

This document is a translated English version for information purposes only. The Dutch version is signed and valid.

The Minister of Economic Affairs and Climate Policy
Postbus 20401
2500 EK Den Haag

The Minister for Digitalisation
Postbus 20011
2500 EA Den Haag

The Minister for Legal Protection
Postbus 20301
2500 EH Den Haag

Date
16 May 2024

Subject
2nd (interim) advice on the Dutch supervisory structure for the AI Act

Dear Ministers,

1. The AI Act requires the establishment of a supervisory structure at national level for the supervision of the new regulation. In this context, you have asked the Dutch Authority for Digital Infrastructure (“Rijksinspectie Digitale Infrastructuur”, RDI) - as chair of the Working Group on the Supervision of AI - and the Dutch Data Protection Authority (“Autoriteit Persoonsgegevens”, AP) – as national coordinating algorithm supervisor - to come up with a joint advice on how the supervision of the AI Act can be organised in an effective way.

2. Our first interim advice was sent to you on 7 November 2023. This advice has been discussed with you on 1 December 2023. In the meantime, the supervisory authorities have further developed the desirable supervisory structure in this second interim advice. The recommendations and points of attention in this letter too are the result of close cooperation with many involved supervisory authorities. This advice has been approved at board-level in the Inspection Board on 1 May 2024 and in the Algorithm & AI Chamber of the Cooperation Platform of Digital Supervisory authorities (“Samenwerkingsplatform Digitale Toezichhouders”, SDT) on 25 April 2024.

3. In this letter, we inform you of the progress and the proposed choices regarding the designation of market surveillance authorities and cooperation with the relevant sectoral or domain-specific supervisors. By jointly exploring the supervisory structure, risk-based supervision on AI can be shaped effectively and

Date

16 May 2024

benefit from synergies and scale advantages. In doing so, the supervisory authorities have been able to take into account the latest texts of the AI Act in the European Parliament and the European Council. In this letter, the supervisory authorities advise on the following topics:

1. The organization of supervision on high-risk AI systems in Annex III;
2. The organization of supervision on prohibited AI;
3. The identification of the authorities protecting fundamental rights;
4. The governance of the regulatory sandbox.

4. As a preliminary point, it should be noted that when assigning tasks following from the AI Act to supervisory authorities, these tasks can only be performed if sufficient resources and capacity are available for this purpose. This explicitly also applies to the role of relevant sector- or domain-specific supervisors that¹ are not market surveillance authorities. Should the Minister decide to take over (parts of) this advice on task allocation, agreement on the allocation of resources must also be found in order to accept these tasks. Moreover, several prerequisites must be met as to ensure effective cooperation between supervisors, which will be discussed in various places later in this advice.

1. Organisation of supervision of high-risk AI systems in Annex III

5. Following their interim advice of 7 November 2023, the supervisory authorities have worked out the desired designation of market surveillance authorities for high-risk systems set out in the areas of application in Annex III. Above all, the supervisory structure must serve the public interests involved in the AI Act, in particular the health, safety and protection of fundamental rights, and help to protect these interests effectively and efficiently. In the previous interim advice, two approaches were outlined to this end:

1. The possibility to designate market surveillance competences in the area of application at a sector or domain-specific supervisory authority that is “nearest” to this area of application. This may require an adjustment of the role, scope and functioning of the relevant authority.
2. The possibility to designate market surveillance competences in the areas of application to a “general” market surveillance authority. In its practice, this market surveillance authority would cooperate with the sector- or domain-specific authority to ensure an integrated risk-based approach.

6. With that, it is important to take into account the current supervisory landscape and to connect with existing goals, roles, mandates and powers of the sector- and domain-specific supervisory authorities. A relevant consideration is also that, given current tasks, mandates, scope and organisational structure, not every sector and domain supervisory authority that has a link with the areas of application in Annex III can be equipped as a market surveillance authority. This has resulted in the creation of a structure of market

¹ The use of the term ‘market surveillance authority’ aligns with the terminology used in the AI Act, i.e. Article 3(26) where this term is defined. The market surveillance authority is the authority ‘carrying out the activities and taking the measures pursuant to Regulation (EU) 2019/1020’; ‘The concept of ‘sector or domain-specific supervisory authorities’ is used to refer to authorities operating in a certain sector (of the market) or domain and supervising AI based on existing mandate, tasks and powers.

Date

16 May 2024

surveillance authorities that, while exercising their market surveillance competences, should cooperate closely with and complementary to sector and domain supervisory authorities (and vice versa). In their next advice, the supervisory authorities intend to explore how this cooperation can be implemented. This may include issues of a more principled and constitutional nature.

7. For the purposes of this interim advice, the supervisory authorities examined which authority would be most obvious market surveillance authority in each area of application. For this purpose, also the relevant sector- or domain-specific supervisory authorities that will be involved in the supervision were identified. Next to that, for each supervisory authority, its goals, role, mandate and powers were mapped. Moreover, the supervisory authorities have jointly formed a better picture of what market surveillance of the AI Act requires and the extent to which it can be distributed along lines of sectors or domains. Finally, in sub-areas, the AI Act itself imposes requirements on the market surveillance authority to be designated,² or to a greater or lesser extent, it designates an existing supervisory authority as a market surveillance authority.³ These aspects have been taken into account in the advice.

