty International looked into sales of digital surveillance technology by European tech companies to China's public security agencies. It reported that in 2015 Morpho, which was acquired by IDEMIA in 2017¹¹¹ - was awarded a contract to supply facial recognition equipment directly to the Shanghai Public Security Bureau¹¹². In July 2022, IDEMIA has been sued before the Paris court, by Data Rights and their Kenyan partner organisations¹¹³. The action relates IDEMIA's conduct on due diligence obligations under French Due Vigilance Law¹¹⁴ in the course of its 2018/2019 contract with the Kenyan government¹¹⁵.

Concerns have also been raised in relation to selling surveillance technologies to Latin America.

IDEMIA has strongly condemned the use of facial recognition technologies for mass surveillance purposes and any other motivation that would be contrary to human rights. Besides, it has called for the setting up of a clear European regulatory framework on facial recognition technologies¹¹⁶.

IDEMIA relies on several thousand suppliers and subcontractors based around the world. IDEMIA has defined a *Supplier Code of Conduct* that all suppliers and subcontractors are required to adhere to and comply with¹¹⁷; the code's acceptance forms part of the contractual provisions entered into with IDEMIA. Suppliers should provide all the information or data required by the provisions of the *Supplier Code of Conduct* and IDEMIA may visit suppliers' facilities, with notice, to assess compliance with it. If IDEMIA identifies, through assessment, reviews or audit, a supplier's non-conformity with the principles laid out in its *Supplier Code of Conduct*, 'IDEMIA has the right to request corrective actions for timely correction of deficiencies. Failure to rectify non-conformities within the agreed time limit, or continued breach of the Code may result in IDEMIA terminating the contract with this supplier'¹¹⁸. The Supply Chain Quality Team assesses whether IDEMIA's basic CSR principles are applied through on-site audits¹¹⁹.

111 <https://www.business-humanrights.org/en/companies/idemia/>

112 <https://www.amnesty.org/en/latest/press-release/2020/09/eu-surveillance-sales-china-human-rights-abusers/>

113 Kenya Human Rights Commission and the Nubian Rights Forum (NRF),

114 <https://www.legifrance.gouv.fr/loda/id/LEGIARTI000034291341/2017-03-29/>

115 <https://datarights.ngo/news/2022-07-29-kenya-due-diligence-biometric-id-case/>

116 <https://www.politico.eu/article/amnesty-international-eu-is-selling-spyware-to-china/>

117 IDEMIA FRANCE SAS and/or any legal entity in which IDEMIA FRANCE SAS directly or indirectly owns equal or more than 50 percent of the capital stock have to respect this Code and the GENERAL PURCHASING CONDITIONS (<https://www.idemia.com/wp-content/uploads/2021/01/Idemia-gpc-202101.pdf>).

118 *IDEMIA Supplier Code of Conduct*, p. 4.

119 *IDEMIA Corporate Social Responsibility Report 2020*, p. 35.

Compliance with labour regulations is also required by the IDEMIA General Purchasing Conditions (p. 22).

None of the documents mentioned illustrates the role of trade unions and worker representatives (if any). *IDEMIA CSR Report 2020* only refers to a stakeholder engagement (p. 10) disentangled from the due diligence process implemented by the company.

The group has almost 14,424 employees and a turnover of 2.2 billion euros. The parent company, IDEMIA Group S.A.S., based in France, is ultimately controlled by ADVENT INTERNATIONAL CORP (headquartered in Boston (U.S.) with 195 employees and a turnover of 36 billion U.S. dollars) that, in itself, controls 985 subsidiaries. IDEMIA Group s.a.s. fully owns 69 subsidiaries.

However, in the IDEMIA group, only two EU subsidiary companies of 69 would fall within the scope of the Proposal¹²⁰.

Hikvision is a manufacturer and supplier of video surveillance equipment for civilian and military purposes, headquartered in Hangzhou, Zhejiang. The group has been accused of enabling human rights abuses by supplying cameras used in the repression of the Uighurs¹²¹. The company replied to this allegation saying that it did not ‘knowingly or intentionally’ abuse human rights in Xinjiang¹²². Hikvision has also been accused of selling most of the surveillance technology deployed in Latin America¹²³.

The company has repeatedly stated that it respects human rights. In particular, in the *2021 Hikvision Environmental, Social and Governance Report*¹²⁴, the company declared that it integrates corporate social responsibility and sustainable development philosophy into its business. However, the Report does not provide any information on due diligence process (if any), nor mentions trade unions, worker representatives or stakeholders.

The group has more than 52,752 employees worldwide and a turnover of 11,572 million euros. The parent company, Hangzhou Hikvision Digital Technology Co. Ltd. is a Chinese state-owned company that fully owns many of the 111 companies of the group¹²⁵. **Of the current EU subsidiaries, none falls within the current scope of the Proposal¹²⁶.** For example, HIKVISION ITALY S.R.L. has 63 employees and a turnover of 64 million euros; it is fully owned by COÖPERATIEF HIKVISION EUROPE U.A., a Dutch company with just 34 employees (the turnover is not available on Orbis) that in turn is owned by the parent company. HIKVISION DEUTSCHLAND GMBH has only 36 employees, HIKVISION EUROPE B.V. (seat in The Netherlands) 120, HIKVISION FRANCE 47, HIKVISION HUNGARY KORLATOLT FELELOSSEGU TARSASAG (Hungary) 11, HIKVISION POLAND SP. Z.O.O. 32, HIKVISION SPAIN SL 44, HIKVISION TECHNOLOGIES S.R.L. (Romania) none.

¹²⁰ See Appendix IV.1

¹²¹ <https://s.ipvm.com/uploads/7591/6164/Hikvision%20IPVM%20White%20Paper-2-3.pdf>

¹²² <https://ipvm.com/reports/arent-hikvision>

¹²³ <https://www.business-humanrights.org/en/latest-news/access-now-raises-concern-about-the-sale-of-surveillance-technologies-in-latam-calls-more-than-20-companies-to-respond-on-human-rights-inc-co-responses/>

¹²⁴ <https://www.hikvision.com/content/dam/hikvision/en/marketing/image/about-us/esg/Hikvision-2021-Environmental,-Social-and-Governance-Report.PDF>

¹²⁵ Hangzhou Hikvision Digital Technology, Orbis, p. 98-104.

¹²⁶ Idem, p. 117-126.

Huawei is a Chinese multinational technology group headquartered in Shenzhen, Guangdong, China. It develops telecommunications equipment including transmission networks and servers, consumer electronics, and other networking products and services. Huawei has faced criticism for various aspects of its operations, including allegations that its products contain backdoors for Chinese government espionage, which Huawei denies¹²⁷.

