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# Evidence From Artificial Intelligence in General Administrative Procedure

**Abstract:** Artificial intelligence is becoming an element of everyday life, and also a part of administrative proceedings. The legislator systematically adds regulations that allow public administration bodies to use artificial intelligence. At the same time, the Code of Administrative Procedure has not been amended in this respect. The article tries to establish what artificial intelligence evidence is. In addition, the issue of whether the rules on administrative evidence should be changed to cover the use of AI evidence is examined.
**Keywords:** artificial intelligence, evidence, administrative procedure.

## Introduction

Algorithms facilitate the analysis of huge amounts of data. Moreover, they are quick and the results of their work are assumed to be objective. Consequently, artificial intelligence units are increasingly used in legal transactions. One of the important issues in this regard is the admissibility of evidence developed by algorithms. However, the Polish legislator is introducing regulations relating to the use of artificial intelligence in the judiciary only to a limited extent. Suffice it to say that in the field of public administration activities in the con-

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text of evidence, there are only regulations concerning the so-called automated processing of personal data by tax administration authorities.

Bearing the above in mind, one should consider the admissibility of evidence from artificial intelligence in the so-called general administrative procedure, the course of which was regulated in the Code of Administrative Procedure. Therefore, the purpose of these considerations is to determine whether the current legal solutions regarding evidence in administrative proceedings are adequate in cases where the evidence proceedings would be based on artificial intelligence.

## Evidence in Administrative Proceedings

The adopted method of assessing the collected evidence is of key importance for issuing an administrative decision. As it is aptly noted in the doctrine, "the image of the factual state in the consciousness of an organ is not simply a reflection, a photograph of the facts of objective reality. In this picture, which is the breaking of the objective reality through the prism of the organ's consciousness, not only the reflections of the facts of the objective reality are contained, but also conclusions about the facts."[1] Thus, the form of an administrative decision is determined both by the collected means and their evaluation. Such means are referred to in the doctrine as both evidence and means of evidence. This nomenclature duality is caused, among other things, by the lack of a common position of the doctrine on the meaning of the concept of evidence.[2] On the one hand, then, one can encounter the view that the concept of evidence has a different meaning than the concept of means of evidence. Supporters of

1 Emanuel Iserzon, "Komentarz do art. 70", in Emanuel Iserzon, and Jerzy Starościak, *Kodeks postępowania administracyjnego. Komentarz, teksty, wzory i formularze*. Warszawa, 1970, 153.

2 Zbigniew Janowicz, *Kodeks postępowania administracyjnego. Komentarz*. Warszawa, and Poznań, 1992, 190; Similar difficulties emerge in the preparation of civil and criminal proceedings – Robert Suwaj, *Judycjalizacja postępowania administracyjnego*. Warszawa, 2009. <https://sip.lex.pl/#/monograph/369198202/165542>, access: 02.05.2022.

this view assume that "the concept of evidence in administrative proceedings should be understood as all sources of true information enabling evidence."[3] On the other hand, evidence can be viewed as a proving process or its result, or as an evidence-based act.[4] In other words, the evidence in the case is the process of collecting the means of evidence, their analysis and the result of this action. The presented approach shows the relationship between the concepts cited, which consists in the fact that it is impossible to take evidence without means of evidence. Therefore, the doctrine assumes that "means of evidence are an integral part of the evidence on the basis of which the authority conducts the evidentiary proceedings, and the result of which is obtaining specific information about a specific fact."[5] It should be pointed out, however, that the doctrine is dominated by the view that "in the strict sense of the word, evidence should be understood as means of evidence."[6]

Considering the above, reference should be made to Article 75 §1 of the Code of Administrative Procedure.[7] According to this provision, anything that may contribute to clarifying the matter and that is not in violation of the law may be admitted as evidence. In particular, documents, witness testimony, expert opinions and inspections may constitute evidence. It is generally accepted that the content of the cited provision does not distinguish between evidence and means

3 Barbara Adamiak, "Komentarz do art. 75" in Barbara Adamiak and Janusz Borkowski, *Kodeks postępowania administracyjnego. Komentarz*. Warszawa, 2021. <https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damrxgu3tcoboobqxalrvgmytemrzg44a#>, access: 02.05.2022.

4 Zbigniew Kmieciak, *Postępowanie administracyjne, postępowania egzekucyjne w administracji i postępowanie sądowoadministracyjne*. Warszawa, 2011, 116.

5 Monika Sadowska, "Komentarz do art. 75" in *Kodeks postępowania administracyjnego*. Tom II. *Komentarz do art. 61–126*, eds. Mirosław Karpiuk, Przemysław Krzykowski, and Agnieszka Skóra. Olsztyn, 2020. <https://sip.lex.pl/#/commentary/587841192/638632/karpiuk-miroslaw-red-krzykowski-przemyslaw-red-skora-agnieszka-red-kodeks-postepowania...?cm=URELATIONS>, access: 02.05.2022.

6 Aleksandra Szopieraj-Kowalska, "Dowody i postępowanie dowodowe według kodeksu postępowania administracyjnego i ordynacji podatkowej", *Studia z zakresu nauk prawnoustrojowych*, no. 2. 2012: 210.

7 Ustawa z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego. Journal of Laws of 2021, item 735.

of evidence.[8] However, one can also come across the view that under the above-mentioned Article 75 §1 of the Code of Administrative Procedure, "the term" evidence "is used in the meaning of the general concept of evidence («anything that may contribute to clarifying the matter and that is not in violation of the law») and means of evidence («in particular documents, witness testimony, expert opinions and inspections»)."[9] In other words, the legislator uses the concept of evidence to define two different procedural institutions which, from the perspective of the doctrine, are means of evidence and evidence. On the one hand, this approach is part of the natural discrepancy between the legal language and the language of legal acts. On the other hand, the presented interpretative proposal seems to be better suited to the legislator's intentions. The above-mentioned means (e.g. documents) are only examples of sources of information that are not *ex lege* evidence. The point is that the means listed in Article 75 §1 sentence 2 of the Code of Administrative Procedure, obtain the status of an evidence only when the conditions referred to in Article 75 §1 sentence 1 of the Code of Administrative Procedure are met.

