AI AND ADMINISTRATION OF JUSTICE – PREDICTIVE POLICING AND PREDICTIVE JUSTICE

Polish Report

by

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1 Predictive policing

1.1 National practices. General questions

The Polish legal language does not contain the term "predictive policing". However, there is the concept of „operational activities", which is contrasted with procedural activities. The latter, of course, involve actions taken as part of the preparatory proceedings (i.e. investigation or inquiry) and trial before courts. They are aimed at detecting the perpetrator of a crime, securing evidence of the crime, and leading to the perpetrator's conviction. In contrast, so-called „operational activities" are undertaken at the preparatory proceedings or alongside the trial. Their goal may be to detect a crime and to find and collect evidence that may serve to prove it. Operational activities are also undertaken in order to identify threats and prevent crimes from being committed. Thus, they also have preventive goals to achieve. Their characteristic feature is that - as a rule - they are of a non-formalized nature. Only some operational activities require special forms and documentation specified by the regulations. These are activities the results of which may later be directly used in a criminal trial (such as eavesdropping). As a rule, operational activities are also conducted secretly. The concept of operational activities has functioned in the Polish legal system since the interwar period, but its contemporary meaning was first used in a 1983 law. At present there is no legal formal definition of this concept, although there is a draft of law on operational and investigative activities dated 2008. So, its meaning has been developed by academia on the basis of the characteristics of such activities.

As concern AI based systems used for predictive policing – there are several police authorities competent to conduct predictive policing. These are: Police, Border Guard (*Straż Graniczna*), National Fiscal Administration (*Krajowa Administracja Skarbowa*) in the field of customs and fiscal crime, Central Anticorruption Bureau (*Centralne Biuro Antykorupcyjne*) in the field of combating corruption, Military Police (*Żandarmeria Wojskowa*) established to prosecute military crimes. Predictive activities can also be undertaken by services responsible for guarding national security, such as the Internal Security Agency (*Agencja Bezpieczeństwa Wewnętrznego*) and the Intelligence Agency (*Agencja Wywiadu*), as well as the Military Intelligence Service (*Agencja Wywiadu Wojskowego*) and the Military Counterintelligence Service (*Służba*

Kontrwywiadu Wojskowego), and services established to protect the supreme organs of the state, i.e. the State Protection Service (*Służba Ochrony Państwa*).

In order to provide answers to the questions indicated in the questionnaire, the research team asked the indicated services about the use of systems based on artificial intelligence in their work. The intelligence services and the State Protection Service replied that in the framework of their duties connected with identification and prevention of crimes against internal and external state security, terrorist crimes, or protection of persons and objects, they use state-of-the-art systems including both specialised electronic devices and technical means, the use of which constitutes a significant improvement in performance of their duties. At the same time, these services declined to provide further details concerning the forms, methods and ways in which they carry out their protection tasks, as well as the types, characteristics and parameters of the means they use in their work, indicating that this is confidential information and keeping it secret is a condition for the effective performance of the tasks entrusted to them.

Similarly, the National Revenue Administration indicated that it uses machine learning and deep learning algorithms to identify frauds in the area of taxation. The resulting analytical products, based on data from ICT systems from 2019, support the operational work of employees of the National Revenue Administration and are systematically developed.

However, the use of such methods was denied by the Police and the Border Guard. The Police have indicated that the systems used in their work are not systems based on artificial intelligence and that no substantive or technical work is currently underway to implement IT systems based on artificial intelligence and aimed at preventing, combating and detecting crime, as well as prosecuting perpetrators of crimes and other infringements.

Nevertheless, it is worth emphasizing that the position expressed in the information provided by the Police is based on a strict understanding of systems based on artificial intelligence, as such systems whose properties are based on the possibility of self-learning. However, when it comes to electronic systems for processing and analyzing large data sets, based only on their automatic sifting, crossing and sorting, they are undoubtedly used by the Police, providing the basis for criminal analysis.

Unfortunately, due to reasons of confidentiality, it is not possible to obtain reliable information that could form the basis of an answer whether there are precise plans for using AI based systems.