8. A bottom-up joint exploration showed that the designation of sector- or domain-specific supervisors as market surveillance authorities is not an obvious choice in most areas. During several workshops, the authorities prepared a memo for each category of Annex III, which explored the considerations for the possible options in assigning market surveillance competences. They established that that the involved sector and domain-specific supervisory authorities, all from their existing supervisory mandate, have a good insight into the (materialisation) of risks of, in particular, the use of AI systems in, for example, schools, the workplace and the government. At the same time, market surveillance under the AI Act will certainly not only focus on parties deploying AI systems in a sector or domain ('deployers'), but also, in particular, on providers of AI systems that may be located outside those sectors and domains and the question of whether they adequately mitigate risks. In other words, market surveillance competences can be used in the entire chain of for example providers, importers, distributors and deployers of AI systems. Also, supervision will have to be set up within the framework of the Market Surveillance Regulation (2019/1020). Moreover, the supervisory authority will have to be equipped as a market surveillance authority and act as such in the event of incidents (for example by removing or ordering to remove an AI system from the market). In addition, for the areas of application listed in Annex III, it is necessary for the market surveillance authority to build up knowledge, expertise and experience regarding, in particular, the risks posed by AI to fundamental rights.⁴ While sector- and domain-specific oversight of issues can be traced back to the protection of specific fundamental rights, the AI Act addresses fundamental rights risks in a broad sense, including the rights to equal treatment, privacy and legal protection.⁵ In summary, the designation of sector and domain supervisory authorities as market surveillance authorities in the different areas of application would always entail a significant extension of their mandate, tasks, powers and the (type of) actors to be supervised. An extension that would not fit well with the existing role and

² See Article 74(8) of the AI Act on points 1 (in case of law enforcement) 6, 7 and 8 in Annex III.

³ See Article 74(6) and (7) of the AI Act on the role of financial supervisory authorities.

⁴ This is not to say that there are only fundamental rights risks in the areas of application listed in Annex III. The AI Act addresses risks to safety, health and fundamental rights.

⁵ For a further discussion of fundamental rights risks, see also the role of fundamental rights authorities, as discussed in section 3.

Date

16 May 2024

objectives of these authorities. In addition, designating each sector or domain supervisory authority as a market surveillance authority would require a significant increase in both the supervisory perimeter and the required AI specialisation and associated costs. In order to achieve effective and efficient market surveillance, it is therefore not obvious to designate the sector- or domain-specific supervisors as market surveillance authorities per respective area in Annex III.

9. The supervisory authorities therefore recommend the following supervisory structure for the areas of application set out in Annex III (see table). This supervisory structure is explained in more detail below.

| Category | | Sector or domain specific supervisors involved | Proposed Market Surveillance Authorities |
|----------|---|--|--|
| 1 | Biometric identification, categorization and emotion recognition | Dutch Authority for Digital Infrastructure | Dutch Data Protection Authority ¹ |
| 2 | Critical infrastructure | Dutch Authority for Digital Infrastructure and Human Environment and Transport Inspectorate (“Inspectie Leefomgeving en Transport”, ILT) | Dutch Authority for Digital Infrastructure or Human Environment and Transport Inspectorate (domain dependent) ² |
| 3 | Education and vocational training | Inspectorate of Education (“Inspectie van het onderwijs”) | Dutch Data Protection Authority ¹ |
| 4 | Employment, workers management and access to self-employment | Netherlands Labour Authority (“Nederlandse Arbeidsinspectie”) | Dutch Data Protection Authority ¹ |
| 5(a) | Assessing eligibility for public benefits and -services | Inspectorate of taxes, allowances and border control (“Inspectie belastingen, toeslagen en douance”); and Netherlands Labour Authority | Dutch Data Protection Authority ¹ |
| 5(b) | Assessment of creditworthiness or credit score | Dutch Authority for the Financial Markets (“Autoriteit Financiële Markten”, AFM) and Dutch Central Bank (“De Nederlandsche Bank”, DNB) | Dutch Authority for the Financial Markets and Dutch Central Bank (financial services); Dutch Data Protection Authority (non-financial services) ³ |

Date

16 May 2024

| | | | |
|------|--|---|---|
| 5(c) | Calculation of premiums for health and life insurance | Dutch Authority for the Financial Markets and Dutch Central Bank | Dutch Authority for the Financial Markets and Dutch Central Bank(financial services); Dutch Data Protection Authority (non-financial services) ³ |
| 5(d) | Emergency calls and deployment of emergency services | Health and Youth Care Inspectorate (“Inspectie Gezondheidszorg en Jeugd”, IGJ) and Inspectorate of Justice and Security (“Inspectie Justitie en Veiligheid”, IGJ) | Dutch Data Protection Authority ¹ |
| 6 | Law enforcement | Inspectorate of Justice and Security | Dutch Data Protection Authority ⁵ |
| 7 | Migration, asylum and border control management | Inspectorate of Justice and Security | Dutch Data Protection Authority ⁵ |
| 8 | Administration of justice and democratic processes | - | Dutch Data Protection Authority ^{5,6} |