The first of the above-mentioned premises can be described as positive. It is based on the fact that everything that contributes to the clarification of the case is evidence. In this context, it should be recalled that the doctrine makes a distinction between evidence based on "the criterion of the manner in which the adjudicating authority contacts the fact which is the subject of evidence."[10] On this basis, on the one hand, direct evidence is distinguished, i.e. "such measures at which the adjudicating authority has the ability to directly perceive and determine the truthfulness of a specific fact (e.g. inspection)."[11] On the other hand, there is indirect evidence, i.e. evidence that allows us to establish

8 Paweł Daniel, *Administracyjne postępowanie dowodowe*. Wrocław, 2013, 21.

9 Wacław Dawidowicz, *Ogólne postępowanie administracyjne. Zarys systemu*. Warszawa, 1962, 153.

10 Barbara Adamiak, "Dowody i postępowanie wyjaśniające" in Barbara Adamiak, and Janusz Borkowski, *Postępowanie administracyjne i sądowoadministracyjne*. Warszawa, 2007, 207.

11 Adamiak, *Dowody*, 207.

a certain fact on the basis of another fact.[12] It is, among other things, obtaining information from personal sources such as e.g. witnesses.[13]

In connection with the above, it should be noted that from the perspective of the cited Article 75 of the Code of Administrative Procedure, it can be said that both types of evidence (i.e. direct and indirect) may be used in administrative proceedings. Moreover, due to the lack of a different position of the legislator, it should be assumed that direct and indirect evidence are equal.[14] As a consequence, it is solely up to the authority conducting the proceedings to assess their credibility and usefulness for establishing the facts in a specific case. This approach of the legislator seems to be justified. It can be noticed that, despite the specifics of indirect evidence presented above, specific evidence of this type may better serve to establish the facts in a given case. This is, in particular, the case where the indirect evidence confirms or supplements the conclusions drawn from the remaining evidence.

The second premise concerning the recognition of a specific measure of evidence as evidence is negative. It consists in the fact that evidence cannot be a means of evidence that is against the law. It should be noted that the legislator did not specify the violation of which law is meant. Therefore, reference should be made to the principle *lege non distinguente nec nostrum distinguere*. Therefore, it can be concluded that the evidence is not a means of evidence which is inconsistent with any legal provision. In other words, means of evidence inconsistent with the provisions of administrative, civil or criminal law will not be granted the status of evidence.[15] Likewise, a breach of substantive

12 Adamiak, *Dowody*, 207.

13 Adamiak, *Dowody*, 207.

14 Marcin Kopeć, "Glosa do wyroku NSA z dnia 2 grudnia 2008 r., II GSK 384/08", *Przegląd Prawa Publicznego*, no. 2. 2010: 89–96. <https://sip.lex.pl/#/publication/385988122/kopec-marcin-glosa-do-wyroku-nsa-z-dnia-2-grudnia-2008-r-ii-gsk-384–08?cm=URELATIONS>, access: 02.05.2022.

15 Agnieszka Skorupka, "Pojęcie dowodów bezprawnych (nielegalnych, sprzecznych z prawem)" in *Dowody w postępowaniu cywilnym*, ed. Łukasz Błaszczak. Warszawa, 2021. <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zogi3damzygq2dmmq#>, access: 02.05.2022; Piotr Marek Przybysz, *Kodeks postępowania administracyjnego. Komentarz aktualizowany*.

and procedural law will not allow the means of evidence to be considered evidence within the meaning of Article 75 the Code of Administrative Procedure.[16]

In the context of the above, it should be emphasized that the evidence regulations are different under the Code of Civil Procedure[17] and the Code of Criminal Procedure.[18] To be precise, the legislator did not define directly in the Code of Civil Procedure the rules concerning the legality of evidence. According to Article 227 of the Code of Civil Procedure, facts that are relevant to the determination of a case are the subject-matter of evidence. Therefore, "in relation to the 'fruit of the poisoned tree', three positions can be taken on a procedural level:

- restrictive, prohibiting the use of this type of evidence in any case, even if it could significantly contribute to the outcome of the case;
- liberal, with no restrictions on the use of this type of evidence and allowing a judgment to be based on it in each case;
- indirect, allowing a judgment to be made based on unlawful evidence only under certain conditions."[19]

Bearing the above in mind, however, it should be pointed out that currently the majority of doctrine representatives agree with the concept of at least the partial admissibility of unlawful evidence.[20] In the case of criminal proceedings,

LEX/el., 2022. <https://sip.lex.pl/#/commentary/587751140/677368/przybysz-piotr-marek-k-odeks-postepowania-administracyjnego-komentarz-aktualizowany?cm=URELATIONS>, access: 10.05.2022.

16 Andrzej Wróbel, "Komentarz do art. 75" in *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*, eds. Małgorzata Jaśkowska, Martyna Wilbrandt-Gotowicz, and Andrzej Wróbel. LEX/el., 2022. <https://sip.lex.pl/#/commentary/587260174/673629/jaskowska-malgorzata-wilbrandt-gotowicz-martyna-wrobel-andrzej-komentarz-aktualizowany-do-kodeksu...?cm=URELATIONS>, access: 02.05.2022.

17 Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego. Journal of Laws of 2021, item 1805.

18 Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego. Journal of Laws of 2021, item 534.

19 Anna Wilk, "Dowody pozyskane z naruszeniem prawa i zasad współżycia społecznego w orzecznictwie sądów cywilnych", *Monitor Prawniczy*, no. 21. 2018. <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zogi3damrrge4teny>, access: 02.05.2022.

