

FILIP GEBURCZYK*

DIGITIZING THE PUBLIC ADMINISTRATION AND SAFEGUARDING INDIVIDUAL RIGHTS: AUTOMATED DECISION-MAKING AT THE INTERSECTION OF THE GDPR AND POLISH ADMINISTRATIVE PROCEDURE

I. INTRODUCTORY REMARKS

As many routine administrative processes are increasingly susceptible to automation through the use of algorithms, a core aim of both the Polish government¹ and the EU² is to expand the share of public services delivered by digital means. The potential benefits are immense: automated administrative procedures can be used for developing new public services based on the automatic processing of data collected by the authorities and generating innovations that lead to more accessibility (e.g. allowing for 24/7 online access unrestricted by geographical and spatial barriers) and efficiency (time, paper and other resource-friendly measures). Overall, digital initiatives within the EU Single Market may contribute up to €415 billion per year to economic growth.³

Notwithstanding the undeniable benefits, automating administrative proceedings entails significant legal challenges, and automated administrative action is still under-researched. Although important studies have touched upon the legal aspects of delivering public services through digital means,

* Filip Geburczyk, SWPS University,
fgeburczyk@swps.edu.pl, <https://orcid.org/0000-0003-4477-3200>.

¹ Council of Ministers (2019). Resolution No. 109/2019 of September 24, ‘Program Zintegrowanej Informatyzacji Państwa’: 20.

² COM(2016) 179 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU eGovernment Action Plan 2016–2020: 17.

³ COM(2016) 179 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU eGovernment Action Plan 2016–2020: 17.

they have approached this issue mostly through focusing on technical issues such as electronic communications, information management or data safety.⁴ However, existing models of delivering public services are being deeply transformed by technological progress, which changes the relationship between the tasks performed by humans and those performed by algorithms. Given that the expansion of task performance by algorithms particularly encompasses reasoning and decision-making,⁵ it will be crucial to adjust the legal framework for algorithmic (automated) administrative action. In principle, automating administrative proceedings will come down to the ability to produce decisions autonomously, namely by technological means without human involvement. Obviously, however, algorithms can only be considered to 'automate' a specific procedure in the sense that they can run continuously and translate inputs (data) into outcomes, such as administrative decisions. Nevertheless, they must have their parameters and uses specified by humans and be deployed in accordance with the applicable legal framework.⁶

In particular, automated administrative action might jeopardize important due process rights guaranteed by the Code of Administrative Procedure.⁷ Individuals risk being degraded to mere objects of administrative action, as they face a so-called 'black-box problem' (i.e. are unable to assess either the specific rules applicable to their case or the potential outcomes of their application). What is more, the automation of administrative procedures might transfer important duties of conducting the proceedings onto individuals (e.g. providing and assessing the pertinence and credibility of information), while at the same reducing the procedural duty of care obligations of administrative authorities. Finally, the disclosure the actual operations of applied algorithms, used data, and their assessment may become challenging for authorities, unintelligible for individuals, and problematic to review. Automating administrative action in a way that makes use of emergent technologies and simultaneously safeguards individual rights can thus only be achieved if the established procedural frameworks are adjusted to the digital environment.

Existing cases of automated administrative action in Poland are essentially regulated on a casuistic basis. For instance, the decisions of the Polish Social Insurance Institution regarding the valorization of benefits are generated automatically by an algorithmic system, and constitute official confirmations of the calculations made.⁸ Another recent and practical example is the awarding of economic impact funds to entrepreneurs who experienced turnover decreases as a result of the COVID-19 pandemic.⁹ A systematic regulatory

⁴ Sibiga (2019).

⁵ World Economic Forum (2018). *The Future of Jobs Report*. Cologny/Geneva: viii and 3.

⁶ Coglianese, Lehr (2017): 1177.

⁷ Journal of Laws of the Republic of Poland [JL] 2020, item 256 („CAP”).

⁸ Draft Act amending the Act on Pensions from the Social Insurance Fund, No. 935 / VII Term of office, Explanatory memorandum (2012): 2.