Notes

- 1) In line with the current task as (coordinating) algorithm supervisory authority, for which the work within the AP is assigned to Directorate for Algorithmic Oversight (“Directie Coördinatie Algoritmes”, DCA)
- 2) For a more detailed explanation of the domains for which the Dutch Authority for Digital Infrastructure and the Human Environment and Transport Inspectorate should be designated, see paragraph 14.
- (3) The purpose of this advice is to designate those authorities, insofar as the placing on the market, putting into service, or the use is in direct connection with the provision of those financial services. However, the precise definition of this scope requires elaboration by the financial supervisory authorities. One possibility is to designate the Dutch Data Protection Authority as a market surveillance authority if creditworthiness tests and credit scores are deployed and developed outside the financial sector.
- (4) This scope – despite its limited size – requires further reflection as it does not have an obvious link with the group of market surveillance authorities to the AI Act that follows from the other parts of Annex II and Annex III.
- 5) In line with the role of coordinating AI and algorithm supervisory authority and given the conditions set in the AI Act regarding the oversight of these application areas.
- 6) In this respect, Article 74(8) of the AI Act requires that “market surveillance activities shall in no way affect the independence of judicial authorities, or otherwise interfere with their activities when acting in their judicial capacity.” How this requirement affects market surveillance will need to be further explored.

Date

16 May 2024

1.1 Sector- and domain-specific supervision

10. The tasks, powers and responsibilities of the relevant sector- and domain-specific supervisors will not be affected and will need to be strengthened by market surveillance of the AI Act. In order to ensure that supervision is complementary and mutually reinforcing, close cooperation is needed between the market surveillance system of the AI Act and the existing supervision on sectors and domains in which (the effects) of AI are also supervised upon. This concerns in particular the supervision that is carried out by the Inspectorate of Education, Netherlands Labour Authority, the Inspectorate of Justice and Security and the Inspectorate of taxes, allowances and border control. By way of illustration: it should be possible for the Inspectorate of Education to pass on perceived risks and problems of AI use in education to support market surveillance on the placing on the market, putting into service, or the use of AI systems in the area of education (and vice versa). It is also important that these inspectorates have a say in identifying the priorities in market surveillance, identifying risks and impact of AI use, and identifying relevant developments and trends to avoid unintended additional risks. This requires exchange at employee-level, but also regular consultation at board-level. Furthermore, this requires a governance structure in which the sector and domain-specific supervisory authorities cooperate with market surveillance authorities. Moreover, cooperation requires resources and conditions that allow for effective cooperation. In any case, clear legal bases will have to be created for the exchange of information between the various authorities. To this end, the ministries, in consultation with the supervisory authorities, will have to identify the extent to which existing frameworks need to be adapted, or whether additional frameworks are needed, in order to enable the exchange of information for the purposes of AI supervision. The structure of cooperation (governance) will be based on the aforementioned. Feasibility and enforcement assessments will also have to be carried out by all authorities involved when it comes to (additional) implementation legislation, for example to create legal bases for the exchange of information between the various authorities.

11. Market surveillance will need to be carefully coordinated with the relevant sector- and domain-specific supervisory authorities in the event of an AI-related incident. Agreements must be made that are set in coordination protocols and through the elaboration of work processes. Which supervisory authority can best act in the AI-supply chain given the mandate, available tools, and the desirability of intervention? Does the market surveillance authority address the provider or deployer of the AI system under the AI Act, or does something (also) go wrong in the responsibility that, for example, an employer, educational institution or governmental organisation has as a user with regard to which a sector- or domain-specific supervisory authority can act on the basis of its own frameworks and supervisory tools? The starting point is that market surveillance of the AI Act should support and strengthen existing supervision and not frustrate it. Sector and domain-specific supervisors involved will need to exchange and coordinate extensively and frequently with market surveillance authorities. This requires a multilateral coordination and consultation structure that requires capacity and for which resources must also be made available.

12. Domain and sector-specific supervisors should benefit from the AI expertise build-up in particular at the Dutch Authority for Digital Infrastructure and the Dutch Data Protection Authority and vice versa. This will require organising different forms of knowledge sharing with respect to technology, risks and fundamental rights. Attention will also need to be paid to increasing 'AI literacy' among operators of AI

Date

16 May 2024

systems and in society. Resources will have to be made available for knowledge sharing to both the coordinating supervisors (Dutch Data Protection Authority and Dutch Authority for Digital Infrastructure) and the sector- and domain-specific supervisory authorities. Finally, supervisory authorities should make efforts to enable 'exchanges' or secondments, so as to create a stronger network of the authorities' staff who can then exchange valuable knowledge and experience and return it to their supervisory organisations.

