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Chapter IX. Post-Market Monitoring, Information Sharing, Market Surveillance

Section 3. Enforcement

Article 74

Market Surveillance and Control of AI Systems in the Union Market

Laura Drechsler & Plixavra Vogiatzoglou

ARTICLE 74. MARKET SURVEILLANCE AND CONTROL OF AI SYSTEMS IN THE UNION MARKET

1. Regulation (EU) 2019/1020 shall apply to AI systems covered by this Regulation. For the purposes of the effective enforcement of this Regulation:
 - (a) any reference to an economic operator under Regulation (EU) 2019/1020 shall be understood as including all operators identified in Article 2(1) of this Regulation;
 - (b) any reference to a product under Regulation (EU) 2019/1020 shall be understood as including all AI systems falling within the scope of this Regulation.
2. As part of their reporting obligations under Article 34(4) of Regulation (EU) 2019/1020, the market surveillance authorities shall report annually to the Commission and relevant national competition authorities any information identified in the course of market surveillance activities that may be of potential interest for the application of Union law on competition rules. They shall also annually report to the Commission about the use of prohibited practices that occurred during that year and about the measures taken.
3. For high-risk AI systems related to products covered by the Union harmonisation legislation listed in Section A of Annex I, the market surveillance authority for the purposes of this Regulation shall be the authority responsible for market surveillance activities designated under those legal acts.

By derogation from the first subparagraph, and in appropriate circumstances, Member States may designate another relevant authority to act as a market surveillance authority, provided they ensure coordination with the relevant sectoral market surveillance authorities responsible for the enforcement of the Union harmonisation legislation listed in Annex I.

4. The procedures referred to in Articles 79 to 83 of this Regulation shall not apply to AI systems related to products covered by the Union harmonisation legislation listed in section A of Annex I, where such legal acts already provide for procedures ensuring an equivalent level of protection and having the same objective. In such cases, the relevant sectoral procedures shall apply instead.
5. Without prejudice to the powers of market surveillance authorities under Article 14 of Regulation (EU) 2019/1020, for the purpose of ensuring the effective enforcement of this Regulation, market surveillance authorities may exercise the powers referred to in Article 14(4), points (d) and (j), of that Regulation remotely, as appropriate.

6. For high-risk AI systems placed on the market, put into service, or used by financial institutions regulated by Union financial services law, the market surveillance authority for the purposes of this Regulation shall be the relevant national authority responsible for the financial supervision of those institutions under that legislation in so far as the placing on the market, putting into service, or the use of the AI system is in direct connection with the provision of those financial services.
7. By way of derogation from paragraph 6, in appropriate circumstances, and provided that coordination is ensured, another relevant authority may be identified by the Member State as market surveillance authority for the purposes of this Regulation.
National market surveillance authorities supervising regulated credit institutions regulated under Directive 2013/36/EU, which are participating in the Single Supervisory Mechanism established by Regulation (EU) No 1024/2013, should report, without delay, to the European Central Bank any information identified in the course of their market surveillance activities that may be of potential interest for the prudential supervisory tasks of the European Central Bank specified in that Regulation.
8. For high-risk AI systems listed in point 1 of Annex III to this Regulation, in so far as the systems are used for law enforcement purposes, border management and justice and democracy, and for high-risk AI systems listed in points 6, 7 and 8 of Annex III to this Regulation, Member States shall designate as market surveillance authorities for the purposes of this Regulation either the competent data protection supervisory authorities under Regulation (EU) 2016/679 or Directive (EU) 2016/680, or any other authority designated pursuant to the same conditions laid down in Articles 41 to 44 of Directive (EU) 2016/680. 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.
9. Where Union institutions, bodies, offices or agencies fall within the scope of this Regulation, the European Data Protection Supervisor shall act as their market surveillance authority, except in relation to the Court of Justice of the European Union acting in its judicial capacity.
10. Member States shall facilitate coordination between market surveillance authorities designated under this Regulation and other relevant national authorities or bodies which supervise the application of Union harmonisation legislation listed in Annex I, or in other Union law, that might be relevant for the high-risk AI systems referred to in Annex III.
11. Market surveillance authorities and the Commission shall be able to propose joint activities, including joint investigations, to be conducted by either market surveillance authorities or market surveillance authorities jointly with the Commission, that have the aim of promoting compliance, identifying non-compliance, raising awareness or providing guidance in relation to this Regulation with respect to specific categories of high-risk AI systems that are found to present a serious risk across two or more Member States in accordance with Article 9 of Regulation (EU) 2019/1020. The AI Office shall provide coordination support for joint investigations.
12. Without prejudice to the powers provided for under Regulation (EU) 2019/1020, and where relevant and limited to what is necessary to fulfil their tasks, the market surveillance authorities shall be granted full access by providers to the documentation as well as the training, validation and testing data sets used for the development of high-risk AI systems, including, where appropriate and subject to security safeguards, through application programming interfaces (API) or other relevant technical means and tools enabling remote access.

13. Market surveillance authorities shall be granted access to the source code of the high-risk AI system upon a reasoned request and only when both of the following conditions are fulfilled:
 - (a) access to source code is necessary to assess the conformity of a high-risk AI system with the requirements set out in Chapter III, Section 2; and,
 - (b) testing or auditing procedures and verifications based on the data and documentation provided by the provider have been exhausted or proved insufficient.
14. Any information or documentation obtained by market surveillance authorities shall be treated in compliance with the confidentiality obligations set out in Article 78.

RECITALS

(156) In order to ensure an appropriate and effective enforcement of the requirements and obligations set out by this Regulation, which is Union harmonisation legislation, the system of market surveillance and compliance of products established by Regulation (EU) 2019/1020 should apply in its entirety. Market surveillance authorities designated pursuant to this Regulation should have all enforcement powers laid down in this Regulation and in Regulation (EU) 2019/1020 and should exercise their powers and carry out their duties independently, impartially and without bias. Although the majority of AI systems are not subject to specific requirements and obligations under this Regulation, market surveillance authorities may take measures in relation to all AI systems when they present a risk in accordance with this Regulation. Due to the specific nature of Union institutions, agencies and bodies falling within the scope of this Regulation, it is appropriate to designate the European Data Protection Supervisor as a competent market surveillance authority for them. This should be without prejudice to the designation of national competent authorities by the Member States. Market surveillance activities should not affect the ability of the supervised entities to carry out their tasks independently, when such independence is required by Union law.