⁹ See, e.g. Article 15zzc sec. 1 and Article 15zze³ sec. 3 of the Act on Special Solutions Related to the Prevention, Counteraction and Combating of COVID- 19, other Infectious Diseases and Crisis Situations Caused by Them (JL 2020, item 1842).

approach to automated administrative decision-making is, however, yet to be elaborated. In this regard, an analysis of the GDPR's¹⁰ regulatory framework concerning automated decision-making (ADM) may prove fruitful, given that the GDPR contains a number of provisions that may turn out to be applicable in automated administrative proceedings that directly affect the procedural rights of parties in proceedings before national authorities. In the context of these considerations, it has to be determined to what extent and in which way the GDPR will influence Polish administrative procedures and whether the GDPR-approach to ADM can be generalized to provide a broader framework for delivering public services by administrative authorities.

The analysis will briefly outline the framework that the GDPR provides for cases of administrative ADM (section II) in order to then proceed to examine the influence of that framework on selected elements of administrative due process as guaranteed by the CAP (sections III–VI). Section VII will present the conclusions.

II. THE ROLE OF THE GDPR IN SHAPING AUTOMATED ADMINISTRATIVE PROCEDURES

The GDPR provides a general framework for ADM concerning individuals that is organized around the principles of fairness and transparency. Putting these principles into action is particularly desirable in a public-related context, in order to avoid the unfounded concealment of governmental action and ensure the democratic accountability of executive power.¹¹ Given that the GDPR directly applies to the exercise of official authority vested in data controllers¹² it is necessary, in the first step, to determine the extent to which the GDPR shapes the legal framework of ADM by the administrations of the Member States. Importantly, however, ADM in the meaning of the GDPR does not entail all forms of automated decisions. According to Article 22 GDPR, individuals (so called data subjects) have the right not to be subject to a decision based solely on automated processing, including profiling, but only with regard to decisions which produce legal effects concerning them or affecting them to a similarly significant degree.¹³ The two conditions for the applicability of Article 22 GDPR (the sole basis of automated processing *and* legal or similarly significant effects) must be met jointly.¹⁴

¹⁰ Regulation 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 May 2016 (GDPR).

¹¹ Coglianese, Lehr (2017): 1213.

¹² Article 6(1) e GDPR.

¹³ Article 22(1) GDPR.

¹⁴ Mednis (2019): 176.

The right to not be subject to an automated decision within the meaning of Article 22 GDPR is nevertheless limited and does not apply in three cases, namely if such a decision:

- a. is necessary for entering into, or performance of, a contract between the data subject and a data controller;
- b. is authorized by EU or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or
- c. is based on the data subject's explicit consent.¹⁵

If a particular case of ADM is covered by one of these exceptions, Article 13(2) f, Article 14(2) g and Article 15(1) h GDPR respectively oblige data controllers to inform data subjects about the fact that a decision concerning them may be or has been issued by the application of automated means, especially if those means included profiling. Moreover, data subjects must receive meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subjects. What is more, in the cases of exception a and c mentioned above, the GDPR obliges data controllers to implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, which should include at least the right to obtain human intervention on the part of the controller, to express the data subject's point of view and to contest the decision.¹⁶ In the case of exception b, however, Member States (or the EU) are competent to make use of ADM which produces legal or similarly significant effects, on the condition that they simultaneously provide *suitable* measures to safeguard data subjects' rights and freedoms and legitimate interests.¹⁷

Therefore, while the GDPR defines a minimum standard of safeguards for ADM, based on two of those exceptions (a and c), it does not define such a minimum for the third one (b) it follows, then, that Member States are at liberty to authorize ADM in any context – also the rendering of administrative decisions – provided that the automation of the particular procedure is mandated by law, and that associated safeguards are considered 'suitable' under the GDPR. The conditions of 'suitability' are, however, not specified. Nevertheless, it must be taken into account that the GDPR aims to 'provide natural persons in all Member States with the same level of legally enforceable rights and obligations and responsibilities for controllers and processors',¹⁸ including through 'setting out in detail the rights of data subjects and the obligations of those who process and determine the processing of personal data'.¹⁹ Considering these objectives, it may be argued that the suitability of the safeguards adopted for specific cases of ADM should be tested against the safeguards set out for the exceptions of Article 22(2) a and c GDPR and affirmed if found to be at least equivalent.

