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Date

7 November 2023

Subject matter

1st (interim) advice on the supervisory structure of the AI Act

Dear Ms Adriaansens and Ms Van Huffelen,

The AI Act is currently being negotiated at the European level. This legislation entails a supervisory framework to be set up by Member States at the national level. 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 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.

Through this letter we provide you with our first (interim) advice. The recommendations and points of attention in this letter are the result of close cooperation with many supervisory authorities involved. On the basis of several workshops and subsequent consultations, the supervisory authorities have tried to get a sense of the supervisory tasks, points of attention and principles for the organisation of supervision under the AI Act. This letter provides a representation of the aforementioned points. This advice was approved at board level in the Inspection Board (“*Inspectieraad*”) on 17 October and in the Algorithm & AI Chamber of the Cooperation Platform of Digital Supervisory Authorities (“*Samenwerkingsplatform Digitale Toezichhouders*”, SDT) on 26 October.

1. Market surveillance, coordination and general AI expertise

The supervisory authorities underline the complexity of the AI Act and the need to align with existing regulations, powers, practices and mandates of the authorities. The AI Act aims to promote the use of AI while addressing different types of risks: from tangible risks such as safety and health to infringements of fundamental rights such as non-discrimination, equality, and freedom of expression. As a result, divergent AI systems are covered by one specific regulation. The AI Act complements existing sectoral and horizontal rules to a great extent, and as a consequence, AI systems need to be assessed in the context in which they are used. As a result, there is an inextricable relationship with the role of sectoral and horizontal

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regulations and supervisory authorities. At the same time, it is precisely because of this complexity that supervisory authorities see the need for national and European coordination and uniform interpretation.

Supervisors think complexity can be reduced by aligning new supervisory roles with existing supervisory roles.

- For the products within the scope of Annex I of the AI Act (which are already subject to market surveillance), this means that the five existing Dutch market surveillance authorities should be given a role as market surveillance authority for AI Act surveillance. These market surveillance authorities already have specific sector knowledge.
- For high-risk AI systems that will fall under Annex III of the AI Act, these are new areas of application, the risks of which are in many cases linked to other public values and fundamental rights. For example, education, public services, and justice. There are a total of eight diverging categories of high-risk applications: 1) biometrics, 2) critical infrastructure, 3) education and training, 4) employment, workers' management, and access to self-employment, 5) access to and use of public and essential private services, 6) law enforcement, 7) migration, asylum and borders, and 8) administration of justice and democratic processes. Within these eight categories, there are likely to be about 25 to 30 concrete applications. In many cases, these areas of application do not fall within the scope of the five existing Dutch market surveillance authorities (an exception being critical infrastructure). At the same time, given their diversity, the areas of application fall within the remit of several sectoral supervisory authorities who are not market surveillance authorities at present. Broadly speaking, there are two variants for assigning the formal role of market surveillance authority to these Annex III areas of application. The trade-off can be made for each area of application. The first possibility is to designate market surveillance competences in the area of application to 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. This clearly requires further analysis. The second possibility is to designate market surveillance competences in the areas of application to a "general" market surveillance authority for Annex III. In practice, this "general" market surveillance authority cooperates with and makes use of the sector-specific knowledge of the sectoral supervisory authority. As mentioned above, a trade-off between the two variants can be made per area of application. In addition, the "general" formal market surveillance authority for Annex III will also have to deal with those areas of application that cannot be traced back to sectoral supervisory authorities – for example in the field of access to and use of public services. Through dialogue, the supervisory authorities aim to take the next step by identifying 1) possibilities and 2) advantages and disadvantages of different options for each field of application.

The supervisory authorities see room for facilitative coordination and the construction of 'AI expertise units' - such coordination does not affect the principle that, when deploying powers under the AI Act, the relevant market surveillance authority will take the lead. This coordination can take place along the lines of Annex I (mainly aimed at product safety) and Annex III (mainly aimed at protecting other public values and fundamental rights). The establishment of coordinating tasks is in line with the establishment requirements resulting from the AI Act and the importance of consistent and coherent application of supervision:

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- In coordinating the monitoring of AI systems within the existing structure of market surveillance, a role for the Dutch Authority for Digital Infrastructure could be envisaged. This is in line with the structure of market surveillance that currently exists.
- A role for the Dutch Data Protection Authority (as coordinating algorithm supervisor) could be envisaged in the coordination of supervision of high-risk AI systems mentioned in Annex III. This is in line with its current task as (coordinating) algorithm supervisor, which task has been assigned to the Directorate for Algorithmic Oversight at the Dutch DPA (“*Directie Coördinatie Algoritmes*”, DCA), with a focus on public values and fundamental rights in the digital society.
- The coordinating role should not affect the ultimate responsibility for supervisory tasks carried out by competent supervisors; the coordinating authorities will have to take the aforementioned into account. Moreover, the coordinating activities will be the link to cooperation at the European level.