20 Agnieszka Laskowska, "Dowody w postępowaniu cywilnym uzyskane w sposób sprzeczny z prawem", *Państwo i Prawo*, no. 12. 2003: 88–101. <https://sip.lex.pl/#/publica-

it should be noted that "the rule is to take legal evidence, but if the evidence is obtained in violation of the provisions of the procedure or by means of a prohibited act, it cannot be considered inadmissible for the purposes of the proceedings (subject to exceptions indicated *in fine*)."[21] According to Article 168a of the Code of Criminal Procedure, evidence shall not be treated as inadmissible exclusively due to the fact that it was gained in violation of procedural law or by commission of a prohibited act referred to in Article 1 § 1 of the Criminal Code,[22] unless it was gained by a public official in connection with the performance of his duties as a result of manslaughter, willful commission of a grievous bodily injury or deprivation of freedom.

Therefore, it can be stated that any means of evidence disqualified due to its illegality in criminal or civil proceedings may not constitute evidence in administrative proceedings. On the other hand, the admission of a specific evi-

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tion/151036573/laskowska-agnieszka-dowody-w-postepowaniu-cywilnym-uzyskane-w-sposob-sprzeczny-z-prawem?cm=URELATIONS>, access: 10.05.2022; Dariusz Korszeń, "Zakres zakazu przeprowadzania w postępowaniu cywilnym dowodów nielegalnych (bezprawnych)", *Monitor Prawniczy*, no. 1. 2013. <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zoge2tkmbvgi3dsn27onzg6zdupf2dc&refSource=guide#tabs-metrical-info>, access: 10.05.2022; Błażej Gadek, "Bezprawny dowód z korespondencji internetowej stron w postępowaniu cywilnym", *Prawo Mediów Elektronicznych*, no. 3. 2018: 16. <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zogi3damrrg44donc7onzg6zdupf2dg&refSource=guide#tabs-metrical-info>, access: 10.05.2022.

21 Agata Pawlak, and Katarzyna Firaza, " *Polska koncepcja „owoców zatrutego drzewa". Artykuł 168a k.p.k. w kontekście doktryny amerykańskiej*" in *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, eds. Tomasz Grzegorczyk, and Radosław Olszewski. Warszawa, 2017. https://sip.lex.pl/#/monograph/369404606/345330 (access: 10.05.2022). Also Ryszard A. Stefański, "Dowód uzyskany z naruszeniem przepisów postępowania lub za pomocą czynu zabronionego" in *Postępowanie przed sądem I instancji w znowelizowanym procesie karnym*, eds. Dariusz Kala, and Igor Zgoliński. Warszawa, 2018. <https://sip.lex.pl/#/monograph/369430322/347178>, access: 10.05.2022; Sebastian Brzozowski, "Dopuszczalność dowodu w kontekście regulacji art. 168a k.p.k.", *Przegląd Sądowy*, no. 10. 2016: 60–74. <https://sip.lex.pl/#/publication/151295744/brzozowski-sebastian-dopuszczalnosc-dowodu-w-kontekscie-regulacji-art-168-a-k-p-k?cm=URELATIONS>, access: 10.05.2022.

22 Article 1§ 1 ustawy z dnia 6 czerwca 1997 r. – Kodeks karny. Journal of Laws of 2021, item 2345: Only a person who commits an act punishable under the law in force at that time shall incur criminal liability.

dence in a civil or criminal case does not automatically mean that it may be used in administrative proceedings.

As already indicated above, the legislator has not specified what constitutes the unlawfulness of the evidence. Therefore, neither does the Code of Administrative Procedure contain information as to whether the evidence cannot be an illegal means of evidence or whether the evidence cannot be a legal means of evidence that was obtained illegally. In this context, it should be noted that the illegality of the evidence as such may, on the one hand, only concern a limited number of means (e.g. drugs). Hence, the prohibition of evidence included in Article 75 §1 sentence 1 the Code of Administrative Procedure would have a small scope of application. On the other hand, it should be noted that *ex lege* illegal materials may repeatedly constitute the basis for establishing the actual state of affairs, in particular in the cases of those administrative proceedings that concern the imposition of an administrative fine. By way of example, we can mention the administrative procedure the subject of which is to determine the amount of the fine for failure to comply with administrative and legal obligations, where the perpetrator used a forged license during the inspection.

It should be assumed then that *ex lege* illegal materials should not always be disqualified as evidence. The situation seems to be different when it comes to secondary illegal materials. This therefore concerns such evidence that is not illegal in itself, but was obtained unlawfully. For example, it is possible to point to an inspection that was carried out without initiating administrative proceedings or notifying the parties to the proceedings.

Finally, it is worth noting that not every violation of the law may constitute a basis for disqualifying means of evidence as evidence.[23] It can be seen that failure to comply with selected legal regulations does not deprive the authority of its competence to deal with a specific case. This concerns, in particular, violations of the regulations defining the deadline for completing administrative

23 Robert Kędziora, *Kodeks postępowania administracyjnego. Komentarz*. Warszawa, 2017. <https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damjxgu2dgnboobqxalrtheytemjtge2a#tabs-metrical-info>, access: 10.05.2022.

proceedings. On this basis, it could therefore be concluded that evidence inconsistent with the provisions of substantive law is always inadmissible.[24] On the other hand, evidence that is inconsistent with procedural law is admissible provided that the violation of the law did not affect the outcome of the case.[25]

## The Concept of Artificial Intelligence

The origins of the idea of artificial intelligence can already be found in Greek myths.[26] On the other hand, the earliest ideas for building analogues for today's robots are ascribed to the ancient Egyptians.[27] There is no doubt, however, that research on "intelligent robots" did not gain momentum until the 20th century, when Alan Turing wrote the scientific article "Computing Machinery and Intelligence,"[28] in which he proposed an experiment[29] that was later called the Turing test after him.[30] In simple terms, it would consist of a conversation between a tester, a human and one machine. If, on the basis of such a conversation, it would be impossible to determine which of the interlocutors is not a human, it would mean that the machine has passed the test positively. Thus, one might start to wonder whether such a device could be considered a thinking unit.[31]

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24 Kędziora.