1.2 Market surveillance

13. For high-risk systems listed in points 1, 3, 4, 5(a) of Annex III, the supervisory authorities advise to designate the Dutch Data Protection Authority as market surveillance authority. This role as market surveillance authority suits the Dutch Data Protection Authority well because of its role as coordinating algorithm supervisory authority in which expertise and experience is built up within the Directorate of Algorithmic Oversight with regards to the identification of risks to fundamental rights and public values when AI is developed or used. In addition, the Dutch Data Protection Authority has expertise and experience in the field of supervision of AI and algorithms from the perspective of personal data protection.⁶ In this respect, the Dutch Data Protection Authority often already supervises upon providers, including the IT sector, and users of AI systems. For these other supervisory authorities in specific sectors or domains will bring important knowledge and experience that can inform and strengthen market surveillance competences. Moreover, fundamental rights authorities have a particular role to play in market surveillance under the AI Act (see section 3 of this advice). Conversely, the role of the market surveillance authority allows to intervene at the level of an AI system (as opposed to interventions against one or a few users) if risks of AI manifest themselves in a sector or domain, which can strengthen supervision in the sectors and domains. Effective supervision of AI (not only on AI systems) therefore requires close cooperation and alignment between the market surveillance authority and the supervisors in the sectors and domains (see also section 1.1 of this advice).

14. For high-risk systems listed in point 2 (Critical Infrastructure), the Human Environment and Transport Inspectorate and Dutch Authority for Digital Infrastructure will both be responsible for the Critical Infrastructure application area. But, the Human Environment and Transport Inspectorate and Dutch Authority for Digital Infrastructure will be responsible for oversight that falls within their sector or domain, regardless of the exact category of critical infrastructure that a product strictly speaking falls under. In concrete terms, this means that in most cases the Human Environment and Transport Inspectorate will be responsible for the 'road traffic' and 'supply of water' categories. The Dutch Authority for Digital Infrastructure will in most cases be responsible for critical digital infrastructure and supply of gas, heating and electricity. In the case of borderline cases or products within its other supervisory domain, the most convenient approach will be coordinated among the two supervisory authorities. In addition, any changes to the scope of 'critical infrastructure' must be coordinated with the Human Environment and Transport Inspectorate and Dutch Authority for Digital Infrastructure on what constitutes an appropriate distribution. Also the possible role of the of the State Supervision of Mines

⁶ For remote biometric identification for *law enforcement purposes*, the same starting point of designation of the DPA applies as for sections 6.7 and 8 below.

Date

16 May 2024

(“Staatstoezicht op de Mijnen”, SodM) and the Authority for Nuclear Safety and Radiation Protection (“Autoriteit Nucleaire Veiligheid en Stralingsbescherming”, ANVS) will have to be considered.

15. For high-risk systems listed in point 5(b) and (c) of Annex III, it is recommended to designate the Dutch Authority for the Financial Markets and the Dutch Central Bank as market surveillance authorities insofar as it concerns financial services. It follows from the AI Act that for high-risk AI systems developed or used by financial institutions subject to Union law on financial services, existing national competent authorities should in principle be designated as market surveillance authorities, to the extent that the provision or use of the AI system is directly related to the provision of financial services. The AI Act complements existing financial sectoral legislation and overlaps with parts of it. The AI Act also refers to specific financial sectoral legislation. For example, institutions are presumed to comply with the requirements of the AI Act on specific points if they comply with the rules on financial supervision. A well-aligned application of existing financial supervision and the AI Act is only possible if supervision is in the same hands. Creditworthiness tests and credit scores are also deployed and developed outside the financial sector, for which the Dutch Data Protection Authority could be designated as market surveillance authority, in line with the role as coordinating algorithm supervisory authority and the envisaged new role as market surveillance authority for the AI Act.

16. For high-risk systems listed in point 5(d) of Annex III, it is recommended to designate the Dutch Data Protection Authority as market surveillance authority. There may be fundamental rights risks in classifying emergency calls and sending out emergency services, but certainly also risks to people’s health. For this scope, it is particularly important to establish close cooperation with the Health and Youth Care Inspectorate and the Inspectorate of Justice and Security and exchange expertise to have a clear view of the whole spectrum of risks associated with AI development and use in this domain.

17. For high-risk systems listed in points 6, 7, 8 of Annex III, the supervisory authorities recommend designating the Dutch Data Protection Authority as the market surveillance authority. It follows from the AI Act that for these parts the data protection supervisor must be designated as a market surveillance authority, or another supervisor that meets the conditions stemming from the Law Enforcement Directive.⁷ Because the Dutch Data Protection Authority already supervises data protection law, among other things, it is reasonable to appoint it as a market surveillance authority. Because the Inspectorate of Justice and Security also has a good overview of the use of AI systems in the relevant application areas, and in order to enable the Inspectorate of Justice and Security to monitor the use of AI in law enforcement from its own mandate, the supervisory authorities find it important to establish a good cooperation between the Inspectorate of Justice and Security and the Dutch Data Protection Authority in this area.

18. Market surveillance competences under the AI Act interact with the mission, tasks and powers of sector- and domain-specific supervisors. A supervisory intervention by a market surveillance authority under the AI Act can affect the deployment of AI and in that way touch upon the mission and task of a sector- and domain-specific supervisory authority. Conversely, the actions of sector- and domain-specific supervisors can also influence the development and use of (high-risk) AI that falls under the mandate of a

⁷ Article 78 (8) of the AI Act.

Date

16 May 2024

market surveillance authority. In line with other supervisory perimeters that overlap between supervisory authorities, is the supervisory authorities therefore have the ambition to address this in the further development of the design of supervisory processes by exploring process agreements so that authorities can take all relevant considerations into account while respecting everyone's formal responsibility. For the purpose of further advice, the supervisory authorities intend to explore how this cooperation can be implemented. This may include issues of a more principled and constitutional nature.