(158) Union financial services law includes internal governance and risk-management rules and requirements which are applicable to regulated financial institutions in the course of provision of those services, including when they make use of AI systems. In order to ensure coherent application and enforcement of the obligations under this Regulation and relevant rules and requirements of the Union financial services legal acts, the competent authorities for the supervision and enforcement of those legal acts, in particular competent authorities as defined in Regulation (EU) No 575/2013 of the European Parliament and of the Council (FN46)^[1] and Directives 2008/48/EC (FN47)^[2], 2009/138/EC (FN48)^[3], 2013/36/EU (FN49)^[4], 2014/17/EU (FN50)^[5] and (EU) 2016/97 (FN51)^[6] of the European Parliament and of the Council, should be designated, within their respective competences, as competent authorities for the purpose of supervising the implementation of this Regulation, including for market surveillance activities, as regards AI systems provided or used by regulated and supervised financial institutions unless Member States decide to designate another authority to fulfil these market surveillance tasks. Those competent authorities should have all powers under this Regulation and Regulation (EU) 2019/1020 to enforce the requirements and obligations of this Regulation,

1 [Capital Requirements Regulation].
2 [Consumer Credit Directive].
3 [Solvency II Directive].
4 [Capital Requirements Directive].
5 [Mortgage Credit Directive].
6 [Insurance Distribution Directive].

including powers to carry out ex post market surveillance activities that can be integrated, as appropriate, into their existing supervisory mechanisms and procedures under the relevant Union financial services law. It is appropriate to envisage that, when acting as market surveillance authorities under this Regulation, the national authorities responsible for the supervision of credit institutions regulated under Directive 2013/36/EU, which are participating in the Single Supervisory Mechanism established by Council Regulation (EU) No 1024/2013 (FN52)^[7], should report, without delay, to the European Central Bank any information identified in the course of their market surveillance activities that may be of potential interest for the European Central Bank's prudential supervisory tasks as specified in that Regulation. To further enhance the consistency between this Regulation and the rules applicable to credit institutions regulated under Directive 2013/36/EU, it is also appropriate to integrate some of the providers' procedural obligations in relation to risk management, post marketing monitoring and documentation into the existing obligations and procedures under Directive 2013/36/EU. In order to avoid overlaps, limited derogations should also be envisaged in relation to the quality management system of providers and the monitoring obligation placed on deployers of high-risk AI systems to the extent that these apply to credit institutions regulated by Directive 2013/36/EU. The same regime should apply to insurance and re-insurance undertakings and insurance holding companies under Directive 2009/138/EC and the insurance intermediaries under Directive (EU) 2016/97 and other types of financial institutions subject to requirements regarding internal governance, arrangements or processes established pursuant to the relevant Union financial services law to ensure consistency and equal treatment in the financial sector.

(160) The market surveillance authorities and the Commission should be able to propose joint activities, including joint investigations, to be conducted by market surveillance authorities or market surveillance authorities jointly with the Commission, that have the aim of promoting compliance, identifying non-compliance, raising awareness and providing guidance in relation to this Regulation with respect to specific categories of high-risk AI systems that are found to present a serious risk across two or more Member States. Joint activities to promote compliance should be carried out in accordance with Article 9 of Regulation (EU) 2019/1020. The AI Office should provide coordination support for joint investigations.

RELATED ARTICLES

Article 2 (Scope); Article 3 (Definitions); Article 6 (Classification rules for high-risk AI systems); Article 70 (Designation of national competent authorities and single point of contact); Article 72 (Post-market monitoring by providers and post-market monitoring plan for high-risk AI systems); Article 73 (Reporting of serious incidents); Article 77 (Powers of authorities protecting fundamental rights); Article 78 (Confidentiality); Article 79 (Procedure at national level for dealing with AI systems presenting a risk).

RELATED LAWS

International

AI Convention.

7 [SSM Regulation].

EU

Capital Requirements Directive; Capital Requirements Regulation; Charter; Consumer Credit Directive; Decision 768/2008/EC; EU Institution Data Protection Regulation; GDPR; Insurance Distribution Directive; Law Enforcement Directive; Market Surveillance Regulation; Mortgage Credit Directive; Regulation on Accreditation and Market Surveillance; SSM Regulation; Solvency II Directive; TEU; TFEU.

National

US: White House 2023: *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* (30 October 2023), www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence (accessed on 4 April 2024).

RELATED CASE LAW

Meta Platforms and Others (Case C-252/21): Case C-252/21, *Meta Platforms Inc., formerly Facebook Inc., Meta Platforms Ireland Limited, formerly Facebook Ireland Ltd, Facebook Deutschland GmbH v. Bundeskartellamt*, 4 July 2023, ECLI:EU:C:2023:537.

COMMENTARY

1 Purpose

The AI Act sets-up a two-tiered post-market monitoring enforcement system, consisting of (1) obligations on providers of AI systems to put in place a post-market monitoring system and a post-market plan for high risk AI systems,⁸ and (2) supervision and enforcement by competent authorities.⁹ These competent authorities are on the one hand, market surveillance authorities (MSAs), and on the other notifying authorities.¹⁰ Both MSAs and notifying authorities are standard authorities for EU legislation under the heading of the EU's New Legislative Framework,¹¹ such as the AI Act.¹² The EU legislator has taken the step to regulate MSAs in a generalized manner for all the legal instruments falling under the New Legislative Framework umbrella in the Market Surveillance Regulation (MSR).¹³ Market surveillance via MSAs can therefore be considered an established tradition within the EU, typically linked to the goal of realizing the internal market of the EU by raising public trust in the products freely moving within the Union's borders, and by ensuring a level-playing field between the economic actors within the internal market.¹⁴

The purpose of Article 74 of the AI Act is to clarify the role of MSAs and to thereby facilitate the enforcement of its different provisions. To this end, it includes provisions in three related areas:

8 See Atabey et al., Art. 72, in this volume.

9 See AIA, Art. 70; Parliament Briefing 2024, 3.

10 AIA, Arts 3(48) and 70(1). See further Feiler & König, Art. 3(48); and Schmid & Rohner, Art. 70, in this volume. For a definition of notifying authority, see AIA, Art. 3(19).