25 Kędziora.

26 Pamela McCorduck, *Machines Who Think: A Personal Inquiry into the History and Prospects of Artificial, Intelligence*. Natick, 2004, 23; Also Adrienne Mayor, *Gods and Robots Myths, Machines, and Ancient Dreams of Technology*. Princeton, and Oxford, 2018.

27 Nadia Ambrosetti, *Cultural Roots of Technology: An Interdisciplinary Study of Automated Systems from the Antiquity to the Renaissance*. Dissertation, The University of Milan, 2010: 25–27. <https://air.unimi.it › handle › phd_unimi_R07642>, access: 10.05.2022. Also Nicholas Reeves, "A Rare Mechanical Figure from Ancient Egypt", *Metropolitan Museum Journal* 50. 2015: 43–61.

28 Stephen Muggleton, "Alan Turing and the development of Artificial Intelligence", *AI Communications* 27, no. 1. 2014: 1.

29 Alan M. Turing, "Computing Machinery and Intelligence", *Mind* no. 49. 1950: 433–460.

30 Donald Michie, "Turing's Test and conscious thought", *Artificial Intelligence*, no. 60. 1993: 3.

31 Turing; Also Paweł Łupkowski, *Test Turinga. Perspektywa sędziego*. Poznań, 2020, 15–20.

It should be emphasized that there are currently no legal regulations defining the concept of artificial intelligence. Nevertheless, it should be noted that intensified legislative work is being carried out at the European Union level, where the first legal act is being prepared that is devoted directly to the issue of regulating artificial intelligence. This is the draft regulation establishing harmonized rules on artificial intelligence published by the European Commission on April 21, 2021.[32] Pursuant to Article 3 (3) of this draft, "Artificial Intelligence System" means software developed using one or more of the techniques and approaches listed in Annex I, which can – for a given set of human-defined goals – generate results such as content, predictions, recommendations or decisions affecting the environments with which it interacts. The presented understanding of artificial intelligence fits into the way this concept is defined in the literature. For example, A. Shchitova defines artificial intelligence as "set of programs, procedures, rules and relevant documentation of information processing systems that are capable of independent data processing and analysis and decision making based on the conclusions obtained, aimed at achieving the goal."[33] It should be noted that the cited author proposes that instead of the concept of artificial intelligence, the term "intelligent software" should be used.[34]

The definitions presented above undoubtedly do not allow artificial intelligence to be distinguished from typical computer software. Therefore, it should be pointed out that the way of understanding artificial intelligence is not limited only to indicating technical instruments serving its operation (i.e. software) and their effects (i.e. goals set by humans). It is equally important to indicate the operating mechanisms of individual algorithms. In this context, it should be emphasized that the literature proposes a number of types of divisions of artificial intelligence units precisely due to the way they function, or more precisely

32 COM (2021) 206 final; 2021/0106(COD).

33 Anastasia Shchitova, "Definition of Artificial Intelligence for Legal Regulation, Advances in Economics" in *2nd International Scientific and Practical Conference on Digital Economy* (ISCDE 2020), ed. Anton Nazarovp. Dordrecht, Paris, and Zhengzhou, 2020, 618.

34 Shchitova, 618.

due to the methods of solving the tasks entrusted to them. It should be noted that the most common division is between Artificial Narrow Intelligence,[35] Artificial General Intelligence[36] and Artificial Superintelligence.[37, 38]

Based on this division, it should be noted that the most technically advanced type of artificial intelligence is ASI. ASI means "the level of artificial intelligence that has been reached when a computer has exponentially surpassed the intelligence level of a human by several orders of magnitude".[39] ASI can take a form similar to a human (i.e. a humanoid robot) or a bare computer program. As an aside, it can be noted that ASI was presented in the Terminator series of films in both these forms: as independent robots (the 'terminators')[40] and as an omnipotent computer system (i.e. Skynet).[41]

Moving on to the way of understanding AGI, it should be noted that, as in the case of artificial intelligence itself, so far we cannot speak of a universally accepted definition of this concept.[42] However, based on individual studies, it can be assumed that AGI "also referred to as strong AI or deep AI"[43] is "the intelligence of a machine that could successfully perform any intellectual task that

35 Hereinafter: ANI.

36 Hereinafter: AGI.

37 Hereinafter: ASI.

38 Bartosz Sądel, "Sztuczna Inteligencja – czyli gdzie jesteśmy i dokąd zmierzamy?", *Zeszyty Studenckiego Ruchu Naukowego Uniwersytetu Jana Kochanowskiego w Kielcach* 24. 2015: 153.

39 Jens Pohl, "Artificial Superintelligence: Extinction or Nirvana?" in *Proceedings for Inter-Symp-2015, IIAS, 27th International Conference on Systems Research, Informatics, and Cybernetics, August 3–18, Baden-Baden, Germany*. 2015, 2.

40 More Hossein Hassani, Emmanuel Sirimal Silva, Stephane Unger, Maedeh TajMazinani, Stephen Mac Feely, "Artificial Intelligence (AI) or Intelligence Augmentation (IA): What Is the Future ?", *AI*, no. 1. 2020: 146.

41 Ronald Bailey, "Is Skynet Inevitable? Artificial intelligence and the possibility of human extinction", *Reason*, April. 2014. <https://reason.com/2014/03/31/is-skynet-inevitable>, access: 17.10.2022.

42 Mark R. Waser, "What Is Artificial General Intelligence? Clarifying The Goal For Engineering And Evaluation" in *Proceedings of the 2nd Conference on Artificial General Intelligence*. 2009. <https://www.atlantis-press.com/proceedings/agi09/1832>, access: 17.10.2022.