In addition, organisations can build general AI expertise, each with its own perspective: e.g. product safety and AI (Dutch Authority for Digital Infrastructure) and fundamental rights and AI (Dutch Data Protection Authority). This division is in line with the core competences of both organisations. The building of general AI expertise contributes to uniform interpretation of standards and to timely signalling, and can be used to support formal market surveillance and adjoining horizontal and sectoral supervision by other organisations – to this end, workable mechanisms should be considered to make this knowledge accessible and deployable among the organisations.

2. Generic requirements and alignment of horizontal regulation/supervision

In addition to the regulation of high-risk AI systems, the AI Act will (1) prohibit certain AI systems, (2) impose transparency obligations, (3) lay down rules regarding the development of generative AI, *general purpose AI and/or foundation models*, and (4) may impose additional requirements on the use of high-risk AI systems. Supervisory tasks can be assigned along the lines above, with the designation of (market) supervisory authorities and coordination by the Dutch Data Protection Authority and the Dutch Authority for Digital Infrastructure, but these aspects will still have to be worked out in more detail by the authorities. The aforementioned generic and cross-sectoral rules in the AI Act cannot easily be linked to a sector or domain. For these aspects, too, the organisation of the supervisory roles depends to a large extent on the outcome of the negotiations on the AI Act and the precise implementation of the rules therein. Attention will have to be paid to the fact that developments in the field of generative AI (also) have an impact on many existing supervisory tasks.

The supervision of AI systems (and their deployment) involves more than just compliance with the AI Act. Sectoral supervisory authorities will also have to consider (the interaction with) requirements regarding human rights, personal data, cybersecurity and competition and consumer rights when assessing high-risk AI systems – the relevant authorities must be able to take an active role in AI supervision in their field, and must therefore also be adequately equipped for this role. This requires cooperation and alignment of market surveillance under the AI Act with supervision based on other frameworks. This aspect will also be worked out in more detail by the supervisory authorities. For example, an incident with an AI system that appears to discriminate may be picked up by several supervisory

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authorities depending on, among other things, the cause and effects of the incident. In addition, the AI Act provides for a system in which Authorities protecting fundamental rights (such as the Netherlands Institute for Human Rights (“*College voor de Rechten van de Mens*”, CRM) in the field of human rights and equal treatment and the Dutch Data Protection Authority on the protection of personal data and the impact on fundamental rights in the digital society) can urge market surveillance authorities to investigate.

3. Supervisory roles

In view of the above, and given the aspects that require further elaboration, the supervisory authorities at this stage see room for the following roles:

- Designation of the role of the market surveillance authority in the AI Act to one or more supervisory authorities. Further elaboration will follow.
- Designation of coordinating tasks and developing general AI expertise to the Dutch Data Protection Authority (from the coordinating algorithm task, focusing on Annex III and risks to public values and fundamental rights) and the Dutch Authority for Digital Infrastructure (based on its task in digital infrastructure and products, focusing on Annex I and the technical dimension of market surveillance).
- The building of sectoral AI knowledge within sectoral and horizontal supervisory authorities that will not become market surveillance authorities within the meaning of the AI Act, for the purposes of their own supervisory tasks and the identification of and alignment between sectoral and horizontal supervision on the one hand and market surveillance on the other hand. Existing market surveillance authorities should also be able to build up further sectoral AI knowledge.
- Embedding the roles for the Authorities protecting fundamental rights and Notifying Authority. Further elaboration should follow.