According to an investigation by the Washington Post, Huawei is suspected of providing Chinese authorities with surveillance technology that targets the country's Uighur minority population¹²⁸. Huawei said it had no knowledge of the projects mentioned in the Washington Post report.¹²⁹

The group is also among a list of companies alleged by the NGO Access Now to have supplied surveillance technology deployed in Latin America¹³⁰.

Huawei says that it firmly opposes the misuse of technology that has an adverse impact on human rights and has empowered the Corporate Sustainable Development Committee to monitor and manage possible human rights abuses in its business activities and supply chains¹³¹. Moreover, Huawei requires all suppliers to sign and abide by the *Supplier Social Responsibility Code of Conduct*¹³². It commits to immediately terminate relationships with any supplier that breaches these rules. In addition, the

group has the right to carry out onsite audits of suppliers to assess their compliance with its Code. However, Huawei can only audit its major suppliers. Indeed, in 2020 it conducted onsite audits on only 319 suppliers, of which 116 were carried out by third-party auditors¹³³. In the same year, Huawei helped 33 suppliers to develop systems for better managing their own value chain; consequently, these suppliers signed CSR agreements with nearly 4,000 Tier 2 suppliers and conducted CSR audits on nearly 400 Tier 2 suppliers¹³⁴.

According to the *Huawei Investment & Holding Co., Ltd. 2021 Sustainability Report*¹³⁵, Huawei conducts due diligence on its global supply chain (p. 12); however, the Report does not mention trade unions and worker representatives but only a generally described stakeholder engagement (p. 17).

In total, 166 companies belong to the group which has a global turnover of 134 billion U.S. dollars and 194,000 employees. The parent company, EMPLOYEES OF HUAWEI INVESTMENT & HOLDING CO. LTD, fully owns, directly or through its main subsidiaries (Huawei Invest Control Corp. Labor Union Commission—turnover and number of employees not available—that controls HUAWEI INVESTMENT & HOLDING CO. with a turnover of 134,463 million U.S. dollars; number of employees not available) almost all of the 166 companies of the group.

127 <https://www.washingtonpost.com/world/2021/12/14/huawei-surveillance-china/>
<https://www.reuters.com/world/china/polish-trial-begins-huawei-linked-china-espionage-case-2021-05-31/>

128 <https://www.theguardian.com/technology/2021/dec/15/documents-link-huawei-uyghur-surveillance-projects-report-claims>

129 see <https://www.theguardian.com/technology/2021/dec/15/documents-link-huawei-uyghur-surveillance-projects-report-claims>: 'Huawei does not develop or sell systems that target any specific group of people and we require our partners to comply with all applicable laws, regulations and business ethics', it said in a statement.

130 <https://www.business-humanrights.org/en/latest-news/access-now-raises-concern-about-the-sale-of-surveillance-technologies-in-latam-calls-more-than-20-companies-to-respond-on-human-rights-inc-co-responses/>

131 *Huawei Investment & Holding Co., Ltd. 2021 Sustainability Report*, p. 104 ff.

132 <https://www.huawei.com/it/sustainability/sustainability-report/huawei-supplier-social-responsibility-code-of-conduct>

133 *Huawei Investment & Holding Co., Ltd. 2020 Sustainability Report*, p. 101.

134 *Idem*, p. 102.

135 <https://www-file.huawei.com/-/media/corp2020/pdf/sustainability/sustainability-report-2021-en.pdf>

However, in the Huawei group, only eight EU subsidiary companies of 166 would fall within the scope of the Proposal¹³⁶.

NSO is an Israeli technology group primarily known for its spyware, Pegasus, which is capable of remote zero-click surveillance of smartphones.

NSO Group spyware has been allegedly used to target human rights activists and journalists in various countries¹³⁷.

The technology is suspected to have been used for state espionage against Pakistan¹³⁸, and for domestic surveillance of Israeli citizens by Israeli police¹³⁹. The company has also faced questions over whether it supplies the Saudi government and whether its technology was used by Saudi government agents in the targeting and murder of Saudi dissident Jamal Khashoggi¹⁴⁰.

NSO has emphatically denied that its technology was used to target the journalist or his family.

In its first *NSO Group Transparency and Responsibility Report*, NSO declares itself 'committed to respecting human rights as enshrined in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organizations Declaration on Fundamental Principles and Rights at Work', as well as the

United Nations Guiding Principles on Business and Human Rights¹⁴¹. Besides, *NSO Human Rights Policy* integrates human rights due diligence procedures to identify, prevent and mitigate the risks of adverse human rights impacts and contractual obligations requiring NSO customers to limit the use of NSO products to the prevention and investigation of serious crimes and to ensure that the products are not used to violate human rights (p. 16). In the same document, NSO admits it is unable to monitor immediate use of its products; therefore, it inserts 'robust contractual terms that seek to institute processes aligned with international standards, and an enhanced review process aimed at screening out customers where the rule of law is weak, local laws do not meet international norms or customers are unable or unwilling to provide sufficient assurances' (p. 19). It is worth recalling that the *NSO Group Transparency and Responsibility Report 2021* never mentions trade unions and worker representatives¹⁴².

The parent company, N.S.O. GROUP TECHNOLOGIES LTD, based in Israel, has 750 employees (its turnover is not available on Orbis). It fully owns the other company of the group, CONVEXUM LTD based as well in Israeli that has 10 employees (its turnover is not available on Orbis). According to the information available on Orbis, **it is not possible to determine whether these companies would be in scope** of Article 2.2 of the Proposal.

136 See Appendix IV.2

137 <https://www.reuters.com/article/us-mexico-spyware-idUSKBN19A30Y>
<https://www.vice.com/en/article/3da5qj/government-hackers-iphone-hacking-jailbreak-nso-group>
<https://economictimes.indiatimes.com/prime/technology-and-startups/who-is-spying-on-indians-whatsapp-pegasus-spyware-maker-the-government-are-caught-in-a-blame-game/primearticleshow/72498345.cms>

138 <https://www.theguardian.com/world/2019/dec/19/israeli-spyware-allegedly-used-to-target-pakistani-officials-phones>

139 <https://www.calcalistech.com/ctech/articles/0,7340,L-3927410,00.html>

140 <https://www.axios.com/2019/03/25/hacking-firm-nso-saudi-sale-no-comment-khashoggi>

141 *NSO Group Transparency and Responsibility 2021*, p. 10.

142 This document merely states that NSO recognises the importance of dialogue with its employees, business partners, customers, and external stakeholders (*NSO Group Transparency and Responsibility Report 2021*, p. 17).

Thales is a French multinational group of 438 companies that specialises in the manufacturing and marketing of electronic equipment and systems for the aerospace, transportation, defence, and security industries. According to a 2018 report published by French and Egyptian NGOs, Thales has allegedly provided Abdel Fattah al-Sisi's regime with technology capable of implementing mass surveillance on an unprecedented scale¹⁴³. Thales said it complies with relevant regulations on export control and reiterated its commitment to human rights¹⁴⁴.