11 Commission NLF (undated). See further Decision 768/2008/EC; Commission Staff Working Document 2022.

12 Veale & Zuiderveen Borgesius 2021, 98 and 102.

13 MSR, Art. 1(1).

14 Goanta & Spanakis 2022, 47.

- (1) designation of MSAs under the AI Act whilst respecting the MSR but also other Union harmonization legislation with established MSAs;
- (2) cooperation and coordination of MSAs and other competent authorities for the purpose of the AI Act; and
- (3) powers of MSAs for the purpose of the AI Act.

In all three areas the above-mentioned MSR operates as the applicable legal framework in the background.¹⁵ This means that the AI Act acts as *lex specialis* to the MSR and that the MSR applies wherever the AI Act does not foresee specific rules.¹⁶ This dependency on the MSR further underlines the character of the AI Act as a ‘framework legislation’ as defined by Voss.¹⁷ In essence, this means that the AI Act cross-references other legislation, without which it would not be possible to make sense of its provisions.¹⁸

Overall, Article 74 is a core article for ensuring effective enforcement of the regulatory scheme for AI envisioned by the EU legislator as it puts in place part of the legal framework for the key actor of said enforcement: MSAs.¹⁹ For the enforcement of the AI Act to be a reality, it must be clear who the MSA is in a given context and what the MSA can do in terms of enforcement powers. Both aspects are covered by Article 74.

2 Legal Background

2.1 International

The use of MSAs for the purposes of enforcement is an EU-specific approach – a key component of the New Legislative Framework – and has therefore no international counter-parts. That being said, the enforcement of various legal obligations in the context of AI systems is a topic that also features in the one supranational approach towards AI regulation to this date – the AI Convention.

The AI Convention requires state parties to put in place one or more effective mechanisms to oversee compliance with the obligations in this Convention.²⁰ Similar to the competent authorities under the AI Act (which include MSAs), such enforcement mechanisms need to be able to act ‘independently’ and ‘impartially’ and have sufficient resources to fulfil their mandate.²¹ State parties have to furthermore ensure sufficient cooperation between the enforcement mechanisms set up on their territory.²² The latter requirement appears comparable to the cooperation and coordination obligations of Article 74 of the AI Act, as further discussed in section 3.3 below.

If EU Member States ratify the AI Convention, they can designate the authorities competent under Article 74 of the AI Act as also competent for the AI Convention. The close similarity between the core requirements for the enforcement mechanism in the AI Convention and competent authorities under the AI Act seems to almost invite EU Member States to do so. Consequently, it becomes even more crucial to ensure MSAs work well as enforcement authorities for AI systems in order to avoid replicating existing issues in the new system set up by the AI Convention.

¹⁵ See further AIA, Rec. 156.

¹⁶ This is specified in the MSR: see Rec. 4 and Art. 2(1) and (2).

¹⁷ Voss 2021, 7.

¹⁸ *Ibid.*

¹⁹ See further AIA, Rec. 156.

²⁰ AI Convention, Art. 26(1).

²¹ Compare AI Convention, Art. 26(1) to AIA, Art. 70(1) and (3).

²² AI Convention, Art. 26(3) and (4).

2.2 EU

A system of market surveillance is a core feature of any EU legislative framework falling under the New Legislative Framework umbrella. The MSR is thereby the key legal framework setting out the organization, activities and obligations, the powers, and the mutual assistance procedures of MSAs.²³ The interaction of these provisions with the AI Act are discussed in detail in section 3.1.1 below.

Prior to the AI Act, the EU had put forth ethical guidelines to deal with some of the challenges raised by AI. The most prominent example is the HLEG, which had been appointed by the Commission.²⁴ The HLEG defined three core characteristics for trustworthy AI, namely, to be lawful, ethical and robust.²⁵ Being lawful refers to compliance with all applicable laws and regulations.²⁶ While the HLEG does not delve further in the lawful-characteristic, it is clear that lawful AI requires proper enforcement of the applicable laws and regulations on AI. As noted by Smuha et al., '[t]he “Lawful” component of Trustworthy AI gives the concept of Trustworthiness “teeth”'.²⁷ The enforcement system set up in the AI Act, of which Article 74, has to be seen against this context making Article 74 part of the ‘teeth’ of the AI Act.

During the legislative process for the AI Act, a keen observer could have noted relatively quickly that MSAs would form a key component of the enforcement structure. Already the Commission’s White Paper on AI of 2020 strongly indicated a preference for an New Legislative Framework approach to AI regulation.²⁸ A public consultation on the regulation of AI launched in connection with the Commission’s White Paper also confirmed support among the respondents for an option involving both ex-post and ex-ante market surveillance.²⁹ Similarly, a resolution of the Parliament of 2020 proposed the establishment of national authorities competent for enforcement of legal obligations in the context of AI and robotics.³⁰

The proposal for the AI Act of the Commission of 2021 confirmed the New Legislative Framework pathway and the key role for MSAs.³¹ The Commission’s original vision for Article 74 of the AI Act has remained the same in its core aspects in the final version of the AI Act, in particular the reliance on the MSR as the core legal framework acting in the background. A significant development during the legislative process was the merging of two paragraphs from the former Article 64 of the Commission’s proposal (now Article 77) into the text of what is now Article 74 AI Act. This meant that the powers of MSAs (to access data and where necessary source codes) form now part of one provision together with the different requirements on which authority should act as MSA in a particular circumstance.³² This change had been proposed by the Council.³³ The Parliament had instead followed the Commission’s approach to have a separate provision on access to

23 MSR, chs IV, V, and VI.

24 Commission HLEG 2022.

25 HLEG Guidelines, 5.

26 *Ibid.*

27 Smuha et al. 2021, 5.

28 Commission White Paper, 23.

29 According to the summary of the Commission of the public consultation: 62% of respondents supported a combination of ex-post and ex-ante market surveillance systems; 3% of respondents supported only ex-post market surveillance; 28% explicitly selected external conformity assessment of high-risk applications as an answer; and 21% of respondents specifically supported ex-ante self-assessment. *See* Commission Consultation 2020, 12.