43 Vijay Kanade, *Narrow AI vs. General AI vs. Super AI: Key Comparisons*. Spiceworks, 25.03.2022. <https://www.spiceworks.com/tech/artificial-intelligence/articles/narrow-general-super-ai-difference/>, access: 17.10.2022.

a human being is capable of," "for example, there would likely be communication in natural language, understanding the context of most situations, as well as performing most of the intellectual tasks that humans are able to perform."[44]

On the basis of the above, it can be said that while AGI is equal to a human, ASI significantly exceeds it. In this context, it should be emphasized that, in accordance with the dominant view at the current level of technical development, it is not possible to speak of fully functioning AGI, and therefore let alone ASI.[45] With this in mind, it is also worth paying attention to the launch of projects such as "DeepMind, OpenCog, and OpenAI,"[46] the aim of which is to create AGI. Despite this, there is a position asserted in the literature that the production of AGI is not possible at all.[47] The logical consequence of this view will therefore be the exclusion of the possibility of creating an ASI. However, the isolated nature of the presented position should be emphasized.

The last type of artificial intelligence is referred to as "narrow AI,"[48] "applied AI"[49] or simply "weak AI."[50] The term "narrow" (weak) comes from the fact that the artificial intelligence units thus defined "operate strictly within the confine

44 Mikhail Batin, Alexey Turchin, Sergey Markov, Alice Zhila, and David Denkenberger, "Artificial Intelligence in Life Extension: from Deep Learning to Superintelligence", *Informatica*, no. 41. 2017: 503.

45 Hein de Haan, *How Some Experts Are Wrong About Artificial Superintelligence A critique of naïve views on our future*. Predict. Where the future is written, 13.10.2021. <https://medium.com/predict/how-some-experts-are-wrong-about-artificial-superintelligence-d45fa40a9d6b>, access: 17.10.2022.

46 Matthew N. O. Sadiku, Olaniyi D. Olaleye, Abayomi Ajayi-Majebi, and Sarhan M. Musa, "Artificial General Intelligence: A Primer", *International Journal of Trend in Research and Development* 7, no. 6. 2020: 7.

47 Pei Wang, and Ben Goertzel, "Introduction: Aspects of Artificial General Intelligence" in *Advances in Artificial General Intelligence: Concepts, Architectures and Algorithms: Proceedings of the AGI Workshop 2006*, ed. Ben Goertzel and Pei Wang. Amsterdam, 2007, 4.

48 Krishna Nand Patel, Sachin Raina, and Saurabh Gupta, "Artificial Intelligence and its Models", *JASC: Journal of Applied Science and Computations* 7, iss. 2. 2020: 95.

49 Ted Goertzel, "The path to more general artificial intelligence", *Journal of Experimental & Theoretical Artificial Intelligence* 26, no. 3. 2014: 343.

50 Bin Liu, *Weak AI" is Likely to Never Become "Strong AI", So What is its Greatest Value for us?*. arXiv:2103.15294. https://arxiv.org/pdf/2103.15294.pdf.

of the scenarios for which they are programmed,"[51] "for example, there's AI that can beat the world chess champion in chess, but that's the only thing it does." [52] It should also be emphasized that ANI "remains important and especially useful for humans on laborious and repetitive tasks, as machines are more efficient and accurate, which in turn shortens the decision cycles of the human."[53] In this connection, the fundamental question may of course arise of how ANI works differently from the "traditional" program that underlies the operation of, for example, a calculator. In order to explain this difference, the ability of an artificial intelligence unit to independently learn ( so-called "machine learning"[54]) should be indicated. Specifying the way of understanding the cited concept, it should be indicated that its purpose is "to develop methods that can automatically detect patterns in data, and then to use the uncovered patterns to predict future data or other outcomes of interest."[55] To illustrate the difference between a "traditional device" and an artificial intelligence unit, one can refer to the aforementioned chess game. An "unintelligent" device will only make moves on the board that are captured in its software. However, for an artificial intelligence unit it will be enough to equip its resources with knowledge about the rules of chess. Already on this basis, the right program will be able to independently decide on the next moves and adapt to the opponent's strategy. An important feature of an artificial intelligence unit is also the fact that, unlike "traditional" programs, "they are, by nature, adaptive to changes in the environment they interact with."[56]

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51 Nicolas Miailhe, and Cyrus Hodes, "The Third Age of Artificial Intelligence", *Field Actions Science Reports. The journal of field actions*, no.17 (Special Issue). 2017: 9.

52 Olga Strelkova, *Three Types of Artificial Intelligence*. 2017. <http://eztuir.ztu.edu.ua/handle/123456789/849>, access: 17.10.2022.

53 Gee-Wah Ng, and Wang Chi Leung, "Strong Artificial Intelligence and Consciousness", *Journal of Artificial Intelligence and Consciousness* 7, no. 1. 2020: 64.

54 Ethem Alpaydin, *Machine Learning*. Massachusetts, 2021.

55 Kevin P. Murphy, *Machine Learning A Probabilistic Perspective*. Massachusetts, 2012, XXVII.

56 Yosri Ghorbel, *Machine learning*. Medium, 31.01.2020. <https://medium.com/@yosrig1997/machine-learning-653ff9123510>, access: 17.10.2022.

## Extracting the Evidence from Artificial Intelligence

The provisions of the Code of Administrative Procedure contain regulations specifying the principles of taking particular types of evidence, such as, inter alia, the inspection or testimony of a witness. This type of evidence is known as named evidence. Alongside this, unnamed evidence can also be distinguished. Based on Article 75 of the Code of Administrative Procedure, it can be said that this concerns everything that has not been regulated in the Code of Administrative Procedure that may contribute to the clarification of the matter, and that is lawful. The key issue in this respect is the use of the word "everything" in the cited provision. As noted in the doctrine, "this provision clearly indicates a very broad approach to evidence: the word «everything» should be understood as the totality of things, the totality of cases, the entire collection (*Słownik języka polskiego*..., vol. III, p. 721)."[57] From this perspective, it can be concluded that, by definition, proof from artificial intelligence will be acceptable. It should be made clear here that, as a rule, the artificial intelligence unit itself will not constitute evidence within the meaning of the Code of Administrative Procedure. However, it should be assumed that exceptions to this rule will be possible, i.e. situations where a given piece of software will be the subject of evidence proceedings. An example may be the proceedings before the President of the Personal Data Protection Office, where the subject of the analysis may be the correctness of personal data processing based on a given algorithm.