In 2021, it was alleged that Thales was exporting military technology to an Indian intermediary partner of the Myanmar military junta¹⁴⁵ and of arming Kopassus, Indonesia's special forces group, which has been instrumental in human rights abuses against West Papuans¹⁴⁶. The group has not publicly responded to these allegations.

Notwithstanding these allegations, in 2021 Thales received the *Supplier relations and Sustainable Procurement Label*, which is awarded to companies that maintain balanced and sustainable relationships with their suppliers¹⁴⁷. Thales promotes a sustainable value chain policy requiring all its suppliers and subcontractors to sign its *Integrity and Corporate Responsibility Charter*, to abide by *Thales's Code of Ethics*, and to comply with the principles of the United Nations Global Compact and OECD guidelines. If these requirements are not met, Thales may decide to review the business relationship with the concerned supplier and pursue corrective actions and either suspend or terminate immediately

the business relationship. However, in *Thales INTEGRATED REPORT Corporate Responsibility 2020-2021* (p. 36), it is mentioned that just 91 percent of the new suppliers are committed to the principles of the new integrity and corporate responsibility charter. Thales has also adopted *Commitments for sustainable procurement* and has signed the *Charter for responsible supplier relations*.

It is worth noting that in these documents trade unions are only mentioned to indicate the two directors appointed by them, as imposed by French law. According to *Thales INTEGRATED REPORT Corporate Responsibility 2020-2021* (p. 34), 'the Group's ongoing dialogue with its main stakeholders and internal work involving most of the Group's functions have made it possible to identify and classify Thales's environmental, social and economic challenges in terms of stakeholders' expectations and their impact on Group activities'. However, the document does not specify the stakeholder consultation in the due diligence process (if any).

The group has a worldwide presence and a turnover of 18,171 million euros and 81,098 employees. The parent company, Thales, is based in France and is listed on Euronext, Frankfurt, Berlin, Stuttgart, Vienna and London stock exchange. Thales fully owns almost all the 438 companies of the group.

However, in the Thales group, only 13 EU subsidiary companies of 438 would fall within the scope of the Proposal ¹⁴⁸.

143 <https://www.business-humanrights.org/en/latest-news/ngos-accuse-french-companies-of-contributing-to-state-repression-in-egypt-mixed-response-from-companies/>

144 <https://www.business-humanrights.org/en/latest-news/thales-responded/>

145 <https://rsf.org/en/civil-society-calls-french-company-thales-put-end-suspected-indirect-support-myanmar-junta>

146 <https://wri-irg.org/en/story/2021/australia-activists-target-thales-factory-solidarity-west-papua>

147 <https://www.thalesgroup.com/en/global/corporate-responsibility/governance/incorporating-csr-principles-all-along-value-chain>

148 See Appendix IV.3

Palantir is an American group of software companies specialising in big data analytics. In 2020, Amnesty International published a report detailing human rights risks associated with Palantir's contracts with the U.S. Department of Homeland Security for products and services for the Homeland Security Investigations division of Immigration and Customs Enforcement. Palantir has been accused of providing the U.S. Immigration and Customs Enforcement Agency with products and services that significantly enhance the latter's capacity to identify, detain and deport individuals and families, thereby potentially contributing to human rights harms¹⁴⁹.

In response to Amnesty International report, Palantir denied the accusations via public statement¹⁵⁰. It said it had deliberately declined to take on contracts with the Enforcement and Removal Operations (ERO) unit and US Customs and Border Protection (CBP) because it shared concerns with the potential serious human rights violations against migrants, refugees and asylum seekers.

The parent company, PALANTIR TECHNOLOGIES, based in Palo Alto, has 2,439 employees and a turnover of 1.09 billion U.S. dollars. It fully owns almost all the 22 companies of the group.

According to the information available on Orbis, **none of the Palantir subsidiaries in the EU falls within the current scope of the Directive**¹⁵¹.

Cellebrite is an Israeli digital intelligence group that provides tools for federal, state, and local law enforcement as well as companies and service providers to collect, review, analyse, and manage digital data. The group has been accused of facilitating human rights violations by selling its products to repressive regimes¹⁵². As a response to allegations, the group stated it has established an Ethics and Integrity Committee and it does not enter into business with customers whose positions or actions it considers inconsistent with its mission to support law enforcement acting in a legal manner¹⁵³.

Cellebrite group has 900 employees and a turnover of 246 million U.S. dollars. The parent company, the Israeli Cellebrite DI Ltd, is controlled by Sun Corporation, a Japan-based manufacturing group with 1,038 employees and a turnover of 304 million U.S. dollars that, through the former, controls all the 22 Cellebrite subsidiaries¹⁵⁴.

In the EU, Cellebrite is present in two countries; however, **none of its European companies reach the current thresholds to fall within the scope of the Directive**¹⁵⁵. Indeed, CELLEBRITE FRANCE SAS has a turnover of 3 million U.S. dollars (the number of employees is not available on Orbis); the German CELLEBRITE GMBH has 23 employees (the turnover is not available on Orbis).

149 https://www.amnestyusa.org/wp-content/uploads/2020/09/Amnest-International-Palantir-Briefing-Report-092520_Final.pdf

150 <https://www.business-humanrights.org/en/latest-news/letter-from-palantir-responding-to-amnesty-international/>

151 See Appendix IV.4

152 <https://www.business-humanrights.org/en/latest-news/cellebrite-faces-further-criticism-of-human-rights-record-as-goes-public-amid-reports-repressive-regimes-kept-buying-products-after-company-said-it-ended-sales/>

153 <https://www.business-humanrights.org/en/latest-news/cellebrite-responds-to-allegations-it-has-not-addressed-transactions-that-carry-human-rights-risks-and-that-police-in-china-continue-to-buy-cellebrite-products-after-the-company-said-it-withdrew-from-china/>

154 Cellebrite DI Ltd, Orbis, p. 50-51.

155 Idem, p. 54-55

TABLE 3

Overview of selected companies in the ICT sector and number/percentage falling within Article 2.1

GROUP	Number of companies (worldwide)	Number of companies falling within Article 2.1 of the Proposal (according to the data available on the used database)	Percentage of companies of the group falling within Article 2.1 of the Proposal
Ericsson	216	11	5,09
Nokia	447	6	1.34
Cisco	600	4	0.67
Deutsche Telekom	304	10	3.29
Telefónica	307	7	2.28
A1 Telekom Austria Group	45	5	11.11
IDEMIA	69	2	2.9
Hikvision	111	0	0
Huawei	166	8	4.82
NSO	2	0	0
Thales	438	13	2.97
Palantir	22	0	0
Cellebrite	22	0	0

CONCLUSIONS

Our analysis reveals some of the current shortcomings of the CSDD Proposal. Firstly, the study has demonstrated that fewer than 0.01 percent of the companies active in the ICT sector in the European Union satisfy the criteria established by Article 2.1.a) of the Proposal.