30 Parliament Resolution 2020, Rec. AA, para. 122. *See further* Annex I.

31 AI Act Commission Proposal, Art. 63.

32 Compare AI Act Commission Proposal, Arts. 63 and 64 to AIA, Art. 74. *See further* the commentary on Art. 77 in this volume.

33 AI Act Council Proposal, Art. 63.

data and documentation, but significantly amended the details of the provided access to data and documentation, as further discussed in section 3.2.2 below.

2.3 National

Before the AI Act, EU Member States did not typically resort to MSAs for enforcing legal obligations on AI systems. Nevertheless, there are recent national attempts at setting up specific authorities to deal with the enforcement of various legal obligations of domestic and EU law on AI systems. Most prominently, the Netherlands has set up a national AI supervision system in the context of its digital infrastructure authority in October 2023.³⁴ The supervision system, which is receiving funding by the Commission, is supposed to help the required capacity building for the enforcement of the AI Act and is also supported by UNESCO with technical support.³⁵

Outside of the EU, the US has taken some notable steps in terms of trying to address potential negative effects stemming from the development and deployment of AI systems. The key document is the ‘Executive Order on the Safe, Secure and Trustworthy development of Artificial Intelligence’ of President Biden issued in October 2022.³⁶ Comparably to the AI Act’s approach, the US’s approach gives a key role to standards for the regulation of AI systems.³⁷ In terms of enforcement, the Executive Order is, however, rather vague and lacks a system of MSAs as established for the EU. It primarily relies on existing enforcement authorities in related areas such as consumer protection for protecting American consumers from un-trustworthy AI, and leaves the rest up to self-regulation and public procurement rules requiring certain AI standards.³⁸

2.4 Case Law

The MSR has been applicable since July 2021,³⁹ but has so far not led to any questions being referred to the CJEU for clarification. A search of case law of the other EU legislations constituting the New Legislative Framework similarly provides little insights into the subject matters covered by Article 74 of the AI Act, namely the designation of competent authorities as MSAs when there is more specialized legislation, cooperation between different authorities acting as MSAs, and enforcement powers of MSAs.⁴⁰

The cooperation of different authorities tasked by EU law with enforcement powers has featured in CJEU case law on a more general level. Most notably, a CJEU ruling of June 2023 by the Grand Chamber emphasized the duty of authorities to cooperate and assist each other in order to fulfil their respective mandates.⁴¹ This duty stems from the principle of sincere cooperation – a core EU principle embedded in the EU’s foundational set-up.⁴² In the context of AI this means that not only should MSA of different Member States work together, but also MSAs should collaborate with other authorities relevant to enforcing legal obligations and fundamental rights on AI systems.⁴³

34 Commission Supervising AI 2023; RDI 2023.

35 Commission News 2023.

36 White House 2023.

37 *Ibid.*, ss 2, (a), 4(a)(i), and 11(b). See further Knowledge Centre Data & Society.

38 White House 2023, ss 2(e) and 8(a).

39 MSR, Art. 44.

40 The other horizontal NLF legislations are: RAMS and Decision 768/2008/EC.

41 *Meta Platforms and Others* (Case C-252/21), para. 53.

42 TEU, Art. 4(3).

43 See further Vogiatzoglou & Drechsler, Art. 77, in this volume.

3 Analysis

3.1 Designating the Appropriate MSA

The AI Act as a framework legislation does not introduce new authorities for its enforcement but relies on existing institutions and frameworks, particularly, for market surveillance, where MSAs are designated the key players.⁴⁴ This approach has the advantage of building on pre-established infrastructures which could make it more resource-efficient,⁴⁵ yet it might also introduce limitations, for example, as noted by Edwards, if MSAs due to their legislative framework that is built on product safety reasoning, might adopt an ‘oversimplified view’ of how AI systems work.⁴⁶ The first part of Article 74 of the AI Act seeks to clarify the application of the MSR in relation to the AI Act, and designates other authorities as MSAs in case the ‘standard’ MSA under the MSR is not the most suitable authority.

3.1.1 Interplay with the Market Surveillance Regulation (Article 74(1))

Under the AI Act, the default enforcement authority is the MSA that had to be appointed under the MSR (thereby designating the MSR as *lex generalis* to the AI Act).⁴⁷ This is also emphasized in the definition of MSAs in Article 3(26) of the AI Act, where MSAs are defined as ‘the national authority carrying out the activities and taking the measures pursuant to Regulation (EU) 2019/1020’.⁴⁸ To ensure that MSAs can take up their role under the AI Act, Article 74(1) offers two clarifications for the interplay of AI Act and MSR.

First, Article 74(1)(a) highlights that all entities covered by the material scope of the AI Act as clarified in Article 2(1),⁴⁹ count as ‘economic operators’ in the system of the MSR.⁵⁰ This is of relevance as economic operators under the MSR have a number of obligations to facilitate eventual enforcement by the MSAs.⁵¹ In particular, MSAs have to ensure that:⁵²

- (1) the required documentation for the conformity assessment can be made available to MSAs upon request;
- (2) that such documentation is available in a language that can easily be understood by the MSA;
- (3) that MSAs are informed if risks from a product are becoming apparent; and
- (4) to cooperate with the MSAs when it comes to rapid risk mitigation after a risk has emerged.

Moreover, economic operators under the MSR have to clearly indicate on the product or an accompanying document, their contact details.⁵³ These obligations are now also applicable to all operators covered by the AI Act.

44 Edwards 2022, 3.

45 Veale & Zuiderveen Borgesius 2021, 110.

46 Edwards 2022, 5.

47 MSR, Art. 10(2). See further Veale & Zuiderveen Borgesius 2021, 110; Nikolinakos 2023, 640.

48 AIA, Art. 3(26). This aligns the definition with the definitions provided in the MSR for ‘market surveillance’ and ‘market surveillance authority’, see Art. 3(3) and (4). See further Voss 2021, 13.

49 See further Van Eecke & Regenhardt, Art. 2(1), in this volume.

50 See the definition of ‘economic operator’ in MSR, Art. 3(13).

51 *Ibid.*, ch. II.

52 *Ibid.*, Art. 4(3). See further the guidance by the Commission on MSR, Art. 4: Commission MSR Guidelines 2021.