2. The organisation of supervision on prohibited AI

19. The designation of the market surveillance authority for prohibited AI systems is particularly urgent. This is due to the fact that these prohibitions apply six months after the entry into force of the AI Act and can be enforced with sanctions after one year.

20. This interim advice advises to designate the Dutch Data Protection Authority as market surveillance authority for all prohibitions in Article 5 of the AI Act. The majority of the prohibitions in the Regulation are closely linked to the areas of application in Annex III. It therefore makes sense to designate the market surveillance authority for those areas – in this advice: the Dutch Data Protection Authority – to also be designated for the related prohibitions. For the remaining prohibitions, it is advised to also designate the Dutch Data Protection Authority as market surveillance authority, because of its role as coordinating AI and algorithm supervisory authority and in order to ensure an efficient organisation of the supervision of the prohibitions.

| Prohibition | | Sector or domain specific supervisors involved | Proposed Market Surveillance Authorities |
|-------------|---|---|--|
| 1 | Biometric identification for law enforcement | Inspectorate of Justice and Security | Dutch Data Protection Authority |
| 2 | Biometric categorization | - | Dutch Data Protection Authority |
| 3 | Emotion recognition | - | Dutch Data Protection Authority |
| 4 | Scraping of facial images | - | Dutch Data Protection Authority |
| 5 | <i>Predictive policing</i> | Inspectorate of Justice and Security | Dutch Data Protection Authority |
| 6 | Manipulative practices | The Netherlands Authority for Consumers and Markets (“Autoriteit Consument en Markt”, | Dutch Data Protection Authority * |

Date

16 May 2024

| | | | |
|---|--|--|-----------------------------------|
| | | ACM), and Dutch Authority for the Financial Markets | |
| 7 | Exploitation of vulnerabilities | The Netherlands Authority for Consumers and Markets; and Dutch Authority for the Financial Markets | Dutch Data Protection Authority * |
| 8 | Social credit systems | The Netherlands Authority for Consumers and Markets | Dutch Data Protection Authority |

Notes

* Designation of the Dutch Authority for the Financial Markets as market surveillance authority for prohibited AI systems that use (6) manipulative practices or (7) exploitative practices is also conceivable. This supervision would then cover AI systems deployed for financial services. This demarcation would then be made by analogy and in line with the distinction between categories 5b and 5c of Annex III.

21. Supervisory authorities recommend the Dutch Data Protection Authority to be designated as a market surveillance authority for prohibited AI systems for (1) biometric identification, (2) biometric categorisation, (3) emotion recognition, (4) facial image scraping for facial recognition and (5) predictive policing, given the close link with supervision of Annex III. The prohibitions relating to biometrics (1, 2, 3 and 5) are closely linked to the concordant high-risk areas listed in Annex III, point 1. The prohibition of (4) AI systems that are intended to, in short, scrape facial images for facial recognition is again closely linked to the regulation and the prohibition of AI systems intended for biometric identification in the AI Act. Furthermore, for the prohibitions of biometric systems and the scraping of facial images, there is a close link between concepts in and the protection provided by General Data Protection Regulation (GDPR). It is therefore desirable to designate the Dutch Data Protection Authority as market surveillance authority for these prohibitions. With regard to the prohibition of biometric identification for law enforcement and predictive policing, the supervision carried out by the Inspectorate of Justice and Security and the supervision of the prohibition in the AI Act should be strengthened, similar to the lines described in Sections 1.1 and 1.2 in this interim advice on the supervision of Annex III. A further point of attention is the relationship between the market surveillance and the authorisation that will have to be given by a judicial authority or an independent administrative authority if biometric identification is used for law enforcement purposes.

22. Furthermore, the supervisors advise to designate the Dutch Data Protection Authority in principle as a market surveillance authority for the prohibitions relating to (6 and 7) manipulative/misleading practices or exploitation of vulnerabilities (8) and for social credit systems, but also stress the need to closely cooperate, coordinate and exchange information with the Netherlands Authority for Consumers and Markets in this regard. The Dutch Data Protection Authority should be appointed because these prohibitions too can be traced back to data protection, privacy and the prevention of surveillance. It also plays a role that, under this advice, the Dutch Data Protection Authority would already supervise the majority of the other prohibitions and it is advisable, from the point of view of effective and efficient

Date

16 May 2024

supervision, to also assign supervision on the prohibitions in question to the Dutch Data Protection Authority. There is, however, an overlap, or at least an interface, between the prohibition of systems that (6 and 7) enable the supervision on manipulative/misleading or exploitative practices and provisions in consumer law and the Digital Services Act, which are supervised upon by the Netherlands Authority for Consumers and Markets. For (8) social credit systems, although to a lesser extent, something similar applies and there too there is a possible overlap and interface with the supervision of the Netherlands Authority for Consumers and Markets. It is therefore important that market surveillance of the prohibitions related to manipulation, exploitation and social credit systems is closely coordinated and coordinated with the Netherlands Authority for Consumers and Markets and that supervisory strategies are aligned in this regard. The intersection between the AI Act and the existing prohibitions with regard to manipulation and deception in financial markets and in financial services will be further investigated by the Dutch Authority for the Financial Markets in cooperation with the Ministry of Finance. A proposal on the designation of roles and powers under the AIV will be made on this basis.