This percentage is unacceptably low, considering the kind of concerns and allegations that have been raised against companies in the sector, as set out above.

The analysis of these companies shows how difficult it is to find information about them. The database used (Orbis) is not open access, and nor are almost all of the national business registers. Consequently, it can be extremely expensive just to check if a company falls within the scope of the Directive. In any case, figures are often not fully available even on these databases, making it practically impossible to know if a company is obliged to respect the Directive.

The analysis of the reports set out by the selected companies demonstrates that the due diligence processes described here lack key information, for

example the names and number of the suppliers, measures taken, contractual assurances obtained, corrective and preventive plans adopted, and audits realised. The recent adoption of the CSRD could partially solve this problem. However, to ensure the effective defence of human rights and environmental standards, it would be necessary to invest national supervisory authorities with the power to order companies to communicate the information to trade unions, worker representatives, NGOs, human rights defenders, and other relevant stakeholders¹⁵⁶.

Our research confirms the complex net of companies existing within groups that—in the cases collected here—behave as a single unit. These groups present consolidated financial statements and adopt several internal rules (such as codes of conduct or codes on sustainable value chains) which should be respected by all the group companies. Consequently, it is highly questionable that the scope of the Proposal does not consider the group when calculating the thresholds established in Article 2, and obliges each single company reaching these thresholds to adopt its own due diligence process.

¹⁵⁶ FIDH, *Europe can do better: How EU policy makers can strengthen the Corporate sustainability due diligence directive*, 2022, p. 6 available on <https://www.fidh.org/en/issues/globalisation-human-rights/european-union-corporate-due-diligence>; ECCJ *Comprehensive analysis of EU Commission's proposal for a directive on due diligence*, 2022, p. 17 <https://corporatejustice.org/publications/analysis-of-eu-proposal-for-a-directive-on-due-diligence/>

We have also pointed out how few companies in these groups would be within the current scope of the Proposal. Consequently, the empirical analysis confirms that, were they minded to do so, it would be extremely easy for groups to avoid applying the Directive, for example by redistributing employees, activities and turnover so as that none or only a few of their companies have to respect the due diligence obligations. Furthermore, a group's strategies can render the Proposal almost ineffective by restructuring their value chain to delegate any risky business relationships to subsidiaries that do not fall within its scope.

Finally, we should underline that all the internal value chain managing processes we examined ignore stakeholder consultation and trade union and workers' representatives' rights.

Indeed, all the documents we consulted provide an unilateral description of the company's due diligence process. All the compliance documentation we reviewed seemed to follow a set template, unilaterally produced by the company and without independent verification and/or approval of stakeholders such as trade unions, and we question whether this is adequate to combat past failings.

APPENDIX I

Orbis lets users search companies according to the sector in which they operate. The database classifies companies based on the main European and American codes (NACE Rev. 2; SIC USA Code; NAICS 2017).

NACE is the European standard classification of productive economic activities. One NACE code is assigned to each unit recorded in statistical business registers, according to its principal economic activity, i.e. the activity which contributes the most to the value added of the unit¹⁵⁷.

Standard Industrial Classification (**SIC**) codes are four-digit numerical codes assigned by the U.S. government to business establishments to identify the primary business of the establishment¹⁵⁸.

The **NAICS** code is the North American Industry Classification System. It was adopted to standardise industry data collection and analysis between Canada, the United States, and Mexico. Currently, the NAICS is the standard used by U.S. Federal statistical agencies in classifying business establishments for the purpose of collecting, analysing, and publishing statistical data related to the U.S. business economy.

* Last available year, excluding companies with no recent financial data and public authorities/states/governments.

TABLE 1

NACE Rev. 2¹⁵⁹ Main Section: J - Information and communication

Active companies in the sector	6,795,408
Active companies in the sector with more than 500 employees *	6,123
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	2,754
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	675

157 For a detailed explanation of the structure of NACE Rev. 2 see Eurostat, *NACE Rev. 2 Statistical classification of economic activities in the European Community* (<https://ec.europa.eu/eurostat/documents/3859598/5902521/KS-RA-07-015-EN.PDF>).

158 For a detailed description of the U.S. SIC code see: <https://siccode.com/sic-code-lookup-directory>

159 NACE consists of a hierarchical structure. The structure of NACE is described in the NACE Regulation as follows: i. a first level consisting of headings identified by an alphabetical code (sections); ii. a second level consisting of headings identified by a two-digit numerical code (divisions); iii. a third level consisting of headings identified by a three-digit numerical code (groups); iv. a fourth level consisting of headings identified by a four-digit numerical code (classes). In the analysis, we will consider the primary and secondary codes.

TABLE 2

NACE Rev. 2 (All codes): 61 - Telecommunications¹⁶⁰

Active companies in the sector	1,409,299
Active companies in the sector with more than 500 employees *	1,991
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	836
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	207

TABLE 3

NACE Rev. 2 (All codes): 62 - Computer programming, consultancy, and related activities¹⁶¹

Active companies in the sector	3,753,690
Active companies in the sector with more than 500 employees *	3,838
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	1,691
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	598

TABLE 4

NACE Rev. 2 (All codes): 63 - Information service activities¹⁶²

Active companies in the sector	2,247,927
Active companies in the sector with more than 500 employees *	1,871
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	623
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	125

160 This division includes wired telecommunications activities; satellite telecommunications activities; other telecommunications activities.

161 This division includes computer programming, consultancy and related activities; computer facilities management activities; other information technology and computer service activities.

162 This division includes data processing, hosting and related activities; web portals; other information service activities; news agency activities.

TABLE 5**NACE Rev. 2 (All codes): 26 - Manufacture of computer, electronic and optical products¹⁶³**

Active companies in the sector	1,030,618
Active companies in the sector with more than 500 employees *	5,515
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	2,754
Companies active in the sector with more than 500 employees and a turnover of more than 150 million, located in the EU	463

TABLE 6**NACE Rev. 2 (All codes): 27 - Manufacture of electrical equipment¹⁶⁴**

Active companies in the sector	869,988
Active companies in the sector with more than 500 employees *	3,639
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	1,653
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	400

TABLE 7**NACE Rev. 2 (All codes): 95 - Repair of computers and personal and household goods¹⁶⁵**

Active companies in the sector	2,892,431
Active companies in the sector with more than 500 employees *	648
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	217
Companies active in the sector with more than 500 employees and a turnover of more than 150 million, located in the EU	38

163 This division includes manufacture of electronic components and boards; manufacture of loaded electronic boards; manufacture of computers and peripheral equipment; manufacture of communication equipment; manufacture of consumer electronics; manufacture of instruments and appliances for measuring, testing and navigation, watches and clocks; manufacture of irradiation, electromedical and electrotherapeutic equipment; manufacture of optical instruments and photographic equipment; manufacture of magnetic and optical media.