53 MSR, Art. 4(4).

Second, Article 74(1)(b) clarifies that for the application of the MSR AI systems – as defined in the AI Act⁵⁴ – are ‘products’ under the MSR framework. The MSR, when describing the obligations of operators but also when laying out the organization and tasks of MSAs, continuously refers to ‘products’.⁵⁵ By equating such references for the context of the AI Act to references to AI systems, the AI Act ensures full applicability of the MSR by precluding any argument around whether AI systems are products for the purposes of the MSR.

The ultimate aim of Article 74(1) seems to be to ensure the smooth application of the MSR in cases where MSAs take up enforcement tasks under the AI Act. This further cements the role of MSAs as enforcers of the AI Act.

3.1.2 Market Surveillance Authorities of Union Harmonization Legislation (Article 74(3))

Union harmonization laws setting up product standards can designate their own authority for market surveillance and enforcement, different from the MSA under the MSR. As this presumably comes with the advantage of having a more specialized and targeted enforcement agency, the AI Act is keen to not disrupt this order by (re-)introducing the MSA under the MSR as the competent authority. The Commission was explicitly trying to avoid any duplication of authorities as already stated in its White Paper on AI preparing the AI Act.⁵⁶ A clarification of the interaction with Union harmonization legislation is the more necessary considering the AI Act’s classification of AI systems as high risk if they are either a safety component of a product or a product in themselves and *if* the products are covered by Union harmonization legislation as listed in Annex I.⁵⁷ In other words, one category of high-risk AI systems always relates to Union harmonization legislation, and therefore might come with its own enforcement agencies.

To ensure the smooth interaction between the AI Act and the Union harmonization acts listed in Annex I in terms of enforcement, Article 74(3) of the AI Act determines that those acts listed in section A of Annex I (‘List of Union harmonisation legislation based on the New Legislative Framework’) maintain their authority for market surveillance also for enforcement of the AI Act. Conversely, following the explicit wording of Article 74(3) of the AI Act, this means that the acts listed in section B (‘List of other Union harmonisation legislation’) of Annex I do not benefit from this exemption. As the acts listed in section B of Annex I are partly exempted of the scope of the AI Act,⁵⁸ this might just be a further reflection of this scope limitation.

The AI Act provides Member States the possibility to opt to appoint another authority as market surveillance authority for AI systems covered by Union harmonization acts, provided that they ensure coordination with the authorities otherwise appointed under the Union harmonization legislation in question.⁵⁹ Member States can make use of this option in ‘appropriate circumstances’. Neither the text of the provision nor any of the recitals give further information on when circumstances would be appropriate.

54 AIA, Art. 3(1).

55 See for example MSR, Art. 4(3)(c) on the obligation to inform MSAs about potential product risks. MSR defines three categories of such products: ‘product presenting a risk’ (Art. 2(19)); ‘product presenting a serious risk’ (Art. 2(20)), and ‘product entering the Union market’ (Art. 2(26)).

56 Commission White Paper, 25.

57 AIA, Art. 6(1)(a). See further Couneson, Art. 6, in this volume.

58 *Ibid.*, Art. 2(2).

59 *Ibid.*, Art. 74(3).

3.1.3 Market Surveillance Authorities for Financial Services (Article 74(6) and (7))

Financial services are heavily regulated in the EU, and such regulation often comes with its own system for market surveillance, including its own authorities. Again, presumably to avoid upsetting specialized oversight and duplicating authorities,⁶⁰ the AI Act is mindful of these authorities, and determines that the authority under the Union legislation on financial services is the MSA for the purposes of the AI Act.⁶¹ Recital 158 provides a more concrete idea for which legislations this will be the case and mentions: (1) Capital Requirements Regulation; (2) Consumer Credit Directive; (3) Solvency II Directive; (4) Capital Requirements Directive; (5) Mortgage Credit Directive; and (6) Insurance Distribution Directive, as legislations where this would apply. It is, however, not clear if Recital 158 was to provide an exhaustive list or if there might be other legislations on financial services where the enforcement authority could become the MSA for the AI Act. For financial services, Member States also have the option to appoint another relevant authority that is neither the authority responsible under the financial services legislation nor the MSA of the MSR.⁶² This option resembles the one provided under Article 74(3) discussed above in section 3.1.2.

The authorities from the financial services legislations listed in Recital 158 only become an MSA when the AI system in question is ‘in direct connection with the provision of ... financial services’ covered in those legislations.⁶³ It is not further specified in the text of Article 74(6) when this would be the case. Recital 158 appears to employ a broad understanding and states that this concerns ‘AI systems provided or used by regulated and supervised financial institutions’.⁶⁴ Following this logic, a direct connection is established as soon as a regulated financial institution provides or uses an AI system, seemingly without regard to whether the provision or use is linked to the core activities of the institution in question. A more restrictive reading, closer to the wording in Article 74(6) would suggest, instead, that a direct connection must relate not only to the institution but also the activity in question. For example, financial institutions using AI systems for tasks not directly linked to the provision of financial services, such as building maintenance or temperature control of IT systems, would not trigger a switch of enforcement authority.

Neither paragraph 6 nor 7 provides much additional information on how the authorities under the financial services legislation are to fulfil their tasks in the context of the AI Act. Paragraph 7 does clarify that the authorities appointed under Capital Requirements Directive, have to report any information of interest for effective supervision to the European Central Bank, if the credit institution being supervised participates in the Single Supervisory Mechanism set up by the Single Supervisory Mechanism Regulation. Beyond this clarification, details on how supervision is to occur, can only be learned from Recital 158, which states as a principle that authorities for financial services should have ‘all powers’ for market surveillance activities provided under both the AI Act and the MSR.⁶⁵ They should, when possible, integrate these powers into their existing enforcement mechanisms and procedures.⁶⁶ Thus, unlike for Union harmonization legislation

60 In a resolution of 2020, the Parliament was concerned about duplicating authorities in the area of financial services. See Parliament Resolution 2020, para. 123.

61 AIA, Art. 74(6).

62 *Ibid.*, Art. 74(7).

63 *Ibid.*, Art. 74(6).

64 *Ibid.*, Rec. 158.