As mentioned above, the rule will be a situation where the proof will not be an artificial intelligence unit, but its product, such as, for example, the identification of a vehicle that is illegally occupying a road lane. Therefore, it can be said that in this respect the evidence from artificial intelligence has an analogous character to the previously mentioned named evidence. The subject

57 Grzegorz Łaszczyca, and Czesław Martysz, "Komentarz do art. 75" in *Kodeks postępowania administracyjnego. Komentarz.* Tom I. *Komentarz do art. 1–103*, eds. Andrzej Matan, Grzegorz Łaszczyca, and Czesław Martysz. Warszawa, 2010. <https://sip.lex.pl/#/commentary/587229745/83479/laszczyca-grzegorz-martysz-czeslaw-matan-andrzej-kodeks-postepowania-administracyjnego-komentarz...?cm=URELATIONS>, access: 17.10.2022.

of evidence from the witness is not his or her person, but his or her testimony. Likewise, the party's evidence is its statement.

Supplementing the above, it should be explained how the proof is created from an artificial sequence. Therefore, first of all, it is necessary to indicate what it is made of. Two possibilities can be distinguished in this respect. First of all, it is necessary to point to the data that has been provided to an artificial intelligence unit by a human and at the same time those that it has obtained from the available collections, e.g. from digitized documents that are in the database of a given office. In short, it is a situation where the entirety of the data used by an AI unit comes "outside of it." The second variant is a situation where the artificial intelligence unit relies on data that it "collects on its own," e.g. from the monitoring it supervises. Regardless of the origin of the data, the proof will be the result of their analysis. So this can be compared with the result of the laboratory tests that provide evidence in the case.

When talking about the method of creating evidence from artificial intelligence, one should secondly refer to the previous point of consideration in the section on machine learning. On this basis, it can be said that the evidence from artificial intelligence is distinguished by the fact that it arises as a result of the "independent" processing of data by given devices. In this connection, however, the question may arise of whether a separate method of obtaining specific evidence alone allows for its distinction. It could be argued that intelligent evidence is in fact of the same nature as information obtained with the use of "normal" computer hardware. However, the difference comes down to the level of technical advancement of the devices used to obtain evidence. Such a claim would seem to be justified in cases where the use of artificial intelligence will differ from obtaining other evidence, since with its help obtaining relevant information will be much faster. On the other hand, it cannot be ignored that the fact of establishing the same using various means of evidence (e.g. witness testimony and inspection) does not deprive the latter of the

status of separate evidence within the meaning of the Code of Administrative Procedure.

In connection with the above, it should be emphasized that "ordinary" electronic devices are based only on what is introduced into them by a human. Moreover, such devices can only take such actions that were foreseen by human beings. In other words, their use is simply a human action, which facilitates their work, but at the same time a human being could come to the same conclusions without the given device. For example, you can use a calculator instead of making calculations yourself. However, as was mentioned earlier, in the case of using artificial intelligence units, it is enough to set them a task, and on this basis an "intelligent" device is able to achieve the desired result.

Next, it is necessary to point out the specific difficulties associated with verifying the correctness and truthfulness of the evidence provided by artificial intelligence. In the case of using information obtained by means of "traditional" electronic equipment, it is easy to determine what data was entered into the computer and what activities were performed with it (e.g. making a complex calculation). It is different in the case of the operation of an artificial intelligence unit. In such a case, only the task entrusted to such a device is known, and possibly the output data (i.e. information provided by a human). In the context, however, it is worth mentioning that this output data may be entirely or partially omitted by an artificial intelligence unit. In the same way, a given device can select data unknown to a human for its task. In short, in the case of obtaining evidence from artificial intelligence, the way in which it was developed is not known. In the literature, this issue is referred to as the black box problem.[58] On the other hand, one could of course say that in the case of using "ordinary" devices, the model of their operation is known, but not necessarily the way. The point is that an exemplary employee of a public administration body usually does not know how a computer works in the sense that he does

58 More: Yavar Bathaee, "The Artificial Intelligence Black Box and the Failure of Intent and Causation", *Harvard Journal of Law & Technology* 31, no. 2. 2018: 890–938.

not know how the individual components of such a device are connected and on what principles they perform their tasks. Returning, however, to the issue under analysis, it is worth emphasizing that the mode of operation of "ordinary" devices can be explained by their manufacturers and specialists in the field of technical and engineering. In turn, when it comes to artificial intelligence units, due to the above-mentioned black box, the problem is that it is not known how the device reaches its findings.

In connection with the above, the verification of the correctness of the findings of the artificial intelligence unit should proceed in a different way than in the case of other evidence. For this reason, it may be proposed that the use of artificial intelligence evidence is admissible, as long as the circumstances demonstrated on its basis can be proved in a different way. Otherwise, there will be no certainty as to the correctness of the findings made by an artificial intelligence unit. Therefore, two acceptable process scenarios can be distinguished. In the first place, it is possible to envisage a situation where there is simply other evidence confirming the findings of artificial intelligence. The situation in which obtaining evidence from artificial intelligence becomes the basis for working out a method of obtaining other means of evidence may also be considered admissible. An exception to the above-described prohibition to limit oneself in administrative proceedings only to evidence from artificial intelligence will be a situation in which, on the basis of this evidence, it will be possible to determine the manner in which it determined the actual situation in a given case. In other words, based on the outcome (that is, the circumstances shown by "intelligent" evidence) it will be possible to recreate the "line of thought" of the artificial intelligence.

In the context of the above, it is worth emphasizing that it seems unnecessary to amend the Code of Administrative Procedure. The explanation of the method of resolving an administrative case and the obligation to maintain clarity and the clarity of the actions taken by public administration bodies are already set out in Art. 8, 9 and 11 of the Code of Administrative Procedure.