164 This division includes manufacture of electric motors, generators, transformers and electricity distribution and control apparatus; manufacture of batteries and accumulators; manufacture of wiring and wiring devices; manufacture of fibre optic cables; manufacture of other electronic and electric wires and cables; manufacture of electric lighting equipment; manufacture of domestic appliances; manufacture of other electrical equipment.

165 This division includes repair of computers, communication equipment and peripheral equipment; repair of personal and household goods; repair of consumer electronics; repair of household appliances and home and garden equipment; repair of footwear and leather goods; repair of furniture and home furnishings; repair of watches, clocks and jewellery; repair of other personal and household goods.

TABLE 8

U.S. SIC (All codes)¹⁶⁶: 35 - Industrial and commercial machinery and computer equipment¹⁶⁷

Active companies in the sector	2,720,086
Active companies in the sector with more than 500 employees *	6,027
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	2,785
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	868

TABLE 9

U.S. SIC (All codes): 36 - Electronic and other electrical equipment and components, except computer equipment¹⁶⁸

Active companies in the sector	1,481,216
Active companies in the sector with more than 500 employees *	7,195
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	3,396
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	638

TABLE 10

U.S. SIC (All codes): 48 - Communications¹⁶⁹

Active companies in the sector	1,631,601
Active companies in the sector with more than 500 employees *	2,390
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	1,018
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	259

166 Every company has a primary SIC code that indicates its main line of business. The first two digits of the SIC code identify the major industry group, the third digit identifies the industry group, and the fourth digit identifies the specific industry. In this research, we will consider the first two digits only.

167 This division includes engines and turbines; farm and garden machinery and equipment; construction, mining, and materials handling; metalworking machinery and equipment; special industry machinery, except metalworking; general industrial machinery and equipment; computer and office equipment refrigeration and service industry machinery; miscellaneous industrial and commercial.

168 This division includes electric transmission and distribution equipment; electrical industrial apparatus; household appliances; electric lighting and wiring equipment; household audio and video equipment; communications equipment; electronic components and accessories; miscellaneous electrical machinery, equipment, and supplies.

169 This division includes: telephone communications; telegraph and other message communications; radio and television broadcasting stations; cable and other pay television services; communication services, classified as not elsewhere.

TABLE 11**NAICS 2017 (All codes): 334 - Computer and Electronic Product Manufacturing¹⁷⁰**

Active companies in the sector	1,273,336
Active companies in the sector with more than 500 employees *	6,203
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	3,090
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	540

TABLE 12**NAICS 2017 (All codes): 335 - Electrical Equipment, Appliance, and Component Manufacturing¹⁷¹**

Active companies in the sector	823,839
Active companies in the sector with more than 500 employees *	3,516
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	1,625
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	357

170 This division includes: computer and peripheral equipment manufacturing; electronic computer manufacturing; computer storage device manufacturing; computer terminal and other computer peripheral equipment manufacturing; telephone apparatus manufacturing; radio and television broadcasting and wireless communications equipment manufacturing; other communications equipment manufacturing; audio and video equipment manufacturing; semiconductor and other electronic component manufacturing; bare printed circuit board manufacturing; semiconductor and related device manufacturing; capacitor, resistor, coil, transformer, and other inductor manufacturing; electronic connector manufacturing; printed circuit assembly (electronic assembly) manufacturing; other electronic component manufacturing; navigational, measuring, electromedical, and control instruments manufacturing; electromedical and electrotherapeutic apparatus manufacturing; search, detection, navigation, guidance, aeronautical, and nautical system and instrument manufacturing; automatic environmental control manufacturing for residential, commercial, and appliance use; instruments and related products manufacturing for measuring, displaying, and controlling industrial process variables; totalising fluid meter and counting device manufacturing; instrument manufacturing for measuring and testing electricity and electrical signals; analytical laboratory instrument manufacturing; irradiation apparatus manufacturing; other measuring and controlling device manufacturing; manufacturing and reproducing magnetic and optical media; blank magnetic and optical recording media manufacturing; software and other pre-recorded compact disc, tape, and record reproduction.

171 This division includes: electric lighting equipment manufacturing; electric lamp bulb and part manufacturing; residential electric lighting fixture manufacturing; commercial, industrial, and institutional electric lighting fixture manufacturing; other lighting equipment manufacturing; household appliance manufacturing; small electrical appliance manufacturing; major household appliance manufacturing; electrical equipment manufacturing; power, distribution, and specialty transformer manufacturing; motor and generator manufacturing; switchgear and switchboard apparatus manufacturing; relay and industrial control manufacturing; other electrical equipment and component manufacturing; storage battery manufacturing; primary battery manufacturing; fibre optic cable manufacturing; other communication and energy wire manufacturing; current-carrying wiring device manufacturing; noncurrent-carrying wiring device manufacturing; carbon and graphite product manufacturing; all other miscellaneous electrical equipment and component manufacturing.

TABLE 13

NAICS 2017 (All codes): 51 - Information¹⁷²

Active companies in the sector	7,923,915
Active companies in the sector with more than 500 employees *	6,991
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	2,922
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	572

TABLE 14

BvD sector: 21 - Industrial, Electric & Electronic Machinery

Active companies in the sector	2,879,777
Active companies in the sector with more than 500 employees *	10,231
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	5,122
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	1,038

TABLE 15

BvD sector: 22 - Computer Hardware

Active companies in the sector	90,932
Active companies in the sector with more than 500 employees *	361
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	207
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	19

172 The list of sectors included in this division is available here: <https://www.naics.com/six-digit-naics/?v=2017&code=51>

TABLE 16**BvD sector: 23 - Communications**

Active companies in the sector	1,323,569
Active companies in the sector with more than 500 employees *	2,035
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	968
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	187

TABLE 17**BvD sector: 30 - Computer Software**

Active companies in the sector	2,555,086
Active companies in the sector with more than 500 employees *	1,994
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	849
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	240

TABLE 18**BvD sector: 36 - Information Services**

Active companies in the sector	117,946
Active companies in the sector with more than 500 employees *	58
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros *	13
Companies active in the sector with more than 500 employees and a turnover of more than 150 million euros, located in the EU	3