65 *Ibid.*

66 For the authorities under Capital Requirements Directive, Rec. 158 suggests in particular that certain obligations of the AIA in terms ‘risk management, post marketing monitoring and documentation’ are implemented in the existing obligations and procedures of the Directive.

authorities discussed in section 3.1.2, these authorities can rely on the procedures of the AI Act set out in Articles 79 to 83.

3.1.4 Data Protection Authorities as Market Surveillance Authorities (Article 74(8) and 9)

Data protection authorities (DPAs) as established in EU data protection legislation such as the GDPR, the Law Enforcement Directive (LED), and the EU Institution Data Protection Regulation (EUDPR), have a longer tradition than MSAs for dealing with risks posed to fundamental rights by AI systems.⁶⁷ The final AI Act therefore decided to leverage their expertise in the context of AI systems considered highly impactful in terms of fundamental rights: AI systems using biometrics for (1) remote identification systems, (2) categorization, and (3) emotion recognition.⁶⁸ These systems are considered high risk for the purposes of the AI Act.⁶⁹ Furthermore, the AI Act relies on the DPA's expertise in the areas of law enforcement, border management, and the administration of justice more generally.

To build on existing knowledge within the DPAs, Article 74(8) designates DPAs under either the GDPR or the LED as MSAs for the purposes of the AI Act. However, this designation is only mandatory in two instances. First, for biometric systems considered as high-risk via Annex III if they are used for 'law enforcement purposes, border management and justice and democracy'.⁷⁰ Second AI systems used for the purposes of law enforcement, migration asylum and border control management, and administration of justice and democratic processes, in so far as the AI system is qualified as high-risk due to Annex III, sections 6, 7 and 8. For the administration of justice, Article 74(8) adds that market surveillance must not interfere with the independence of judicial authorities or with their activities when acting in judicial capacity.⁷¹ For other high risk AI systems, Article 74 foresees no role for DPAs, either as a MSA or as an authority to be consulted. Instead, DPAs enjoy the same powers as all fundamental rights authorities and bodies under Article 77 of the AI Act.

The AI Act gives a much broader role to the EDPS as the DPA of the EU institutions appointed under the EUDPR.⁷² The EDPS is considered the MSA for all EU institutions, agencies and bodies in the scope of the AI Act without any restrictions to certain AI systems as is the case for the designation of DPAs.⁷³ The only EU institution exempted from the EDPS' supervisory role is the CJEU.⁷⁴

The limited role of DPAs has been a point critically commented upon during the legislative process. The EDPB, the EU body combining the voices of all national DPAs under both the GDPR and the LED, voiced concerns about the limited role of DPAs when it comes to the supervision of AI systems using biometrics.⁷⁵ These concerns were raised towards the original proposal of the Commission, which had the option of giving the supervisory tasks over biometric AI systems to other authorities with supervisory functions for law enforcement and border management that were not the DPAs.⁷⁶ During the

67 See for example EDPB 2023.

68 AIA, Annex III, area 1. See further Vogiatzoglou 2023.

69 See further Couneson, Art. 6, in this volume.

70 AIA, Art. 74(8). See further *ibid.*, Rec. 159.

71 *Ibid.*

72 EUDPR, ch. VI.

73 Compare AIA, Art. 74(8) to Art. 74(9). See further AIA, Rec. 156; and Nikolinakos 2023, 619.

74 AIA, Art. 74(8).

75 EDPB-EDPS 2021, 16. See further Ebers et al. 2021, 600.

76 Compare to AI Act Commission Proposal, Art. 63(5).

legislative process, this option was removed by both the Parliament and the Council.⁷⁷ It remains to be seen whether this addresses the concerns of the EDPB and the EDPS, as DPAs are still ‘only’ acting as MSAs and thus might not have the required independence for effective data protection supervision as required by Article 8(2) of the CFR.⁷⁸ Leaving aside the limited role of DPAs, there could also be issues with the resources DPAs have available to deal with all the matters that are assigned to them under the AI Act. DPAs under both the GDPR and the LED are notably already struggling to keep up with the enforcement demands under data protection law⁷⁹ (in particular DPAs have so far done little in terms of LED enforcement).⁸⁰ It can, therefore, be questioned whether they will have the capacity and resources to deal with the additional issues coming from the AI Act, at least without sufficient resources increases in the different Member States.⁸¹

3.2 Powers of Market Surveillance Authorities

An important element for any enforcement systems are the enforcement powers an authority will be able to rely on to ensure compliance with the legislation supervised. Article 74 AI Act further specifies these powers in two manners: (1) by clarifying the application of the powers assigned under the MSR, and (2) by creating additional powers specific to the enforcement of the AI Act.

3.2.1 Powers Under the Market Surveillance Regulation (Article 74(5))

Under the AI Act, the default manner for powers of MSAs to be determined is by applying the MSR,⁸² except for the cases where one of the derogations of Article 74(3) or (6) applies.⁸³ An overview of MSA powers can be found in Article 14(4) of the MSR, which determines the abilities each Member State must confirm to their MSA as a minimum standard.⁸⁴ Article 74(5) of the AI Act underlines that these powers are in principal applicable for the context of the AI Act.

Additionally, Article 74(5) of the AI Act extends two of these minimum powers for the context of the AI Act. Under the MSR, MSAs need to have the power to ‘carry out unannounced on-site inspections and physical checks of products’ and to ‘acquire product samples, including under a cover identity, to inspect those samples and reverse-engineer them in order to identify non-compliance and to obtain evidence’.⁸⁵ Article 74(5) specifies that these two powers can be exercised ‘remotely, as appropriate’. This seems to indicate that MSAs should be able to exercise both powers without having to be in the same country as the operator investigated. Whether this is indeed the meaning is difficult to ascertain, as there is no further explanation in the AI Act in either the text or a recital on what remote exercise means.