¹⁵ Article 22(2) GDPR.

¹⁶ Article 22(3) GDPR.

¹⁷ *Ibid.* (Emphasis added.)

¹⁸ Recital 13 GDPR.

¹⁹ Recital 11 GDPR.

Apart from the obligation to provide data subjects with meaningful information concerning ADM, Article 22(3) GDPR postulates a minimum level of safeguards.²⁰ The regulatory framework for decisions based solely on automated processing (which produces legal effects for or similarly significantly affects the data subject) must include (1) the right of data subjects to be informed about the application of ADM and its logic, significance and consequences, as well as (2) the right to express one's point of view, (3) the right to human intervention, and (4) the right to contest the decision.²¹ The next sections will examine how these obligations relate to traditional due process elements guaranteed by the CAP, such as the duty to give reasons, the duty of care principle, participation rights, and the right to a remedy, and whether they coincide or at least serve a comparable function.

III. THE RIGHT TO BE INFORMED

According to the scholarly literature, a conjunction of Article 13–15 and 22 GDPR allows to infer the right of data subjects to be informed about the application of ADM and its logic, significance and consequences ('right to be informed').²² The particular content of that right, however, remains controversial. The debate in this regard comes down to two central issues: (1) whether the right to be informed entitles data subjects to an *ex post* justification of automated decisions or only to *ex ante* general information that presents the modus operandi of the applied algorithm; and (2) whether it obliges data controllers to give reasons for each particular automated decision or only to present the general functionalities of the applied algorithm.

One widely cited paper argues that the right to be informed should only entail an *ex ante* explanation of the general functionalities of the mechanism behind the ADM, as opposed to a right to explanation of particular automated decisions,²³ and this approach used to be confirmed by the Article 29 Data Protection Working Party (A29WP). According to its 2017 guidelines, the right to be informed provided a 'more general form of oversight', rather than 'a right to an explanation of a particular decision'.²⁴ The revised 2018 guidelines, however, state that 'In *addition* to general information about the processing, [...], the controller has a duty to make available the data used as input [...].'²⁵ Moreover, an alternative approach has proposed that the right to receive in-

²⁰ Martini, Nink (2017): 3.

²¹ Malgieri (2019): 3.

²² Kaminski (2019); Malgieri, Comandé (2017); Selbst, Powles (2017); Edwards, Veale (2017).

²³ Wachter, Mittelstadt, Floridi (2017): 78.

²⁴ Article 29 Data Protection Working Party (2017). Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, 17/EN WP 251: 24.

²⁵ Article 29 Data Protection Working Party (2018). Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, 17/EN WP 251rev.01: 17 (emphasis added).

formation on the logic, significance and consequences of ADM should be interpreted in the context of its purpose to safeguard the rights of data subjects.²⁶ According to this model, the explanation concerning the logic involved should be clear and meaningful to a non-expert. Meeting this threshold should be assessed through a functional analysis in relation to actually enabling data subjects to exercise their rights guaranteed by the GDPR (e.g. the right to contest the automated decision). In the above-mentioned example of awarding economic impact funds to entrepreneurs, the right to be informed might oblige the administration to provide information on the particular data processed and their sources (in other words, the financial situation based on tax returns), the parameters of the applied algorithm and the operations carried out by it.

Both threads of the above considerations can be said to be reflected in two elements of administrative due process included in the Polish CAP. First, its Article 9 establishes the so called ‘duty to provide information’ by obliging administrative authorities to fully inform the parties about factual and legal aspects which may influence their rights and duties being the object of the given proceedings. What is more, authorities must ensure that the parties (and other persons participating in the proceedings) do not suffer damage due to ignorance of the law, and for this purpose provide them with the necessary explanations and instructions.