APPENDIX II: HARDWARE PROVIDERS

1. ERICSSON

The group has 101,322 employees worldwide and a turnover of 22,726 million euros. The parent company (TELEFONAKTIEBOLAGET LM ERICSSON AB), whose business consists mainly of corporate management, generally fully owns the 216 subsidiaries¹⁷³. Out of them **only 11 EU companies fall under the current** scope of the Proposal, according to the data available on Orbis¹⁷⁴:

	COMPANY	SEAT	EMPLOYEES	TURNOVER IN U.S DOLLARS
1.	ERICSSON EESTI AS	Estonia	1,633	759 million
2.	ERICSSON ESPAÑA SAU	Spain	2,241	615 million
3.	ERICSSON SP. Z O.O.	Poland	2,162	228 million
4.	ERICSSON TELECOMMUNICATIONS ROMANIA SRL	Romania	2,699	199 million
5.	ERICSSON TELECOMUNICAZIONI - SOCIETA' PER AZIONI	Italy	1,807	601 million
6.	ERICSSON FRANCE	France	656	470 million
7.	L.M. ERICSSON LIMITED	Ireland	1,268	252 million
8.	ERICSSON MAGYARORSZAG KOMMUNIKACIOS RENDSZEREK KFT	Hungary	2,012	171 million
9.	ERICSSON AB	Sweden	14,087	16,351 million
10.	ERICSSON NIKOLA TESLA D.D.	Croatia	3,471	336 million
11.	GRUPO EZENTIS S.A.	Spain	8,993	416 million

¹⁷³ *Ericsson Annual Report 2021* provides with a list of the subsidiaries, joint ventures and associated companies and the percentage of ownership in each of them (p. 90). See also TELEFONAKTIEBOLAGET LM ERICSSON AB, Orbis, p. 212-221.

¹⁷⁴ TELEFONAKTIEBOLAGET LM ERICSSON AB, Orbis, p. 239-250. It should be noted that ERICSSON ANTENNA TECHNOLOGY GERMANY GMBH (974 employees and a turnover of 48 million), ERICSSON ANTENNA TECHNOLOGY ROMANIA S.R.L. (1,302 employees and a turnover of 126 million), ERICSSON CORPORATIA AO (seat in Romania; 565 employees and a turnover of 67 million), OY L M ERICSSON AB OY (seat in Finland; 703 employees and a turnover of 145 million) and ERICSSON NIKOLA TESLA SERVIZI D.O.O. (seat in Croatia; 661 employees and a turnover of 99 million) have more than 500 employees but do not have sufficient turnover to be in the proposal's scope.

2. NOKIA

The group has 87,927 employees (of whom 37,696 are in Europe) and net sales of 22,579 million euros (of which 6,635 million euros are in Europe). A total of 447 companies belong to the group, the majority of which are fully owned by the parent company, Nokia OYJ¹⁷⁵. Only six EU subsidiaries are in the current scope of the Proposal¹⁷⁶:

	COMPANY	SEAT	EMPLOYEES	TURNOVER
1.	ALCATEL-LUCENT INTERNATIONAL	France	4,053	1,867 million U.S. dollars
2.	NOKIA SOLUTIONS AND NETWORKS BRANCH OPERATIONS OY	Finland	967	1,068 million U.S. dollars
3.	NOKIA SOLUTIONS AND NETWORKS ITALIA S.P.A. IN FORMA ABBREVIATA NSN ITALIA S.P.A.	Italy	1,311	379 million euros
4.	NOKIA SOLUTIONS AND NETWORKS OY	Finland	5,655	12,693 million euros
5.	ALCATEL SUBMARINE NETWORKS	France	1,017	853 million U.S. dollars
6.	NOKIA SOLUTIONS AND NETWORKS B.V.	The Netherlands	52,564	11,253 million euros

3. CISCO

The group has 79,500 employees and a turnover of 43,986 million euros. Six hundred companies belong to the group, the majority of which are fully owned by Cisco Systems INC, the parent company¹⁷⁷. Many of the subsidiaries do not reach the thresholds currently established by the Proposal. Only four of the EU companies in the group exceed the thresholds established by Article 2.1.a)¹⁷⁸:

	COMPANY	SEAT	EMPLOYEES	TURNOVER IN U.S DOLLARS
1.	CISCO SYSTEMS FRANCE	France	763	305 million
2.	CISCO SYSTEMS GMBH	Germany	1,113	363 million
3.	CISCO SYSTEMS INTERNATIONAL B.V.	The Netherlands	630	12,646 million
4.	CISCO SYSTEMS POLAND SP. Z O.O.	Poland	1,655	175 million

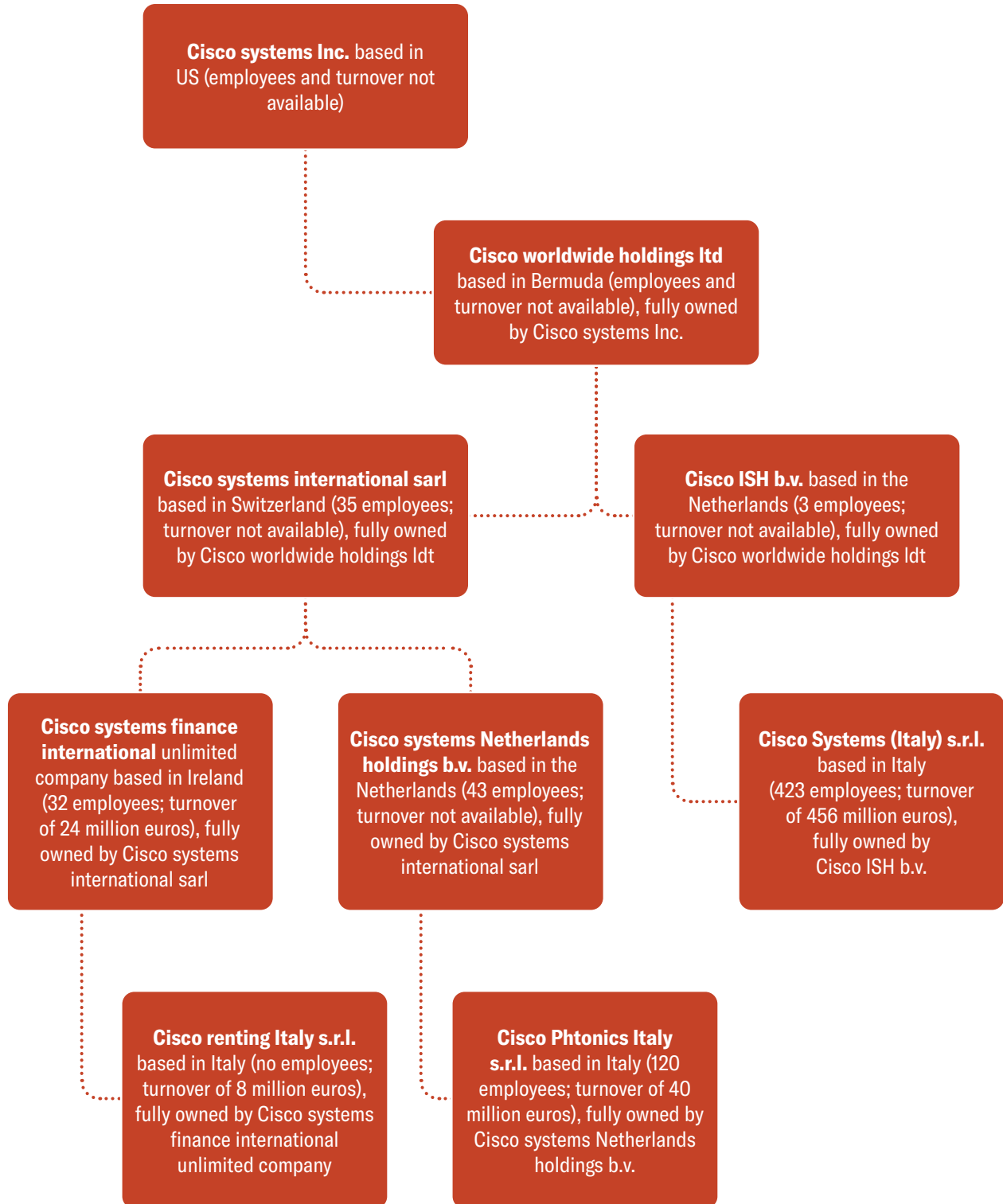
¹⁷⁵ *Nokia in 2021 Report*, p. 179-183; Nokia OYJ, Orbis, p. 198-207.