3.2.2 Powers Granted by the AI Act (Article 74(12) and (13))

The AI Act grants two new powers for the purposes of the AI Act that are not included in the MSR. As discussed in section 2.2, these powers were originally introduced in a

77 See AI Act Parliament Amendments, Art. 63(5); AI Act Council Proposal, Art. 63(5).

78 CFR. See further TFEU, Art. 16(2); and Veale & Zuiderveen Borgesius 2021, 111.

79 See further Edwards 2022, 26.

80 See further Vogiatzoglou et al. 2020.

81 See also Edwards 2022, 11; Veale & Zuiderveen Borgesius 2021, 111.

82 Nikolinakos 2023, 642. See further MSR, Rec. 37.

83 See the discussion in ss 3.1.2 and 3.1.3 above.

84 MSR, Art. 14(4).

85 *Ibid.*, Art. 14(4)(d) and (j).

separate article (Article 64, now Article 77) but during the legislative process they were merged into the text of what is now Article 74(12) and (13).⁸⁶

The first new power enables MSAs to gain full access to the documentation on high-risk AI systems and any training, validation and testing data sets that were used for their development.⁸⁷ This power is not without limitations. It can only be used ‘where relevant’ and only to the extent that it is ‘necessary’ for MSA to fulfil their enforcement role. There is no further information in the AI Act on the circumstances under which such access would be considered relevant and necessary. Regarding the access to training, validation and testing data sets, Article 74(12) introduces the idea of granting such access to MSAs via application programming interfaces (APIs) or other technical means for remote access. Such remote access should be limited to ‘where appropriate’ and only as long as there are security safeguards. Unfortunately, also this specification has no further explanation in either the text or a recital of the AI Act.

The second new power granted to MSAs enables them to gain access to the source code of a high-risk AI system. Such access can only be granted upon a ‘reasoned request’ and only if access is necessary for assessing conformity of a high-risk AI system with the requirements of Chapter III, section 2 (for example the requirements on the risk management system, for data and data governance, human oversight or cybersecurity),⁸⁸ *and* if other means to verify compliance have been exhausted or proved insufficient, in particular testing or auditing based on the data and documentation provided by the AI systems’ provider.⁸⁹ These two conditions are cumulative, thus, for a successful request to source code, both must be fulfilled. Similar to the first new power, the AI Act does not provide further details on the access to source code power beyond the descriptions in the text of the provision itself.

The two new powers seem to address one of the known enforcement challenges in relation to AI – the difficulty in understanding how an AI system functions.⁹⁰ Access to training, validation and testing datasets as well as source code has been highlighted by, for example Goanta & Spanakis, as an important means to increase the enforcement capabilities of authorities in the context of AI.⁹¹ As a means of true transparency that is less likely to be manipulated, Busuioc et al. consider the new powers of the AI Act as a step towards real transparency as disclosure.⁹² It is an important additional means on top of other information sources, which require the providers of AI systems to adequately offer the information in the first place,⁹³ e.g., by feeding the AI database to be established under Article 71 of the AI Act.⁹⁴ Whether these powers will be enough, will depend significantly on how easily they can be used and when exactly they apply. As noted in the previous paragraphs, the descriptions of both powers come with many qualifiers limiting their use to situations where it is necessary and appropriate without however clarifying any examples for such situations.

The access to source code and training and testing datasets has been criticized during the legislative process as it might undermine existing intellectual property protection or

86 Compare AIA, Art. 74(12) and (13) to AI Act Commission Proposal, Art. 64.

87 AIA, Art. 74(12).

88 See *ibid.*, Arts 9, 10, 11, 14 and 15.

89 *Ibid.*, Art. 74(13)(a) and (b).

90 This was already admitted by the Commission’s White Paper as a challenge to overcome. See Commission White Paper, 15 and 22.

91 Goanta & Spanakis 2022, 51.

92 Busuioc et al. 2023, 84.

93 Jacobs & Simon 2022, 16–17.

94 Veale & Zuiderveen Borgesius 2021, 111; Smuha et al. 2021, 2. See *further* Harkens, Art. 71, in this volume.

be ‘unworkable’ as the required datasets might no longer exist.⁹⁵ Furthermore, being forced to retain datasets could cause conflicts with data protection obligations under the GDPR or the LED, which generally require data minimization.⁹⁶ The final version of the AI Act has not heeded this criticism, although, as further discussed in section 3.2.3 below, confidentiality to protect intellectual property was taken on as a key consideration.

The MSR, as the legislation in general regulating MSA powers, applies a risk-based approach to determine which powers are appropriate to apply in a given context.⁹⁷ It could be that the different references to appropriateness and necessity are supposed to highlight that, also for the context of the AI Act, MSAs should use the risk-based approach when deciding what powers to use when. It is not clear how this squares with the fundamental rights supervisory tasks of MSAs under the AI Act, as for fundamental rights bodies such a risk-based approach is more alien.⁹⁸ In light of the impact of certain AI systems on fundamental rights, any risk assessments must provide an appropriate role for fundamental rights considerations, for example by designating an (potential) interference with fundamental rights as an appropriate situation to use the additional powers of Article 74(13) of the AI Act.

3.2.3 Confidentiality (Article 74(14))

The AI Act has a general requirement of confidentiality for its competent authorities and other actors involved in the application of the AI Act under its Article 78.⁹⁹ Article 74(14) explicitly refers to this confidentiality requirement and reiterates its application to MSAs.¹⁰⁰ It is not quite clear whether this reiteration has any added value beyond a declaratory nature, as the text of Article 78 already explicitly refers to MSAs, leaving no doubt that they are bound by it.¹⁰¹

Presumably, the reiteration of confidentiality in Article 74(14) after setting out two new powers for MSAs serves the purpose of reacting to the above-mentioned criticisms voiced against the additional powers provided to MSAs discussed in section 3.2.2 above. The access to testing and training data and source code was in particular considered a problem from the perspective of the protection of intellectual property rights, such as confidential business information or trade secrets.¹⁰² By repeating the confidentiality obligation, the EU legislator might have intended to dispel these concerns. However, it is worth noting, that the AI Act’s focus on confidentiality was also critically commented on during the legislative process. Busuioc et al. feared that such confidentiality will make it even more difficult for any information on AI systems to become public, thereby hampering civil society from acting, as it might be the only means of access to information not intermediated by the providers of AI systems and therefore able to provide a more truthful image of an AI system as discussed in section 3.2.2 above.¹⁰³

95 Ebers et al. 2021, 598. *See further* Smuha et al. 2021, 48.

96 Ebers et al. 2021, 598.

97 *See* MSR, Rec. 32.