If one were to include in artificial intelligence systems also tools for automatic processing of large data sets, it could be said that they function in the form of specialized software, applied e.g. to telecommunication data, allowing for automatic comparison and processing of information obtained from the databases of telecommunication service providers, and allowing for selection of data concerning facts, frequency of calls to specific numbers, the fact and route of their user's movement, etc.

In Poland – it can be presumed – that telecommunications data including subscriber, billing, location, as well as banking, tax and social security data are used by simple AI-based systems, especially the area of crimes against the fiscal interests of the state. There is no data for the intentional use of such systems in Poland with respect to specific ethnic, religious or national groups.

There are many crimes against which AI tools can be used. Just mention but a few:

a) The Internal Security Agency is a state authority competent in matters concerning the protection of the internal security of the state and its constitutional order (Art. 1 of the ABW Act). Its basic tasks in the field of combating crime include: 1) identification, prevention and combating of threats to the internal security of the state and its constitutional order, and in particular to the sovereignty and international position, independence and inviolability of its territory, as well as state defence; 2) identification, prevention and detection of offences, such as (a) espionage, terrorism, unlawful disclosure or use of classified information and other crimes detrimental to the security of the state, (b) detrimental to the economic basis of the state, (c) corruption of persons performing public functions, illegal manufacture, possession and trade in weapons, ammunition and explosives, weapons of mass destruction and narcotic drugs and psychotropic substances, in international trade, (f) against the justice system.

b) The Border Guard is a uniformed, armed and disguised formation established to protect the state border, control border traffic and prevent and counteract illegal migration. The tasks of the Border Guard include the identification, prevention and detection of offences and prosecution of their perpetrators, in particular a) compliance of crossing the state border with regulations concerning its marking, performance of work by foreigners, b) conducting economic activity by foreigners and commissioning work to foreigners, as well as certain offences concerning the reliability of documents authorizing documents entitling to cross a state border, documents entitling to stay in the territory of the Republic of Poland or documents required for their issuance, etc.

c) The Central Anti-Corruption Bureau is a special service established to combat corruption in public and economic life, particularly in state and local government institutions, as well as to combat activities detrimental to the state's economic interests.

d) The National Revenue Administration – its tasks in the field of combating crime include, among others: a) the identification, detection and combating of fiscal offences and fiscal transgressions, b) identification, detection and combating of offences related to the infringement of provisions on goods the trade in which is subject to prohibitions or restrictions under provisions of Polish law, provisions of European Union law or international agreements, prevention of these crimes and offences, as well as prosecuting their perpetrators, if they are disclosed by the Customs and Fiscal Service and many more.

To conclude all operational work is carried out to recognize threats, prevent and possibly detect crimes and reveal evidence. The results obtained employing programs for automatic processing of large quantities of data are also sometimes directly used in criminal proceedings in the form of criminal analysis or expert opinion.

An AI-based systems directly rely on intelligence, counterintelligence and fiscal police organizations. However due to confidentiality, it is not possible to obtain reliable information on concrete results which AI-based systems produce. The results of predictive policing are mainly confidential. This is a preventive area and it supports the subsequent criminal process. They help to obtain analytical information based on which evidence of procedural significance is sought, and thus materials which are disclosed at a later stage.

Due to the lack of data on the fact and type of use of AI, we cannot unequivocally indicate how the results of using AI systems improve policing. Assuming, however, that also the software used for forensic analysis – i.e. software that allows for sorting and cross-referencing large amounts of data – can be included in the scope of our interest – then forensic analysis as an exclusive police service has certainly influenced policing methods. Subsequently, reaching for telecommunication data, esp. traffic data (to determine contacts between given individuals, location of an object, person, route of movement) has become a standard police method.

It must be noted that so far Polish system does not provide the political or socio-economic incentives – at the national or local level – for using AI-based systems.

A serious public discussion about AI in Poland is just beginning. Media coverage focuses on the sensationalist-spy aspects of using AI possibly in business. However, the Council of Ministers in December 2020 adopted a special resolution on the development of artificial intelligence in Poland[1]. It has very general scope and does not contain any specific resolutions regarding law enforcement authorities. It declares however increasing the number of AI procurements in the public sector and supporting cybersecurity projects as goals of the government.