¹⁷⁶ Nokia OYJ, Orbis, p. 228-234. ZAO NOKIA SOLUTIONS AND NETWORKS (seat in Romania) has 1,183 employees but a turnover of only 32 million U.S. dollars.

¹⁷⁷ Cisco Systems Inc., Orbis, p. 145-176.

¹⁷⁸ *Idem*, p. 185-219. CISCO SYSTEMS PORTUGAL – SISTEMAS INFORMÁTICOS, SOCIEDADE UNIPessoal, LDA has enough employees (639) but the turnover is below the current threshold (84 million U.S. dollars).

To fully understand the group’s complexity, it is worth exploring the three Cisco Italian subsidiaries, which show the value chain fragmentation that a group can maintain—allowing thresholds to be progressively lower both in terms of employees and turnover¹⁷⁹:



179 The scheme is based on the information available on Orbis.

APPENDIX III: TELECOMS PROVIDERS

1. DEUTSCHE TELEKOM

DT is the largest telecommunications provider in Europe by revenue. The group has 216,528 employees (of whom 85,160 are in Germany and 35,319 in other European countries) and a turnover of 109,978 million euros. The parent company (DEUTSCHE TELEKOM AG) fully owns many of the 304 subsidiaries¹⁸⁰. Of the current EU subsidiaries, only 10 would fall within the scope of the Proposal¹⁸¹:

	COMPANY	SEAT	EMPLOYEES	TURNOVER IN U.S DOLLARS
1.	DEUTSCHE TELEKOM IT GMBH	Germany	2,000	not available
2.	DEUTSCHE TELEKOM SERVICES EUROPE SE	Germany	1,000	not available
3.	T-SYSTEMS INTERNATIONAL GMBH	Germany	24,000	not available
4.	TELEKOM DEUTSCHLAND GMBH	Germany	3,321	not available
5.	DEUTSCHE TELEKOM BUSINESS SOLUTIONS GMBH	Germany	3,000	not available
6.	SLOVAK TELEKOM, A.S.	Slovakia	2,817	976 million
7.	T-MOBILE POLSKA S.A.	Poland	4,100	2,179 million
8.	T-MOBILE NETHERLANDS HOLDING B.V.	The Netherlands	1,834	2,427 million
9.	HT D.D.	Croatia	5,680	1,230 million
10.	HELLENIC TELECOMMUNICATIONS ORGANIZATION S.A.	Greece	11,453	3,963 million

¹⁸⁰ DEUTSCHE TELEKOM AG, Orbis, p. 162-167.

¹⁸¹ Idem, p. 178-186.

2. TELEFÓNICA

The group has 104,150 employees and a turnover of 39,277 million euros and a presence in 12 countries¹⁸². The vast majority of the 307 companies of the group are fully owned by the parent company (Telefónica S.A.)¹⁸³. However, only seven EU subsidiaries would be in the current scope of the Proposal¹⁸⁴:

	COMPANY	SEAT	EMPLOYEES	TURNOVER IN U.S DOLLARS
1.	TELEFONICA CYBERSECURITY & CLOUD TECH SL.	Spain	1,017	155 million
2.	TELEFONICA DE ESPAÑA SAU	Spain	13,689	9,939 million
3.	TELEFONICA GLOBAL SOLUTIONS SL.	Spain	658	666 million
4.	TELEFONICA INVESTIGACION Y DESARROLLO SA	Spain	584	157 million
5.	TELEFONICA MOVILES ESPAÑA SA	Spain	3,808	5,120 million
6.	PROMOTORA DE INFORMACIONES SA	Spain	6,810	839 million
7.	BANCO BILBAO VIZCAYA ARGENTARIA SA	Spain	110,432	27,485 million

3. A1 TELEKOM AUSTRIA

In 2021, A1 Telekom Austria Group, headquartered in Vienna, employed 17,856 employees and had a turnover of 5.38 billion U.S. dollars¹⁸⁵. The vast majority of its 45 subsidiaries are fully owned by Telekom Austria AG, which is controlled by the Mexican telecommunications group América Móvil (a group of 888 companies)¹⁸⁶. Only five of these 45 subsidiaries fall within the current scope of the Proposal:

	COMPANY	SEAT	EMPLOYEES	TURNOVER
1.	A1 TELEKOM AUSTRIA AKTIENGESELLSCHAFT	Austria	4,200	3,133 million U.S. dollars
2.	TELEKOM AUSTRIA PERSONALMANAGEMENT GMBH	Austria	3,472	282 million euros
3.	A1 BULGARIA EAD	Bulgaria	3,901	631 million U.S. dollars
4.	A1 HRVATSKA D.O.O.	Croatia	1,937	519 million U.S. dollars
5.	A1 SLOVENIJA, TELEKOMUNIKACIJSKE STORITVE D. D.	Slovenia	538	254 million euros

¹⁸² <https://www.telefonica.com/en/about-us/countries-emerging-business-units/>

¹⁸³ Telefónica s.a., Orbis, p. 160-165.

