28 May 2021

**Thematic report by the UN High Commissioner for Human Rights
concerning possible effects of Artificial Intelligence, including profiling, automated-decision making and machine-learning technologies on the enjoyment of the right to privacy**

**Submission by Poland**

With regard to the letter by OHCHR dated April 28, 2021 and concerning the submissions to the thematic report by the UN High Commissioner for Human Rights – as mandated by the Human Rights Council resolution 42/15 on the right to privacy in the digital age – on how Artificial Intelligence, including profiling, automated-decision making and machine-learning technologies may, without proper safeguards, affect the enjoyment of the right to privacy, Poland is pleased to present its national submission as requested in the above-mentioned letter.

Artificial Intelligence (AI), including profiling, automated-decision making and machine-learning technologies, may affect human rights, in particular the right to privacy and the right to personal data protection. An unauthorized use of the AI may violate the protection of personal interests, such as freedom, honour, name or nickname, image, or right to privacy. The actions by AI may be used, for instance, to facial recognition, tracking or profiling people online, including of their data and personal preferences.

Due to the dynamic development of new technologies and the increasing use of AI, particular attention should be paid to issues related to appropriate legal solutions regulating the use of these devices, including in particular the personal data protection obtained by using them. AI is already widely used worldwide also due to the SARS-CoV-2 pandemic, for example to process data to detect infection but also to predict the course of the pandemic. The dynamic development of various forms of activity using AI algorithms requires to apply appropriate legal regulations, including those in the field of personal data protection. The AI systems must ensure respect for human rights including the right to privacy. Therefore, it is necessary to take appropriate actions and develop solutions that will increase security and awareness of the risks associated with the use of these devices.

The progress related to AI shall take into account the principles set out in the EU General Data Protection Regulation (GDPR) and Convention 108+, including data minimization, accuracy and integrity. Additionally, it is important to continually raise public awareness of the risks, consequences, safeguards and rights in relation to the personal data processing, also in the context of AI.

Given the use of AI in relation to security surveillance and monitoring, including the use of facial recognition in public places, it should be noted that such surveillance poses significant threats to data protection and privacy of the public. A proper and, above all, risk-based management of information security and integrity is crucial to the functioning of facial recognition technology. Before implementing facial recognition technology, it is essential to define the appropriate legal framework and to establish technical and organizational safeguards. In this case, proper management of data confidentiality, integrity, accessibility and usability is extremely important. It is also worth mentioning that the use of AI algorithms in biometric processes is often associated with a decreasing importance of a physical interaction. In such a case, the vigilance of the profiled person is significantly lowered, as he or she may not even be aware of the purposes for which his/her data will be used (e.g. personalized marketing without the knowledge of the profiled person). The GDPR, as well as Convention 108+, indicates that the processing of personal data must be proportionate which means that, for example, facial recognition technology should not be used if the purpose can be achieved by less intrusive means.

Moreover, the construction of any biometric data processing system should be preceded by a data protection impact assessment. There is also a concern that due to the fact that AI often misidentifies women and persons of colour, it may lead to a potentially misidentification or violation of privacy, which may also be perceived as discrimination and biased prosecution based on sex or ethnicity. A similar situation may occur with regard to the use of AI in recruitment processes. Such a situation occurred in the case of employee recruitment at a big international company, which used AI to analyse CVs in order to automate the first stages of recruitment, resulting in female candidates being rejected as a result of misidentification of job applicants by the system. Unfortunately, most of the current AI systems are based on automatic searching for correlations between huge amounts of data what can lead to the discrimination discussed above, especially in a situation where incomplete or insufficient data have been analysed. In this situation, it is necessary for such a process to be controlled by a human in order to detect potential errors and correct then if necessary.

In the European Union, the next step of further analyses related to the use of AI algorithms is the Proposal for a Regulation laying down harmonised rules on AI (Artificial Intelligence Act) presented on April 21, 2021 by the European Commission. This proposal aims to develop an ecosystem of trust by proposing a legal framework for trustworthy AI. This proposal is currently being consulted with the European Data Protection Board and the European Data Protection Supervisor who will adopt a joint Opinion on this matter on June 17, 2021.

Moreover, the use of artificial intelligence without appropriate safeguards may also cause property and non-property damage. Hence, the issue of liability for infringement of personal rights and for damages caused by AI is related to the discussed matter. In this context it is important to create an effective way of pursuing claims that may result from actions or omissions by AI. In this context it is to be observed that currently, at the level of the national, EU and international law, there is no unified liability regime to the above-mentioned scope. Moreover, the fact that the AI has no legal personality as well as it has no material character may raise doubts as to the grounds and scope of liability and to the identification of entities obliged to redress the damage resulting from action or omission by the AI systems. Any possible structures of the liability regime based on guilt, risk and liability for damage caused by a dangerous product, as well as contractual liability, should guarantee persons whose rights as a result of an act or omission by AI have been violated, the possibility of effective pursuing civil law claims.

In this area the European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)) has been issued. The resolution recommends issuing a regulation in the matter of liability for damages in the discussed area with a liability regime on the basis of risk (for AI systems with high risk) and on the basis of guilt with presumption of guilt (for other AI systems).

In the national area of civil proceedings, no solutions enabling the use of AI have been provided so far. In the ongoing discussion, the possibility of using achievements of science and technology in this subject is being considered, in particular with regard to transcribing trials or assisting experts and interpreters. In the longer term, a partial use of AI in the decision-making processes during the trial is also possible. So far, however, these solutions remain in the sphere of plans and discussions and none of them has been implemented.