3. Authorities protecting fundamental rights

23. The AI Act assigns a special role to ‘authorities protecting fundamental rights’. The AI Act will thus strengthen the monitoring of existing Union law frameworks for the protection of fundamental rights, including the frameworks on equal treatment and the protection of personal data (GDPR and the LED).⁸ To this end, information obligations are included and market surveillance authorities should cooperate with authorities protecting fundamental rights if risks to the protection of fundamental rights arise. This enables these authorities protecting fundamental rights to supervise more proactively on the possible violations of fundamental rights based on existing legal frameworks. Within three months of the entry into force of the AI Act, the Netherlands will have to communicate which authorities in the Netherlands supervise or enforce the protection of obligations under Union law protecting fundamental rights.

24. The supervisory authorities advise that at least the Netherlands Institute for Human Rights (“College voor de Rechten van de Mens”, CRM) and the Dutch Data Protection Authority should be identified as authorities protecting fundamental rights under the AI Act because their supervision is based on Union law protecting fundamental rights. The Netherlands Institute for Human Rights should be considered to be identified in its capacity as a supervisory authority of fundamental rights in the broad sense, including the right to equal treatment and non-discrimination. The Dutch Data Protection Authority should be considered in its capacity as a data protection supervisory authority.⁹ These authorities will then be given specific powers and will also be able to play a role in market surveillance.¹⁰ The authorities protecting fundamental rights can thus receive signals from market surveillance authorities and actively participate in market surveillance when fundamental rights risks arise.¹¹ Moreover, these authorities are allowed to

⁸ The LED is the Data Protection Law Enforcement Directive (2016/680).

⁹ The processing of personal data has now been brought almost entirely within the scope of EU law. The entire Charter therefore applies. This means that the DPA, as a data protection supervisor, can enforce even now as soon as the processing of personal data leads to a violation of one or more fundamental rights in the Charter, such as the non-discrimination clause, the protection of children or access to an independent court.

¹⁰ See, in particular, Articles 73(1), 77(1) and (3), 79(2) and 82(1) of the AI Regulation.

¹¹ This implies that in the internal organisation of the tasks as (a) market surveillance authority for the AI Act and (b) fundamental rights monitor for the AI Act, respectively, the Authority should take into account the division of roles between these two tasks.

Date

16 May 2024

obtain information from the providers of AI systems that may be useful in monitoring the use of those systems by potentially other actors in the AI chain.

25. The supervision of fundamental rights in the AI Act requires resources and a cooperation structure that adequately empowers authorities protecting fundamental rights. Of course, resources should be made available to fulfil the task of authorities protecting fundamental rights in the evaluation of AI systems. This is particularly important in the case of AI systems that (may) still present a risk to fundamental rights in the event it is compliant with the Regulation (especially in the event of compliance with standards).¹² In addition to the information obligation towards authorities protecting fundamental rights,¹³ it should be possible for these authorities to inform the market surveillance authority of any breaches of Union law in the field of fundamental rights in relation to AI systems, so that market surveillance authorities can take this into account in their supervisory activities. In addition, authorities protecting fundamental rights can contribute to the expertise and knowledge building of market surveillance authorities to help them identify and maintain a clear view on the full spectrum of fundamental rights risks. This requires a cooperation structure that provides for regular consultation and exchange of knowledge and expertise between authorities protecting fundamental rights and market surveillance authorities. The Netherlands Institute for Human Rights and the Dutch Data Protection Authority will also have to work out their structure of cooperation.

4. Regulatory sandbox

26. It is recommended to invest the coordination of the sandbox activities with the Dutch Authority for Digital Infrastructure and the Dutch Data Protection Authority in their capacity as (intended) coordinating market surveillance authorities. They should be involved in facilitating sandbox trajectories, supporting and involving the relevant supervisors, monitoring a consistent application of the AI Act by market surveillance authorities and, where relevant, notified bodies, aspects related to communication to providers, and reporting to and interaction with or within the AI Office and the AI Board, as far as general matters are concerned.

27. Article 57 of the AI Act allows for multiple competent authorities to set up a sandbox.¹⁴ This means that the frameworks of the governance structure are broad. Within these broad frameworks, we therefore advise the competent authorities to be¹⁵ involved in setting up and operating the sandboxes. Competent authorities shall then mutually determine who takes on which tasks in setting up the sandbox(es) and how they participate in the sandbox. The notion of '(national) competent authority[s]' allows for both notifying authorities and¹⁶ market surveillance authorities to set up the AI regulatory sandboxes. This is also in line with the other (interim) advice on governance, in which several market surveillance authorities are appointed. In addition, we advocate setting up the test environments within this structure as follows. For

¹² Article 82(1) of the AI Act.

¹³ Article 79(2) of the AI Act.

¹⁴ Article 57(1) AI Act: 'Member States shall ensure that their competent authorities establish at least one AI regulatory sandbox at national level, ...'

¹⁵ Article 3(48) AI Act: 'national competent authority' means a notifying authority or a market surveillance authority .