1.2 Assessment of reliability, impartiality and effectiveness

Since we do not know what specific tools are used by police services, we are not able to comment about the reliability of the AI-based systems used for predictive policing in Poland. However, it is known that technical universities operating in Poland conduct research on software that can be used for such purposes. Their usefulness and reliability are thus verified at this level[2].

[1] *Policy for the development of artificial intelligence in Poland from 2020*, Monitor Polski 2021, item 23; < https://www.gov.pl/web/ai/polityka-dla-rozwoju-sztucznej-inteligencji-w-polsce-od-roku-2020 > accessed 21 November 2023.

[2] < https://www.agh.edu.pl/osiagniecia/info/article/oprogramowanie-opracowane-przez-zespol-informatyki-sledczej-agh-nagrodzone-na-miedzynarodowych-targa/ > accessed 21 November 2023.

At the present, we are not able to comment the problem of the impartiality of the AI-based systems used in Poland. If such research has been done, the evaluations come only from software developers and institutions that use such software. Similarly, it applies to the problem of the effectiveness of using AI-based systems for policing/reducing crime in Poland. We also have no information regarding the experimental use of AI by any public authorities now or in the future.

1.3 Normative framework. Law and soft law

There are no regulations in the Polish legal system which would apply to systems based on artificial intelligence. Only the rules of data collection and gathering are regulated. Moreover, the legislation specifies the purposes for which the data may be processed. It does not, however, refer to the principles and systems in which this processing may be performed. Moreover, in the case if the memos, ministerial recommendations or other normative instruments has been produced by the executive authorities that deal with AI-based systems for predictive policing, it is not binding law and is also classified information subject to applicable confidentiality levels. Furthermore, there are no reliable information as to national criminal justice system refers to international or regional normative instruments concerning the use of AI-based systems for predictive policing.

As concern the issue of soft law sources, private sector regulations concerning predictive policing in your country arguably, there are contracts between the provider of the AI exploitation software and the police service that is the purchaser. This information is kept confidential and is not known to the public.

1.4 Case law

There is no case-law of criminal courts known addressing the admissibility and principles of using AI-based tools in predictive policing. Nonetheless the Constitutional Court in its the judgment of 30 July 2014, K 23/11[3], commented on the principles of obtaining and collecting data that can be used in the work of police services for further processing, also by systems based on artificial intelligence. However, the Court did not comment on the admissibility of the use of automated data processing systems themselves, nor on the degree of their technological advancement and the associated potential risks. This issue has not yet been addressed in Polish jurisprudence, perhaps precisely because such tools are used mainly for strictly operational purposes, and therefore limited to the phase of uncovering relevant evidence at most. The police are not interested in disclosure the detection methods used for fear that criminal groups may later bypass them.

[3] OTK 2014, no. 7, pos. 80.

1.5 Substantive guarantees

Polish law does not provide regulations dedicated directly to the use of AI-based systems by state authorities. As a result, there are no dedicated guarantees of independence, impartiality and effectiveness in the use of AI. There are also no specific means of compensation by the person involved. We are not aware of such situations so far. Possible ruling will have a precedent character.

In the Polish legal system, there are no rules based on common law for the certification of systems. A significant part of predictive policing is protected under the Law on Protection of Classified Information. According to this act, all systems in which classified information is processed must meet certain security conditions and ensure that no data is disclosed. In this sense, such systems are certified, but not because they may be based on artificial intelligence, but due to the rules of police work.

We also do not have information on the duty of authorities using AI-based systems for predictive policing to continuously monitor and adjust them.

As it concerns the transparency about the technological functioning of AI based systems or whether the companies allowed to refer to unclear mechanism – such information are trade secret.

The problem of accountability of organizations for the actions they undertake based on indications provided by AI is purely theoretical so far. No such principles exist. They have not yet been developed in the Polish system, neither in regulations nor in jurisprudence. No special attention has been given to this issue in research so far. It should be noted, however, those trial decisions are made based on verifiable evidence. Predictive police work, if any, is usually only of an auxiliary nature, enabling the search for relevant evidence.

1.6 General principles of law

There is not much debate in Poland about protecting fundamental rights with respect to AI-based systems used for predictive policing. However, there are more and more members of academia speaking on AI issues in general.