4. Focus points and open questions

The supervisory authorities stress that the aforementioned only provides a broad outline of how the supervisory roles should be filled in. In particular, there are currently the following points of attention:

- The implementation of the supervisory roles becomes appropriate once the AI Act is final. This applies both to the designation of market surveillance authorities (the content of Annex III is also decisive here) and to the coordination tasks (which must be embedded within the bandwidth that the AI Act will provide). Certainly in the area of Annex III, this requires research at a more detailed level on some points. It should be noted that, as explained in Section 2 of this letter, Annex III identifies almost 30 specific types of high-risk applications, sometimes with a further specification within them.
- Supervisory authorities should be provided with sufficient additional (financial) resources to fulfil their possible roles. The direction of the proposed supervisory structure under the AI Act requires a lot of cooperation and coordination between supervisory authorities. It is in the common interest of the authorities that everyone should have sufficient capabilities.

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- The precise way in which coordination and cooperation can take shape requires more reflection and dialogue between supervisory authorities in order to find a right balance (what kind of cooperation do the tasks under the AI Act exactly require, where is a greater and where is less need for cooperation, and how should this be reflected in the distribution of roles?).
- Individual supervisory authorities still have to assess to what extent market surveillance competences under the AI act are sufficiently compatible with their existing tasks. For some existing Dutch market surveillance authorities, it is questionable whether a supervisory task under the AI Act is in line with their current scope of supervision, for example because this form of supervision concerns different types of companies, organisations and applications. For sectoral supervisory authorities within whose domains high-risk applications are at play, it is questionable whether the additional role as market surveillance authority is sufficiently aligned with the current purpose, mission and role of the authority.
- The supervisory authorities attach importance to the involvement of all relevant Ministries in the process. This applies in particular to sectoral supervisory authorities that primarily cooperate with ministries other than the Ministry of Economic Affairs and Climate Policy, the Ministry of the Interior and Kingdom Relations, and the Ministry of Justice and Security.

5. Follow-up

The supervisory authorities intend to cooperate in the coming months to give further substance to the assignment of tasks to supervisory authorities and cooperation between authorities. In doing so, developments in the negotiations on the AI Act will be taken into account.

The supervisory authorities aim to provide your Ministries with detailed advice based on the principles above in the 1st quarter of 2024, when the negotiations on the AI Act are expected to be concluded. We will be happy to discuss the content of this interim advice in more detail.

Yours sincerely,

Dutch Data Protection Authority

Dutch Authority for Digital Infrastructure

[signed]

[signed]

Aleid Wolfsen
Chair

Angeline van Dijk
Inspector General

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| Organisations mentioned in this letter, and their roles (in order of appearance) | |
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| Dutch Authority for Digital Infrastructure (“ <i>Rijksinspectie Digitale Infrastructuur</i> ”, RDI) | The Dutch Authority for Digital Infrastructure is responsible for obtaining and allocating frequency space and monitoring its use. The activities of the agency cover the entire field of wireless and wired communication. |
| Dutch Data Protection Authority (“ <i>Autoriteit Persoonsgegevens</i> ”, AP) | The Dutch Data Protection Authority (Dutch DPA) supervises the processing of personal data in order to ensure compliance with the laws that regulate the use of personal data. |
| Inspection Board (“ <i>Inspectieraad</i> ”) | The Inspection Board is the association for cooperation of the Dutch government inspectorates. |
| Cooperation Platform of Digital Supervisory authorities (“ <i>Samenwerkingsplatform Digitale Toezichthouders</i> ”, SDT) | The Cooperation Platform of Digital Supervisory authorities is a platform of the Netherlands Authority for Consumers and Markets (“ <i>Autoriteit Consument en Markt</i> ”), Dutch Authority for the Financial Markets (“ <i>Autoriteit Financiële Markten</i> ”), Dutch Data Protection Authority (“ <i>Autoriteit Persoonsgegevens</i> ”) and the Dutch Media Authority (“ <i>Commissariaat voor de Media</i> ”). This platform contains ‘rooms’ in which these supervisory authorities cooperate with authorities that are part of the platform, but also other authorities. Within the platform, there is a ‘Chamber’ for ‘AI and algorithms’. |
| Directorate for Algorithmic Oversight at the Dutch DPA (“ <i>Directie Coördinatie Algoritmes</i> ”, 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. |
| Netherlands Institute for Human Rights (“ <i>College voor de Rechten van de Mens</i> ”, CRM) | The Netherlands Institute for Human Rights is an independent human rights monitoring institute. |