Finally, it can be noticed that the methods of falsifying the findings of artificial intelligence are generally of a different nature than in the case of other evidence. There are two possibilities in this respect. In the first place, it is possible to indicate a malfunction of a specific device, which is the result of defects in its software. This concerns, in particular, cases of inappropriate selection of data or their improper combination in a cause-and-effect relationship. Incorrect operation of a given artificial intelligence unit may also be the result of inappropriate human behavior, including illegal actions. This concerns, in particular, cases of entering incorrect data into the device as well as interference in the operating mechanism of an artificial intelligence unit, e.g. by introducing a virus into the software.

On the basis of the above, it can first be concluded that the evidence from artificial intelligence is rather open to manipulation. Taking into account the aforementioned difficulty related to the verification of the "way of thinking" of artificial intelligence, it may turn out that verifying the correctness of the "intelligent" evidence may be significantly more difficult. On the other hand, however, it should be pointed out that even the aforementioned named evidence may be manipulated in a way that significantly impedes the detection of its irregularities, e.g. when the testimony of a witness was given as a result of blackmail. It should also be pointed out that on the basis of the previously proposed rules of evidence proceedings with the use of "intelligent" evidence, the aforementioned dangers can be eliminated.

Bearing in mind such a specificity of the operation of artificial intelligence, it can be said, with some simplification, that "intelligent evidence" is the result of the analysis of data possessed by the software. Thus, it is not, as in the case of witness testimonies, a direct description of a specific factual state. Accordingly, in the literature, evidence from artificial intelligence is often classified as hearsay. It also seems that providing "intelligent proof" can be treated as a kind of trial experiment. For example, it can serve to reconstruct the method and scope of contributing to environmental pollution by throwing waste in a place not intended for it.

Supplementing the above, it should be clearly indicated that in the case of artificial intelligence arrangements being used by any participant in the administrative procedure, two process scenarios should be considered. First, it may be a situation where only AI findings are reported (e.g. in the form of a party's statement). In such a case, it should be assumed that there is only "intelligent" evidence in the case. The second trial scenario assumes that the evidence from artificial intelligence appears in the case as a specific element of other evidence. This is, in particular, the case of an expert opinion, which was formulated using the findings of an artificial intelligence unit. As it has already been pointed out, it is impossible to equate "ordinary" and "intelligent" devices, because the latter somehow independently determines the mode of its operation. Consequently, the expert opinion given as an example should contain a recreation of the reasoning of the artificial intelligence unit. The mere comment on its findings will not be verified by the authority conducting the proceedings precisely because of the repeatedly mentioned "machine learning."

The above comments therefore lead to the conclusion that the evidence from artificial intelligence can be distinguished from other means of evidence. Nevertheless, it should be remembered that the status of the evidence depends on the fulfillment of the conditions set out in Art. 75 of the Code of Administrative Procedure, which will be considered in more detail later in the discussion.

## The Prerequisite for Contributing to the Clarification of the Matter

At the outset, it should be recalled that pursuant to Art. 75 § 1 of the Code of Administrative Procedure, only what may contribute to the clarification of the case may be considered evidence. "Therefore, only facts relevant to the resolution of the case can be the subject of evidence."[59] On the other hand, as mentioned

59 Sadowska.

before, it does not matter "what" contributes to the explanation, so it may be the result of artificial intelligence, as long as it has not been illegally obtained.

When it comes to the possibility of contributing to the clarification of the facts, the most important is undoubtedly the fact that proving certain circumstances may only be possible with the use of artificial intelligence. This therefore concerns cases in which the reconstruction of the actual state is impossible due to the limitations of the human mind. It is obvious that "with more and more available digitally recorded data, it becomes obvious that there are treasures of meaningful information buried in data archives that are way too large and too complex for humans to make sense of."[60]

Secondly, as already indicated, the operation of an artificial intelligence unit is much faster than that of humans and "traditional" devices. Therefore, the findings of an artificial intelligence unit may set the direction of the taking of evidence. Thus, the stage of arduous searching for all possible evidence may be skipped, and instead concentrating on that which is actually relevant to the clarification of the case.

Third, unlike other kinds of evidence, the AI unit's findings are essentially objective (impartial).[61] Such devices do not have their own preferences or tendency to ignore facts that are inconvenient for them. To put it simply, the point is that machines are devoid of human feelings. Of course, in this context, it can be indicated that the artificial intelligence unit depends on the preferences of the programmer. On the other hand, the possible negative influence of the programmer may be eliminated by the AI unit itself in the course of its learning, e.g. by analyzing the way of considering similar matters. Moreover, as indicated earlier, it is proposed to exclude the possibility that the evidence from artificial intelligence should be the only means of evidence in the case.

60 Shai Shalev-Shwartz, and Shai Ben-David, *Understanding Machine Learning: From Theory to Algorithms*. New York, 2014, 22.

61 Giampiero Lupo, "Regulating (Artificial) Intelligence in Justice: How Normative Frameworks Protect Citizens from the Risks Related to AI Use in the Judiciary", *European Quarterly of Political Attitudes and Mentalities* 8, no. 2. 2019: 86.

As mentioned at the beginning of the considerations, when it comes to the activities of public administration in the context of evidence, only the Act of August 29, 1997 Tax Ordinance (hereinafter referred to as op)[62] mentions artificial intelligence. It concerns the provisions of Art. 119zn § 2 op on so-called automated data processing. Pursuant to Art. 119zn § 1 of the Act, this action is taken in connection with the analysis of the risk of using the activities of banks and cooperative savings and credit unions. This risk analysis is performed for tax fraud purposes. Attention is drawn to the fact that Art. 119zn § 1 of the Act clearly indicates that in order to carry out the aforementioned risk analysis, it is obligatory not only to use evidence from artificial intelligence (i.e. the result of the abovementioned automated data processing) but also other data (including information and summaries described in detailed provisions of op). It can therefore be said that the legislator, in the wording of Art. 119zn § 1 of the Tax Ordinance Act established a protective mechanism that allows the dangers described in the previous point of considerations to be prevented.