2 Predictive justice

2.1 General remarks

There is no legal definition of “predictive justice” in Poland and the Polish system of criminal justice does not use AI-based systems for predictive justice in the meaning applied in this report (i.e. as risk assessment tools or tools producing or suggesting judicial decisions, like for instance “HART” – Harm Assessment Risk Tool – tested in the UK or “COMPAS” used in the USA). There are currently no clear plans to introduce AI-based systems in the judiciary. "Policy for the development of artificial intelligence in Poland

from 2020" adopted in December 2020 by the Council of Ministers does not contain any specific solutions for the judiciary.

While calculating the risk of reoffending/recidivism, dangerousness, non-compliance etc., judges or other organs of the system of criminal justice only rely on data collected in electronic databases, like criminal record data, data collected for investigations, protected personal data, legal data, government and/or soft law data, case-law data at a national level or from local courts. Thus, it is a judge personally or other procedural organ (a natural person) who makes assessment of all necessary circumstances of the case, also all kinds of risk assessment using data collected and processed electronically. However, it should be once again underlined, that we do not have AI-based systems replacing a judge od other procedural organ in assessing any circumstances of the case.

There are of course steps taken in Poland aimed to modernize the justice administration and increase using modern tools in its daily work. First, in civil cases, and later in criminal cases, the so-called "E-minutes system" was introduced. It enables digital recording of sound and image from the court hearing, which in turn makes possible to waive detailed written minutes. However, this system is not widely used in criminal cases, partly due to the lack of necessary hardware in courtrooms, and partly due to the greater operative usefulness of written minutes in a daily work of a judge on a case. There were also works carried out on the automatic speech recognition system, which would enable the automatic creation of transcriptions of the recording of the hearing. Only in the plans for the coming years are such projects as the digitization of court files and the introduction of electronic delivery of court correspondence. Although the aforementioned "Policy" indicates the implementation in public institutions of electronic management of documents' systems also using AI components, there are no specific solutions regarding courts. The above-mentioned modern tools will not have to necessarily use AI-based systems. However, in the literature it is indicated that the wider use of AI-based systems in the judiciary may contribute to the implementation of the fair trial standard, especially as far as the efficiency of judicial proceedings is concerned[4].

Summarizing these introductory remarks, it should be underlined that Polish law and practice follow recommendations in this field elaborated by CEPEJ, that big data analytics techniques could be used by criminal justice professionals to centralise and collect information on the person accused of a crime or misdemeanour, which could then be stored by various institutions and agencies and would then need to be examined by a judge, with due regard to the principle of individualisation of the sentence, based on objective elements of personalities without any other form of analysis than that carried out by specifically trained professionals, such as probation officers[5].

[4] Mariusz Załucki, *"Nowe technologie a sprawność i przyszłość sądownictwa w Polsce*" (2021) 11-12 Przegląd Sądowy 7, 16.
[5] European Commission for the Efficiency of Justice (CEPEJ), *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment*, p. 49, < https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c > accessed 21 November 2023.

Having said that, it is not denied that AI has some influence on Polish criminal justice and the way criminal proceedings are conducted in Poland. In particular, it should be distinguished the following issues:

1) the influence of advanced case-law search engines on courts' decisions and their justification,
2) the influence of electronically processed data concerning previous convictions and detentions on courts' decision,
3) electronic judges' drawing system,

2.2 The influence of advanced case-law search engines on courts' decisions and their justification

With reference to this issue, one may argue that such influence has considerably increased over the last few years. Of course, it is not possible to measure it without in-depth analyses of all courts' judgments and decisions and, so far, such analysis has not been done by Polish researchers. Thus, below we refer rather to our opinions and professional experience than to the outcomes of the research.