98 *See further* Smuha et al. 2021, 37; Busuioc et al. 2023, 101.

99 *See further* Erdoğan, Art. 78, in this volume.

100 *See further* AIA, Rec. 167.

101 *Ibid.*, Art. 78(1).

102 Nikolinakos reports on such concerns being voiced by several large tech companies such as Microsoft and Google. *See* Nikolinakos 2023, 643–644.

103 Busuioc et al. 2023, 102.

3.3 Cooperation and Coordination of MSAs (Article 74(2), (10) and (11))

As a final issue, Article 74 tackles the cooperation and coordination of different MSAs and other competent authorities. Three means are foreseen to foster such cooperation and coordination. First, Article 74(2) introduces a reporting obligation for MSAs, whereby they have to annually release information to both the Commission and national competition authorities on any matters of interest for the application of EU competition law.¹⁰⁴ In addition, they need to report annually on any noted use of prohibited practices and any measures taken.¹⁰⁵ Second, Member States are encouraged to facilitate the coordination of MSAs competent under the AI Act with other authorities that are either designated via a Union harmonization legislation or otherwise ‘relevant’ for high-risk AI systems.¹⁰⁶ There are no further details either in the text of the AI Act or in a recital on how Member States are supposed to enable such coordination exactly. There is also strangely no mention of the authorities supervising financial services, which as discussed in section 3.1.2, also take on supervisory tasks under the AI Act. Presumably, coordination should also be facilitated between them and MSAs. Finally, MSAs should be able to work with the Commission on joint activities including joint investigation when it comes to AI systems that present a serious risk for more than one Member State.¹⁰⁷ Such joint activities are already foreseen in the MSR, and Article 74(11) clarifies the application of this regime to the AI Act.¹⁰⁸ Joint activities are to be coordinated by the newly established AI Office (Article 64 of the AI Act) within the Commission.¹⁰⁹

The approach of Article 74 AI Act to ensure proper cooperation and coordination between the different authorities constituting its enforcement mechanism is overall rather vague. There are no details on how the different actors are to cooperate and coordinate exactly, which can especially be of relevance when it comes to the sharing and exchanging of information. This lack of detail could prove to be an obstacle to the effective enforcement of the AI Act via MSAs, considering the fragmented landscape of MSAs in the first place. While MSAs under the MSR are the default authority, they frequently will not be the only authority with enforcement tasks under the AI Act as elaborated in section 3.1 above. In light of this fragmentation, it would have been helpful to have a concrete framework for cooperation and coordination beyond vague statements that the Member States should facilitate such initiatives.¹¹⁰ Such issues are typical for EU legislation working with composite procedures, which as defined by Hofmann, are procedures involving both the EU level and Member States or authorities in various Member States.¹¹¹ The AI Act includes both vertical and horizontal composite procedures¹¹² due to the dual system in place that relies on Member State authorities (MSAs, notifying authorities) and EU bodies (AI Board, AI Office).¹¹³

3.4 Concluding Remarks

Effective enforcement of the AI Act will be an important component in measuring its success in the long term. It marks a decisive difference to the previous ethical approaches

104 AIA, Art. 74(2).

105 *Ibid.*

106 *Ibid.*, Art. 74(10).

107 *Ibid.*, Art. 74(11).

108 See MSR, Art. 9.

109 AIA, Art. 74(11). See further AIA, Rec. 160.

110 Smuha et al. 2021, 47.

111 Hofmann 2009, 202. Hofmann describes product legislation based on the NLF as a typical instance for composite procedures. See *ibid.*, at 203.

112 *Ibid.*, at 205.

113 Nikolinakos 2023, 604; Commission Q&A 2023, 6.

of the EU in regulating AI, which lacked such a system.¹¹⁴ Article 74 of the AI Act places MSAs at the centre of this enforcement. This raises the question whether MSAs will be able to effectively fulfil this role. The answer to such a question requires an investigation on two levels: (1) to verify whether MSAs have the required legal competences and structures to be effective enforcement authorities for the AI Act, and (2) to analyse whether MSAs can be efficient authorities in practice based on their resources and existing expertise. The latter point is outside the scope of Article 74 of the AI Act as Article 70 mandates Member States to equip their authorities accordingly.¹¹⁵ For the first point, Article 74 provides mixed answers due to the fragmented approach it introduces for determining the competent MSAs, the absence of clear rules on cooperation and coordination, and the unclear provisions determining the additional powers of MSAs.

Regarding the fragmentation, it has to be admitted that such fragmentation is a consequence of the Commission's aim to avoid duplication of supervisory authorities and tap into existing expertise. Unfortunately, the road to hell is filled with good intentions, and it is already apparent that it will be quite a puzzle to figure out which MSA will be charged with supervising what AI systems.¹¹⁶ Especially for instances where either authorities for financial services or DPAs are tasked with being the MSA the delineation made by Article 74 is not always clear-cut. For authorities for financial services there is no clear list of what authorities could then become MSAs for the AI Act.¹¹⁷ For DPAs, it remains a mystery how their role, which is determined by EU primary and secondary law, matches the tasks under the AI Act. A concern already raised by the EDPB and EDPS during the legislative process. As noted by Smuha et al., the AI Board will have its work cut-out clarifying some of these details.¹¹⁸ These issues are only further exacerbated by the lack of clear coordination and cooperation provisions in Article 74.

Finally, regarding the enforcement powers, the AI Act leaves much to the MSR, which is in principle a logical approach, considering that the MSR constitutes the general legal framework for MSAs. Yet, the AI Act also adds to the MSR in not always clearly circumscribed manners. Further details on the exercise of certain powers 'remotely' and the access to training and testing data as well as source code are needed to fully understand the extent of these powers under the AI Act. Again, this seems to be an aspect for the European Artificial Intelligence Board to further hash out. In the end, only time (and first enforcement actions) will show whether market surveillance is the right enforcement mechanism for the risks posed to society by AI systems.

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114 See further Smuha et al. 2021, 6.

115 AIA, Art. 70(3).

116 See further Busuioc et al. 2023, 95.

117 Smuha et al. note for example the MiFID Regulation as a legislation affecting supervision over financial services and AI. See Smuha et al. 2021, 44.

118 *Ibid.*, at 47.

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