## Inadmissibility of Evidence from Artificial Intelligence

Based on the division into indirect and direct evidence adopted in the doctrine, it is proposed that the evidence from artificial intelligence should be divided in this way as well. Therefore, it can be assumed that the artificial intelligence unit itself will be direct evidence. There are two types of inadmissibility with regard to this type of evidence. First of all, it is necessary to mention a situation where an artificial intelligence unit has been obtained unlawfully. In this context, one can point to, for example, the theft of an artificial intelligence unit and then using it as evidence in the course of administrative proceedings. The second type of illegal direct evidence will be all those cases where an artificial intelligence unit has been illegally constructed. For example, it may be a situation where the creation of a given mechanism did not comply with the rules of patent law.

62 Journal of Laws of 2021, item 1540.

In addition, it should be emphasized that an illegal artificial intelligence unit may be used as evidence in administrative proceedings if its evidentiary significance is related to the fact of its non-compliance with the law. In addition to direct evidence, one can distinguish indirect evidence from artificial intelligence. We are talking here about the effects of its use. First of all, we can mention the forecasts of future events. For example, it may be an environmental assessment where the environmental impact of a planned (future) investment is examined. Another type of indirect evidence from artificial intelligence may be the verification of the facts in terms of meeting the requirements provided for in the law. By way of example, this can be an assessment of the implementation of remediation. The last type of indirect evidence from artificial intelligence could be an attempt to reconstruct the actual state of the past events, e.g. assessing how the soil was contaminated.

Bearing the above in mind, it should be assumed that the illegality of artificial intelligence analyses is of a consequential nature, i.e. resulting either from it or the way it is used. In the first case, it would be a situation where the artificial intelligence unit itself is illegal (e.g. it was stolen). It is obvious then that neither would its use be in accordance with the law. When it comes to the illegal use of artificial intelligence, two more cases can be distinguished in this respect. First of all, it is necessary to point out the situation where an unauthorized entity uses an artificial intelligence unit. For example, this would be the case if an office employee is excluded by law in a given proceeding. Secondly, there are cases where an artificial intelligence unit operates on illegal information. For example, it may be personal data obtained contrary to the provisions of the GDPR.[63]

Summing up the considerations presented above, it should be noted that the described types of illegal evidence from artificial intelligence fall within the formula specified in Article 75 of the Code of Administrative Procedure. Thus, it can be said that the code regulations on evidence are also adequate in the case of

63 Regulation (EU) 2016/679 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 and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, 1–88).

evidence involving artificial intelligence. In addition, it should be remembered that for the purposes of this article, software is considered artificial intelligence. In this context, it should be noted that the way it is programmed is also of great importance to the AI evidence. Two points should be noted. First, a malfunction of the artificial intelligence (e.g. failure to take into account relevant data) can be regarded as tantamount to a breach of the obligation to take complete evidence. In other words, in such a case, it is possible to speak of an infringement of Article 7 and 77 §1 of the Code of Administrative Procedure.[64] Secondly, it should be pointed out that pursuant to Articles 8 §1, 9 and 107 §1 point 6 and §3 of the Code of Administrative Procedure,[65] the authority is obliged not only to properly handle the case, but also to clearly present its course of reasoning, both in the course of administrative proceedings and in the justification of the issued decision. On this basis, it can be assumed that it will be illegal to use artificial intelligence units in a manner that is unclear to the party to the administrative procedure. As indicated above, the obligation to ensure the clarity of decisions results from the provisions of law. On this basis, it should be concluded that it is

64 Article 7 of the Code: In the course of the proceedings public administration authorities shall safeguard the rule of law and undertake, ex officio or upon application, any actions necessary to accurately clarify the facts of a matter and to dispose of the matter, taking into account the public interest and just interest of citizens.
Article 77 §1 of the Code: A public administration authority shall exhaustively collect and evaluate all evidence.

65 Article 8 § 1 of the Code: Public administration authorities shall conduct the proceedings in such a manner as to deepen the trust of its participants in the public authorities, abiding by the principles of proportionality, impartiality and equal treatment.
Article 9 of the Code: Public administration authorities shall duly and fully inform the parties on factual and legal aspects which may influence the establishment of the parties' rights and duties being the object of the proceedings. The authorities shall safeguard the parties and other persons participating in the proceedings, so that neither the parties nor the persons suffer any damage due to their ignorance of law and to this end the authorities shall furnish the parties and persons with necessary explanations and guidelines.
Article 107 §1 point 6 and §3 of the Code: A decision should include factual and legal reasons. Factual reasons of the decision shall in particular include the following: identification of facts which the authority considered to be proven, evidence on which the authority relied and reasons why the authority refused to consider other evidence as credible and refused to rely thereon; the legal reasons shall in particular include an explanation of the legal basis of the decision with citation of the provisions of law.

not necessary to adjust the Code of Administrative Procedure due to the evidence being derived from artificial intelligence.

## Summary

When in 1956 John McCarthy introduced the concept of artificial intelligence into scientific circulation, no one could have expected that half a century later, such devices would not only become an element of the consumer world, but would also be systematically introduced into the justice system. In fact, however, artificial intelligence evidence appears with increasing frequency in administrative proceedings.

The analysis carried out in this text leads to the conclusion that the Code of Administrative Procedure, which is eight years younger than the concept of artificial intelligence, contains sufficiently flexible evidence regulations that it is not necessary to amend this law to cover the use of evidence involving artificial intelligence. In this context, it should also be pointed out that there is no fundamental difference between evidence from artificial intelligence and "classic" evidence. Nevertheless, it must not be forgotten that the use of artificial intelligence is still a novelty in administrative proceedings. Therefore, it becomes necessary to develop standards of reliable information to the parties about the proceedings conducted on the basis of artificial intelligence technology.

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