Currently Polish judges have at their disposal the following case-law search engines (they do not use AI) governed by judicial authorities or by the Ministry of Justice:

1) The common courts case-law search engine governed by the Ministry of Justice (Polish: "Portal orzeczeń sądów powszechnych") available at: https://orzeczenia.ms.gov.pl/ – judgments or decisions of common courts (District Courts, Regional Courts and Appellate Courts) may be searched there in a few different ways: keywords; text; selection of a given court; selection of type of a decision (criminal/civil); date; legal basis.
2) The database of the Supreme Court of Poland, available at: http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx - this case-law search engine allows for searching judgments or decisions of the Supreme Court by keywords and other criteria. The database gathers 104.326 documents (data valid for 5 August 2022).
3) The European Court of Human Rights case-law engine governed by the Ministry of Justice, available at: https://etpcz.ms.gov.pl/ - it gathers 488 judgments and decisions of the European Court of Human Rights issued mainly against Poland and some other Council of Europe Member States. What important, judgments and decisions of the ECtHR are available in Polish.
4) Some Appellate Courts in Poland had published their case-law on their websites, see for instance the case-law of the Kraków Appellate Court published since 1991 until 2020: https://www.krakow.sa.gov.pl/kzs-krakowskie-zeszyty-sadowe,m,mg,235,307 – currently the case-law of the appellate courts in Poland is available via the general search engine indicated in point 1.

There are also a few advanced case-law search engines offered by private entities, like LEX, Legalis. Usually, they are also available for judges in courts' intranet.

The ease of access to the case-law caused that the length of written justifications of courts' decisions has increased over the last years. They usually contain the general remarks and references to "standing jurisprudence" or even lengthy quotation of this jurisprudence. This is particularly true with reference to judgments and decisions of the Supreme Court. If we compare the average length of the Supreme Court's resolutions issued in nineties of the last century and today, this difference in the length is evident.

What is more striking, however, is that ease access to the jurisprudence may discourage judges from seeking their own interpretation of the law and may encourage them to follow standing case-law. On the one hand such "interpretative attitude" allows for unified application of the law which should be welcomed. On the other hand, however, it may result in persistence of incorrect application of the law in violation of the constitutional principle of the Polish law that judges are bound only by the Constitution, international law and statutes and not by the case-law of other courts (with exceptions applicable to the chambers of the Supreme Court which, under certain circumstances, are bound by resolutions of the Supreme Court).

2.3 The influence of electronically processed data concerning previous convictions and detentions on courts' decision

It should be underlined at the outset that the above-mentioned databases do not pertain to the real AI-based systems. The available database NOE-SAD (database of all persons placed in penitentiary institutions in Poland) and the database of previous convictions (National Criminal Register [https://www.gov.pl/web/krk-en]) simply allow judges for obtaining immediate information on a criminal past and current situation of a defendant. Such information is relevant in the process of applying statutory provisions which allow or oblige the court to increase the penalty imposed in case of recidivism. Furthermore, in accordance with Article 53 § 2 of the Polish Criminal Code, while imposing a penalty the courts shall take into account, *inter alia*, "the defendant's way of life prior to the commission of the crime and his behaviour after the commission of the crime". In case of imposing a fine on a defendant the court shall also take into consideration his ability to execute this penalty which is considerably influenced by his imprisonment in another case (its duration, perspective of release, etc.). Such updated information may be gathered immediately by the use NOE-SAD.

Summarising, the National Criminal Register and the NOE-SAD system are electronic tools which speed up access to information and, consequently, the criminal proceedings. However, their influence is limited to just providing information which must be analysed personally by a judge.

2.4 Judges' drawing system

The central system of drawing judges for cases (Polish: *System Losowego Przydziału Spraw – SLPS*) was introduced in 2018 and is applied in common courts. It does not apply to the Supreme Court. The system is

fully controlled by the Ministry of Justice. It is in this Ministry that the system's servers are located. The assumptions to the system and the method of their implementation have not been disclosed to the public for a long time which was criticized by many non-governmental organisations and the association of judges « Iustitia ». The Ministry of justice refused to disclose to the public the randomization algorithm. Requests of two NGO's (« e-Państwo Foundation and the Civic Network Watchdog Poland ») for access to this information, based on the Act on access to public information, were refused by the Ministry of Justice. However, on 19 April 2021 the Supreme Administrative Court decided that the algorithm presenting the operation of the SLPS network application, by means of which the composition of courts in a given case is created, falls within the concept of « public information » because it provides information on courts' functioning and the way of settling the composition of the court in a given case. For this reason, the Ministry of Justice was obliged by the Supreme Administrative Court to disclose this algorithm (case no. III OSK 836/21). Despite this, the Ministry of Justice in August 2022 refused once more to disclose the algorithm of the SLPS to the public.