¹⁶ Article 3(19) AI Act: 'notifying authority' means the national authority responsible for setting up and carrying out the necessary procedures for the assessment, designation and notification of conformity assessment bodies and for their monitoring."

Date

16 May 2024

each situation (sandbox), it should be considered which competent authorities, including market surveillance authorities and notified bodies, are most involved in relation to a specific AI system being tested. For each test situation, there will then be a competent authority to lead the specific project. This ensures that the competent authority that may encounter the AI system and its provider later in its supervision is also competent to take decisions in the context of the sandbox.

28. For the sandbox to be successful it is important that other supervisors are also closely involved in sandbox projects and that they can actively participate. Examples include the Netherlands Institute for Human Rights, Netherlands Authority for Consumers and Markets, Inspectorate of Justice and Security and other relevant supervisory authorities if this is necessary for the implementation of an AI-sandbox-project. Only then innovation and legal certainty will be fostered while also preventing or mitigating risks related to safety, health and fundamental rights. After all, every supervisor has insight into and knowledge of their specific domain/sector and the other applicable regulations. For that reason, it is desirable that for every sandbox-project supervisory authorities are inquired about their participation by default

5. Focus points and open questions

29. The designation of market surveillance authorities will need to take place swiftly. These authorities will have to be designated one year after the entry into force, which is likely to take place in May 2024. The organisation of the supervision of prohibited AI is even more urgent, given that the provisions on the prohibitions will apply six months after the entry into force. Moreover, the Dutch Data Protection Authority will have to be designated as market surveillance authority on these points, a role that it does not currently have, and therefore it must also be equipped for this role. This requires preparation and further elaboration. This also applies to the identification of authorities protecting fundamental rights, which should take place within three months of the entry into force. Consequently, discussions on the above will have to be started quickly between the ministries and the relevant supervisory authorities.

30. This advice underlines the importance of close cooperation and alignment of market surveillance authorities with other sector and domain-specific supervisory authorities. This is equally relevant to sector- and domain-specific supervisory authorities that have not been explicitly involved in the making of this advice. The way in which this cooperation and coordination should take shape requires further elaboration. In the coming months, in the run-up to the designation of the various supervisory roles, the supervisory authorities will elaborate in more detail on what the cooperation should look like and the type kind of agreements this requires. In addition, it will be necessary to examine whether and to what extent adaptation or supplementation of legislation is necessary to enable cooperation and exchange of information. This requires further analysis by both supervisory authorities and ministries. In order to ensure the necessary cooperation, exchange of information and coordination, attention needs to be paid specifically to placing different roles and powers within the same supervisor, while also considering the independence requirements of the AI Act and other legislation to which the supervisory authorities must adhere.

Date

16 May 2024

31. All relevant ministries should be involved in the implementation of the AI Act and there is a need for swift clarification on how funds are allocated through the different ministries. Various supervisory authorities and ministries play a role in the supervision of the AI Act and in the envisaged cooperation structure. All these ministries should be involved in the elaboration of the supervisory structure of the AI Act. It should also be clarified how the funding of supervision, in particular as regards the role of sector and domain-specific supervisors, will take place. This in order to avoid incomplete funding of AI supervision.

32. If this advice is followed, the Dutch Data Protection Authority will have to prepare organisationally for the expansion of its tasks with a role as market surveillance authority under the AI Act. The AI Act ensures the protection of fundamental rights and public values when deploying (high-risk) AI and the prohibitions on specific AI application. For the Dutch Protection Authority, this is in line with the social objectives pursued in the supervisory task set out in the GDPR and the LED. At the same time, the implementing framework for the supervision of the AI Act, which is based on the new legislative framework for (supervision of) product safety, has a different working method than the supervision of the GDPR and the LED. The role as market surveillance authority under the AI Act therefore is a task for the organisation that must be specifically designed and embedded. The Dutch Data Protection Authority wishes to do this in such a way that this task is properly set up alongside the GDPR and LED task and is separately recognisable within the organisation. Here the approach can be followed that is taken for the current coordinating algorithm supervisory task that is embedded within the DPA. With regard to exploring the concrete and practical organisational consequences of the AI Act on its own organisation, the Dutch Data Protection Authority has already launched internal exploratory workshops, also with a view to exploring synergies (e.g. in the area of complaint notifications). Due to the importance of cooperation between market surveillance authorities and sector- and domain-specific supervisors – as underlined in this 2nd interim advice – the Dutch Data Protection Authority intends to also involve other market surveillance authorities and sector- and domain-specific supervisors in its exploration.

33. The collaboration with respect to the involvement of supervisory authorities in the AI Board is another point of attention. The supervisors intend to advise on this in a subsequent and final letter.

34. The establishment of the oversight of the AI systems falling within the scope of Annex I is also the subject of the next advice. This also applies to the supervision of transparency obligations for providers and deployers of certain AI systems.

35. The role and position of notifying authorities and notified bodies will also need to be further elaborated on in the next advice. Not only in relation to the AI systems covered by Annex I, but also in relation to Annex III of the AI Act, for example when it comes to biometric identification. The establishment of frameworks for the designation of notified bodies is a priority and will need to be addressed swiftly.