The duty to provide information is considered a safeguard aimed at protecting individuals against state power during administrative proceedings.²⁷ It translates into several procedural obligations on the part of the authorities, as it applies at every stage of proceedings, and not just at their last stage directly preceding the issuing of a decision.²⁸ Primarily it comes down to ensuring that parties are fully aware of the factual and legal circumstances pertinent to their case which may influence their legal position. Fulfilling this requirement will only be effective if the communication by the authorities is *meaningful* (i.e. understood by the party).²⁹ For instance, should an authority come to the conclusion that satisfying a party’s application requires additional documents application, it should inform the party of such necessity in order to ensure the full protection of his or her rights.³⁰ The authority is also obliged to inform the party about the possibility of proving a given circumstance by means of specific evidence.³¹

However, the duty to provide information does not oblige the administrative authorities to provide legal advice or instruct parties to choose the optimal course of action. The duty of the authorities is to be interpreted broadly,

²⁶ Selbst, Powles (2017): 238.

²⁷ Judgment of the Voivodship Administrative Court [‘VAC’] in Rzeszów, 12 March 2019, II SA/Rz 76/19; all judgments available at the Central Database of Administrative Court Decisions at <www.orzeczenia.nsa.gov.pl>.

²⁸ Judgment of the VAC in Cracow, 11 April 2018, III SA/Kr 107/18.

²⁹ Judgment of the VAC in Warsaw, 11 January 2018, VII SA/Wa 559/17.

³⁰ Judgment of the VAC in Wrocław, 21 March 2017, IV SA/Wr 404/16.

³¹ Wojciechowska (2020).

yet limited to providing the party with the necessary information on the basis of which he or she will be able to make an informed choice and decide on its actions.³²

Second, administrative authorities are obliged to explain to the parties the specific reasons for deciding a specific case.³³ An administrative decision should include, among other things, a statement of facts and the associated legal reasoning behind the decision.³⁴ The statement of facts should in particular present the 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 reasoning, in turn, should in particular include an explanation of the legal basis of the decision and indicate the applied provisions of law³⁵ and their interpretation. The authority should respond to all the arguments raised by the party during the proceedings, and this should be reflected in the reasoning of the decision.³⁶ Most importantly, when considering the arguments submitted by the party, the authority should do this in reference to the applicable law and in its reasons indicate the interpretations of the relevant provisions in order to clarify why a decision was made, and also why a different decision was not made.³⁷

The debates concerning the right to be informed established in the GDPR seem inadequate from the perspective of the Polish CAP as it provides both an *ex ante* duty to inform parties about legal and factual circumstances that may have implications for their case – before rendering a decision – *and* an *ex post* duty to give reasons for each particular decision after it has been issued. If a restrictive approach to the GDPR safeguards for automated decisions were to prevail, the Polish CAP would offer a higher degree of protection. Whether such a situation would remain within the ambit of Article 22(3) b GDPR is yet to be determined.

IV. THE RIGHT TO EXPRESS ONE'S POINT OF VIEW

Another safeguard guaranteed by the GDPR is the right to express one's point of view. This right did not receive much attention in the scholarly literature and the GDPR does not elaborate on its scope. However, some scholars argue that it constitutes a participation mechanism with similar functions to the right to be heard³⁸ or even its equivalent.³⁹

³² Judgment of the Supreme Administrative Court [SAC], 11 February 2019, II GSK 1989/18.

³³ Article 11 CAP.

³⁴ Article 107 § 1 pt 6 CAP.

³⁵ Article 107 § 3 CAP.

³⁶ Judgment of the SAC, 13 February 2019, II OSK 681/17; Judgment of the SAC, 7 June 2016, II GSK 143/15.

³⁷ Judgment of the VAC in Warsaw, 29 January 2019, II SA/Wa 1214/18.

³⁸ Yeung (2019): 26.

³⁹ Kaminski (2019): 198.