Currently the allocation of cases to judges with the use of SLPS system is regulated in §§ 43-76 of the Ordinance of the Minister of Justice of 18 June 2019 on Rules of the functioning of common courts[6]. The Rules provide also for certain exceptions to the use of the SLPS.

One may argue that currently the SLPS is the only AI-based system which in fact allows for replacing the personal decision of the president of the court (or a person executing his power) by a decision taken by the electronic tool. In accordance with the previous legal rules, in principle the decision on allocation of judges to the case in criminal matters was taken by the president of the court, of course with due regard to the order of submission of cases to the criminal division and the publicly available list of all judges of the criminal division of the court.

2.5 Other possibilities of using AI in Poland

The fact that AI-based systems are currently not used in the justice system in Poland does not mean, however, that there is no room for it in the practice of the criminal justice in the future. Introduction of such systems may be considered in several fields.

The first is the use of AI-based systems for risk assessment and predicting in relation to the accused and convicted persons. Many decisions made by the courts are based on predictions of a person's future behavior, most notably whether they will respect the legal order and not re-offend. This is primarily about probation-based institutions: conditional discontinuation of proceedings, conditional suspension of imprisonment and conditional early release from imprisonment. The condition for their application is the court to make a prognosis that a given person will not commit a crime in the future. This prediction is based

[6] Unified text published in: Journal of Laws of 2022, item 2514.

on the assessment of a number of factors, such as: the perpetrator's attitude, his/her personal attributes and features, lifestyle prior to carrying out the offence, the circumstances of the offence, the offender's conduct after committing the offence, his/her behavior while serving the sentence (see Art. 67 § 1 CC, Art. 69 § 2 CC, Art. 77 § 1 CC).

Therefore, it is possible to prefigure that, before making a decision, the Court will reach for a prognosis generated by an appropriate AI-based system, which, based on the available data about a given person and other perpetrators of crimes, will determine the probability that a given person will commit an offence again. The main problem at the present stage seems to be the lack of sufficiently large databases, in which detailed information necessary for making reliable prediction would be collected. IT systems used in the judiciary contain personal data of the defendants and convicted persons, data on the legal qualification of offences for which they have been convicted, information on stays in prisons, decisions on the execution of a suspended sentence and revoking an early release. However, there are no databases that would contain more detailed information about the personal attributes and features of the perpetrators, the circumstances of the crimes they committed, attitude during the criminal proceedings, conduct before and after the crime (other than previous and subsequent convictions), or their conduct while serving of prison sentence. This type of data is found in case files, which have a traditional (paper) form. Therefore, the establishment of an AI-based predicting system for criminal justice would require the collection of an appropriate amount of data that could then be processed. Additionally, it should be noted that in Poland there are no in-depth criminological research on recidivism that could be used to create the first forecasting models for these systems. Creating a database using personal data of defendants and sentenced persons for purposes of predicting by the AI-based systems will undoubtedly require an appropriate statutory basis and analysis from personal data protection's point of view.

Regardless of the above, the functioning of such systems seems to be possible only on the assumption that they will support – not replace – the judge's decision-making, and thus constitute the material that will be analysed by the judge who will be responsible for decision-making. If such a system will be functioning efficiently, it would be of course a certain danger that the judges will not actually make any decisions other than those resulting from the prediction prepared by artificial intelligence. As far as such systems are used to make a prediction related to already finally convicted persons, the problem of the presumption of innocence does not arise.

The second field, where it seems possible to use AI-based systems in the criminal justice system, is the settlement of cases in the petty, simple and evidence-clear criminal cases. It is primarily about traffic misdemeanors that are uncovered and proved through various IT systems (e.g. speed cameras, public monitoring, automatic speed measurement, etc.). It could be figured out that after the disclosure of the offence (e.g. speeding, passing a red light crossing), the IT system that recorded the offence will send the data to the court system along with all the necessary data on the offence and its perpetrator, and the AI-based court

system will prepare decision on penalty, taking into account information from criminal records, information on income from the tax system, etc. and send it to the perpetrator. Due to the right to a fair trial guaranteed in the Constitution (Art. 45 sec. 1 of the Constitution), such a decision made by AI-based system may only be treated as a proposal addressed to the defendant. One of the aspects of this constitution guarantee is right to access to the court, which should be understood as a access to the human judge. The introduction of such a system of adjudication by AI would therefore require granting the defendant the possibility to challenge this decision, that without any additional conditions would result in the loss of its validity and referring the case to a judge. Wider use of AI-based systems depends above all on answer to the general question whether it is due to the constitutional standards of criminal justice[7].