¹⁸⁴ Idem, p. 228-234. TELEFONICA INGENIERIA DE SEGURIDAD SA (seat in Spain) has 792 employees but a turnover of only 78 million U.S. dollars. Similarly, TELEFONICA DIGITAL ESPAÑA SLU has 755 employees but a turnover of only 134 million U.S. dollars and MOVISTAR PROSEGUR ALARMAS SL. (seat in Spain) has 943 employees but a turnover of only 148 million U.S. dollars;

¹⁸⁵ A1 TELEKOM AUSTRIA GROUP – COMBINED ANNUAL REPORT 2021, p. 160.

¹⁸⁶ The list of the companies of the group is available in the *A1 TELEKOM AUSTRIA GROUP – COMBINED ANNUAL REPORT 2021*, p. 142-143. The structure of the group is available on the A1 group website: https://cdn1.a1.group/final/en/media/pdf/A1_Group_Structure.pdf

APPENDIX IV: DIGITAL COMPANIES

1. IDEMIA

The group has almost 14,424 employees and a turnover of 2.2 billion euros. The parent company, IDEMIA Group S.A.S. based in France¹⁸⁷, is controlled, through a sequence of companies, by ADVENT INTERNATIONAL CORP (headquartered in Boston (U.S.) with 195 employees and a turnover of 36 billion U.S. dollars) that, in itself, controls 985 subsidiaries¹⁸⁸. IDEMIA Group s.a.s. fully owns 69 subsidiaries. However, only two of them fall under the current Article 2.1.a) of the Proposal¹⁸⁹: IDEMIA FRANCE with 1,353 employees and a turnover of 899 million euros; IDEMIA IDENTITY & SECURITY FRANCE (1,724 employees and a turnover of 668 million U.S. dollars).

2. HUAWEI

In total, 166 companies belong to the group, which has a global turnover of 134 billion U.S. dollars and 194,000 employees. The parent company, EMPLOYEES OF HUAWEI INVESTMENT & HOLDING CO. LTD, fully owns, directly or through its main subsidiaries (Huawei Invest Control Corp. Labor Union Commission—turnover and number of employees not available—that controls HUAWEI INVESTMENT & HOLDING CO. with a turnover of 134,463 million U.S. dollars; number of employees not available) almost all the 166 companies of the group. Many of the EU subsidiaries would not fall under the current scope of the Proposal¹⁹⁰; indeed, only eight companies satisfy both the thresholds:

	COMPANY	SEAT	EMPLOYEES	TURNOVER IN U.S DOLLARS
1.	HUAWEI TECHNOLOGIES COÖPERATIEF U.A.	The Netherlands	27,846	29,949 million ¹⁹¹
2.	HUAWEI TECHNOLOGIES ITALIA S.R.L.	Italy	658	1,258 million
3.	HUAWEI TECHNOLOGIES FRANCE	France	865	1,582 million
4.	HUAWEI TECHNOLOGIES DEUTSCHLAND GMBH	Germany	767	2,299 million
5.	HUAWEI TECHNOLOGIES DUESSELDORF GMBH	Germany	1,125	501 million
6.	HUAWEI TECHNOLOGIES SRL	Romania	920	484 million
7.	HUAWEI TECHNOLOGIES SWEDEN AB	Sweden	267	469 million
8.	HUAWEI TECHNOLOGIES ESPAÑA SL	Spain	939	1,199 million

187 IDEMIA Group s.a.s., Orbis, p. 32.

188 Idem, p. 36-51.

189 Idem, p. 54-58.

190 HUAWEI INVESTMENT & HOLDING CO., Orbis, p. 38-43.

191 This is the holding of the Huawei companies in Europe. Consequently, the turnover and the number of employees refer to the European turnover of the group.

3. THALES

The group has a worldwide presence¹⁹² and a turnover of 18,171 million euros and 81,098 employees. The parent company, Thales, is based in France and is listed on the Euronext, Frankfurt, Berlin, Stuttgart, Vienna, and London stock exchanges. Thales fully owns almost all the 438 companies of the group¹⁹³. Until May 2022 the French government held a share of company stock.

From the data available on Orbis¹⁹⁴, we find out that only 13 of the EU subsidiaries would fall into the current scope of the Directive:

	COMPANY	SEAT	EMPLOYEES	TURNOVER
1.	THALES AVIONICS ELECTRICAL SYSTEMS SAS	France	546	185 million U.S. dollars
2.	THALES GLOBAL SERVICES SAS	France	1,705	763 million U.S. dollars
3.	THALES DEUTSCHLAND GMBH	Germany	2,805	948 million U.S. dollars
4.	THALES ESPAÑA GRP SAU	Spain	673	226 million U.S. dollars
5.	THALES NEDERLAND B.V.	The Netherlands	1,834	516 million U.S. dollars
6.	THALES AVS FRANCE SAS	France	6,164	1,583 million U.S. dollars
7.	THALES DIS FRANCE SA	France	2,424	1,150 million U.S. dollars
8.	THALES ALENIA SPACE ITALIA S.P.A.	Italy	2,157	644 million euros
9.	THALES ALENIA SPACE BELGIUM	Belgium	530	151 million U.S. dollars
10.	THALES INFORMATION SYSTEMS SA	France	2,732	432 million U.S. dollars
11.	DIEHL AEROSPACE GMBH	Germany	1,136	274 million U.S. dollars
12.	ELETTRONICA - SOCIETA PER AZIONI	Italy	748	329 million U.S. dollars
13.	TELESPAZIO S.P.A.	Italy	940	342 million U.S. dollars

192 <https://www.thalesgroup.com/en/global/group/about-us/thales-worldwide>

193 Thales, Orbis, p. 137-150.

194 Thales, Orbis, p. 163-177.

4. PALANTIR

The parent company, PALANTIR TECHNOLOGIES, based in Palo Alto, has 2,439 employees and a turnover of 1.09 billion U.S. dollars. It fully owns almost all the 22 companies of the group¹⁹⁵. In the EU, Palantir is present in seven countries:

	COMPANY	SEAT	EMPLOYEES	TURNOVER
1.	PALANTIR ITALIA S.R.L.	Italy	3	1.7 million euros
2.	PALANTIR TECHNOLOGIES	France	Not available	60.6 million euros
3.	PALANTIR TECHNOLOGIES GMBH	Germany	52	43.9 million U.S. dollars
4.	PALANTIR TECHNOLOGIES SWEDEN AB	Sweden	21	8.44 million U.S. dollars
5.	PALANTIR TECHNOLOGIES SPAIN SL.	Spain	Not available	4.90 million U.S. dollars
6.	PALANTIR LIBRA B.V.	The Netherlands	Not available	Not available
7.	PALANTIR TECHNOLOGIES DENMARK APS	Denmark	23	Not available

¹⁹⁵ Palantir Technologies, Orbis, p. 16.