Date

16 May 2024

6. Follow-up

36. With this letter, the supervisory authorities have provided an important further basis for advising on the organisation of the supervision of the AI Act. We are happy to explain the content of this interim advice in more detail and to start discussions with the ministries about the organisation of the supervisory structure.

37. As indicated, a number of aspects still require further elaboration. The supervisory authorities will continue to work on this in the coming months. The authorities aim to provide you with a final advice at the end of the second quarter.

With kind regards,

Dutch Data Protection Authority

[signed]

Aleid Wolfsen
Chair

Dutch Authority for Digital Infrastructure

[signed]

Angeline van Dijk
Inspector General

Date

16 May 2024

| Organisations mentioned in this letter, and their roles (in order of appearance) | |
|---|---|
| Dutch Authority for Digital Infrastructure (“Rijksinspectie Digitale Infrastructuur”, RDI) | The Dutch Authority for Digital Infrastructure is responsible for obtaining and allocating frequency space and monitoring its use. The work of the agency covers the entire field of wireless and wired communication. |
| Dutch Data Protection Authority (“Autoriteit Persoonsgegevens”, AP) | The Dutch Data Protection Authority (Dutch DPA) supervises the processing of personal data in order to ensure compliance with laws that regulate the use of personal data. |
| Inspection Board (“Inspectieraad”) | The Inspection Board is the association for collaboration of the Dutch government inspectorates. |
| Cooperation Platform of Digital Supervisory authorities (“Samenwerkingsplatform Digitale Toezichthouders”, SDT) | In the Cooperation Platform of Digital Supervisory authorities is platform of the Netherlands Authority for Consumers and Markets (“Autoriteit Consument en Markt”), Dutch Authority for the Financial Markets (“Autoriteit Financiële Markten”), Dutch Data Protection Authority (“Autoriteit Persoonsgegevens”) and the Dutch Media Authority (“Commissariaat voor de Media”). This platform contains ‘rooms’ in which these supervisory authorities cooperate with authorities in the platform, but also other authorities. Within the platform, there is a Room for ‘AI and algoritms’. |
| Inspectorate (“Inspectie Leefomgeving en Transport”, ILT) | The Human Environment and Transport Inspectorate works on improving safety, confidence and sustainability in regard to transport, infrastructure, environment and housing. |
| Inspectorate of education (“Inspectie van het onderwijs”) | The inspectorate stimulates schools and educational institutions to maintain and improve the quality of the education they offer; assesses the quality of education of the individual educational institutes and the education system as a whole in the Netherlands and its developments; communicates in an accessible way with all its target groups and stakeholders; reports to the public. |
| Netherlands Labour Authority (“Nederlandse Arbeidsinspectie”) | The Netherlands Labour Authority works for fair, healthy and safe working conditions and socio-economic security for everyone. |

Date

16 May 2024

| | |
|---|--|
| Inspectorate of taxes, allowances and border control (“Inspectie belastingen, toeslagen en douance”) | The inspectorate of taxes, allowances and border control examines if Dutch government treats people and businesses fairly with respect to taxes, allowances and border control. |
| Dutch Authority for the Financial Markets (“Autoriteit Financiële Markten”, AFM) | The authority supervises the conduct of the entire financial market sector: savings, investment, insurance, loans, pensions, capital markets, asset management, accountancy and financial reporting. |
| Dutch Central Bank (“De Nederlandsche Bank”, DNB) | De Nederlandsche Bank seeks to safeguard financial stability and sustainable prosperity. |
| Health and Youth Care Inspectorate (“Inspectie Gezondheidszorg en Jeugd”, IGJ) | The inspectorate’s role is to supervise healthcare and youth care services in the Netherlands and the international market for medicines and medical devices. |
| Inspectorate of Justice and Security (“Inspectie Justitie en Veiligheid”, IGJ) | The Inspectorate of Justice and Security contributes to a just and safe society. The Inspectorate achieves this by supervising the implementing organisations of the Ministry of Justice and Security. |
| Directorate for Algorithmic Oversight at the Dutch DPA (“Directie Coördinatie Algoritmes”, DCA) | The Department for the Coordination of Algorithmic Oversight of the Dutch Data Protection Authority monitors the possible effects of the use of algorithms and AI on public values and fundamental rights. |
| State Supervision of Mines (“Staatstoezicht op de Mijnen”, SodM) | The State Supervision dedicates itself to safety of people and the protection of the environment in energy production and the utilization of the subsurface. |
| Authority for Nuclear Safety and Radiation Protection (“Autoriteit Nucleaire Veiligheid en Stralingsbescherming”, ANVS) | The Authority for Nuclear Safety and Radiation Protection (ANVS) ensures that the highest standards of nuclear safety and radiation protection are met in the Netherlands. The ANVS performs that role by laying down rules, issuing licences, ensuring that licence-holders abide by the conditions and, if the need arises, taking enforcement action. |
| Netherlands Authority for Consumers and Markets (“Autoriteit Consument en Markt”, ACM) | The Netherlands Authority for Consumers and Markets (ACM) ensures fair competition between businesses, and protects consumer interests. |
| Netherlands Institute for Human Rights (“College voor de Rechten van de Mens”, CRM) | The Netherlands Institute for Human Rights is an independent monitoring human rights institute. |