3 Evidence law

3.1 Introduction

Neither the Polish Code of Criminal Procedure, nor so called "Police acts"[8] explicitly refer to evidence gathering through AI-based systems, evidence produced by AI-based systems, nor evidence assessed through AI-based systems. Whereas high-tech evidence (such as car software) would not be *per se* inadmissible in Polish criminal trial, and various law enforcement agents use automated processing (for example, to extract information from documents or communication), activities based on AI systems are still underused. Therefore, domestic law has not been influenced by the questions on lawfulness, trustworthiness or reliability of such evidence, nor the scope of defendant's rights confronted with such evidence. The only area in which such systems are used for the purposes of crime prevention and investigation is tax fraud, where deep learning and machine-learning instruments have been introduced to support detection of crime and tax fraud. Therefore, the following part of the report builds upon this backdrop.

3.2 The use of machine-learning and deep-learning to identify tax fraud

The main body in the field of tax administration, fiscal control and custom service is the National Revenue Administration (hereafter: NRA). The NRA is competent, among other things, to prevent crime, including tax fraud. There is a specific unit within the NRA structure that controls and combats economic crime and undertakes activities to eliminate the grey market and reduce tax offences and irregularities. To perform these tasks, the NRA is empowered with investigative measures, including secret surveillance. Data gathered by the NRA upon these measures is not only of investigative character, and it may turn into evidence in criminal proceedings. From 2018 onwards, the legislation on the NRA has been gradually updated with

[7] Mariusz Załucki, *"Nowe technologie a sprawność i przyszłość sądownictwa w Polsce*" (2021) 11-12 Przegląd Sądowy, 7, 17.
[8] This term refers to the specific acts regulating law enforcement activities in the following areas: anti-corruption, national security, border guard etc.

new legal basis for data-gathering and its automatic processing for the purposes of identification tax fraud. The details are described below.

The way towards the use of machine-learning for the purposes of identifying tax fraud has started from amending the legal basis for data gathering in a specific format that allows for its further automated processing. When it comes to the NRA, the main legal basis regulating the scope of data the NRA may collect, are the Tax Ordinance[9] and the National Revenue Administration Act[10]. The former relates to data collected from business, whereas the latter covers individuals[11]. Both acts have recently been amended with the provisions that allow for specific data collection using the systems administrated by the fiscal agencies. For example, Tax Ordinance has introduced the Clearing House's Information and Communications Technology System (*System Teleinformatyczny Izby Rozliczeniowej*, hereafter: STIR). STIR, as part of the effort to close loopholes in the tax system, aims at enabling the NRA to daily gather and analyse data from all bank accounts[12]. The NRA itself uses the "CRDP" system to collect and process all the data, as well as perform risk analysis[13]. An important move to ensure data availability and readability for machine-learning systems was also the introduction of a new format for VAT data-gathering. From 2020 onwards entrepreneurs in Poland are bound to report VAT-related data using the JPK_V7 form[14], which allows for further automatic processing of the data reported therein to the NRA. Altogether the amount of fiscal data currently gathered by the NRA gives a full tax data landscape, ready for further automatic processing, which enables the NRA to take the next step: its processing using data mining techniques to extract information relevant for tax fraud identification.

To do so, two important provisions have been introduced to the National Revenue Administration Act. Firstly, the Head of the NRA has been authorized[15] to perform analytical and reporting tasks which include processing of data gathered on the basis of the National Revenue Administration Act and Tax Ordinance. Secondly, the NRA bodies have been authorized to conduct automatic data processing and automatic decision-making including profiling, which produces legal effect on the individual, when undertaking analytical, forecasting, research activities and risk analysis regarding fiscal area[16]. While this provision does not explicitly refer to AI, the entirety of the provisions of the National Revenue Administration Act regarding data processing clearly opens up a possibility of gathering data and its automated processing for the above-mentioned purposes. In response to the inquiry presented for the purposes of the AIDP report,

[9] Law of 29 August 1997 – Tax Ordinance (Journal of Laws 2021, item 1540).
[10] Law of 16 November 2016 on National Revenue Administration (Journal of Laws 2022, item 813).
[11] If crime prevention and investigation is at stake, data regarding individuals may also include data coming not from taxpayers themselves, but from other bodies, such as internet, telecom and mail providers, upon NRA's request, Law on National Revenue Administration, Art. 114 sec. 1.
[12] The use of this system has been criticized in the doctrine as it is dependent on the functioning of the secret algorithms, intrusive to privacy and business freedom, Paweł Mikuła, "*System Teleinformatyczny Izby Rozliczeniowej – najważniejsze aspekty nowej regulacji*" (2018) 2 Przegląd Podatkowy 27.
[13] Law on National Revenue Administration, Art. 35.
[14] Which partially corresponds with the SAF-T (Standard Audit File for Tax), developed by the OECD.
[15] Tax Ordinance, Art. 14 § 2.
[16] Law on National Revenue Administration, Art. 47c.

the NRA has confirmed the use of machine-learning and deep-learning to develop analytical system that identify tax fraud.

The existing normative framework on the NRA, although allows for AI and machine-learning systems, is far from precise when it comes to the use of such systems. The data-gathering processes, covered by law, are rather generic and blurred when one asks the question what data are processed, for which purposes, and in which circumstances. Moreover, the scope of "tax fraud identification", to which the NRA admits, does not have a clear legal basis. Although it falls within the scope of "analytical, forecasting, research activities and risk analysis regarding fiscal area", one should expect more a precise provision on the use of systems that may result in automatic decision-making including profiling, which produces legal effect on the individual. Regrettably, the legal framework is silent when it comes to the question to whether such "analytical, forecasting, research activities and risk analysis" may turn into evidence in criminal trial or to what extent it may be used against the defendant.

3.3 Data protection

The above-mentioned provisions that explicitly allow for automatic data processing or automatic decision-making including profiling, which produces legal effect on the individual, are not followed with the data subject rights. Therefore the umbrella framework protecting individuals from far-reaching use of such techniques is the Data Protection in Criminal Justice Act[17], in particular its Art. 15 on automated individual decision-making. This provision prohibits decision-making based solely on automated processing, including profiling, which produces adverse legal effect concerning the data subject or significantly affects him or her, unless authorized by the law and which provides appropriate safeguards for the rights and freedoms of the data subject, at least the right to obtain human intervention on the part of the controller[18]. Data protection framework may thus give rise to disputes on the lawfulness of the use of personal data by the algorithm used by the NRA which may have impact on the evidentiary proceedings at court.

3.4 Conclusion

Polish evidence law has not been much influenced by AI-related issues. The only example of the use of machine-learning and deep-learning systems for evidence-gathering is the National Revenue Administration, which since 2018 gradually develops AI-based instruments to perform analytical, forecasting, research activities and risk analysis regarding fiscal area. Such activities include automatic data

[17] Law of 14 December 2018 on the protection of personal data processed with regard to the prevention and combating of crime (Journal of Laws 2019, item 125).

[18] This provision transposes art. 11 of the Directive 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, *OJ L 119, 4.5.2016.*

processing and automatic decision-making including profiling, which produces legal effect on the individual. These legal bases have been used to develop systems that, using the vast amount of tax data gathered by the NRA, supports tax fraud identification. Therefore, the legal framework itself is rather generic and neither addresses specific, AI-related issues, nor require disclosure of main features of the algorithm. As a result, the NRA has flexibility in developing and determining the scope of use of such systems, whereas a defendant's specific rights against automated decision-making are narrowed to these laid down in the data protection framework. When we notice that data is collected from all VAT taxpayers without exception, regardless of whether there are any grounds for suspecting that a given taxpayer may have committed tax fraud and then – after being processed by AI-based system – may give a basis to institute a criminal investigation against given taxpayer regarding suspicion of a tax fraud, as well as this data could be used for evidence purposes, then we see that these provisions raise strong doubts from perspective of the *nemo tenetur* rule.