In the context of administrative proceedings, the right to be heard has been attributed to two rationales.⁴⁰ On the one hand, the right to be heard allows the parties to actively participate, act independently and make their own choices, and therefore to respect their dignity and self-determination. On the other, enabling parties to participate in administrative proceedings increases the likelihood that a correct outcome will be reached on the merits of the case. Both rationales may be applied to administrative ADM. Considering that ADM comes down to the ability to issue decisions autonomously (i.e. via the application of algorithms and without human involvement) it produces the risk of forcing individuals into roles of passive objects of administrative action. To avoid such risks the GDPR clearly enables data subjects to participate in the decision-making process by exercising the right to express their point of view. What is more, given that ADM is necessarily based on the processing of data, for example observed about or inferred from the profiles of data subjects that have already been created,⁴¹ the probability of legitimate outcomes is increased as controllers may acquire missing data directly provided by data subjects.⁴²

According to the Polish CAP, authorities must ensure the active participation of the parties at every stage of the proceedings. What is more, the parties are entitled to present their position concerning collected evidence and materials prior to the issuing of the decision.⁴³ This obligation is considered to constitute a guarantee of the parties' right to be heard. Within the context of Polish administrative procedures, it encompasses the parties' right to undertake procedural actions affecting the determination of the facts of a case and their legal implications,⁴⁴ in particular the right to actively participate in investigatory proceedings and the gathering and evaluating of evidence. For instance, if an expert witness is heard, the authority conducting the proceedings must notify the parties about the place and time of the hearing and enable them to ask the witness questions and provide explanations. A fact may be considered proven if the party had the opportunity to comment on it, irrespective of the content and weight of the particular piece of evidence.⁴⁵

The main purpose of the right to actively participate in the proceedings and to present the party's position on collected evidence is to allow the party to learn what facts and evidence, the authority will actually take into account when issuing the decision. This produces an opportunity to seek further clarification of the facts of the case or to anticipate its outcome.⁴⁶ Only the knowledge of all the circumstances that will be taken into account by the authority

⁴⁰ Craig (2006): 360361.

⁴¹ Article 29 Data Protection Working Party (2018). Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, 17/EN WP 251rev.01: 8.

⁴² Yeung (2019): 26 and 30.

⁴³ Article 10 § 1 CAP.

⁴⁴ Judgment of the SAC, 14 June 2016, II OSK 2473/14.

⁴⁵ Judgment of the SAC, 26 September 2012, I OSK 1425/12.

⁴⁶ Borkowski, Krawczyk (2020): 184–185.

when issuing the decision is considered to provide parties with a proper guarantee of defending their rights.⁴⁷

Taking into account that the GDPR does not specify the contents of the right to express one's point of view, it is susceptible to varying interpretations. To what extent the conception of the right to be heard elaborated in the Polish case law and doctrine is consistent with the GDPR, whether it should be exercised in a specific form (e.g. oral hearing or via digital interface), and whether it will encompass a right to discovery of data used as input by the administration are only the first examples of issues that will need to be addressed through ongoing dialogues between legislators, courts, and administrative authorities. A rigid standardization of hearings may undermine their goals, but in the discussed example of awarding economic impact funds to entrepreneurs the automation of a hearing might constitute a sufficient form given standardizable case constellations. However, when deciding whether to approve the full automation of other administrative procedures, the legislator should first consider whether the motives in favour of guaranteeing a (classic) hearing are not more important than those for a full automation and whether the latter should thus be rejected.

V. THE RIGHT TO HUMAN INTERVENTION

Based on Article 22(3) GDPR, in the case of ADM data subjects are, among other things, provided with the right to obtain human intervention on the part of the controller. When compared to the right to express one's point of view, the specific scope of the right to obtain human intervention is yet unclear.⁴⁸ However, a consensus in this regard seems to be gradually emerging in the scholarly debate.

According to the literature, its main function is to grant data subjects the possibility to request a new decision which takes into account their perspective (if they have not exercised their right to express their point of view) and/or previously overlooked evidence.⁴⁹ The effective exercise of this right in turn is contingent upon two elements: the intervening person must be (1) legally relevant in the process, and (2) must dispose of an expert understanding of the logic and operation of the involved algorithm. The first requirement will be fulfilled if the intervention is carried out by someone bestowed with the authority to change the decision on the basis of a reconsideration of all the relevant data⁵⁰ including relevant additional information provided by the data subject if the omission of information by the algorithm was unfounded.⁵¹ The

⁴⁷ Judgment of the VAC in Wrocław, 28 July 2016, IV SA/Wr 60/16.

⁴⁸ Mednis (2019): 183.

⁴⁹ Malgieri (2019): 22.

⁵⁰ Article 29 Data Protection Working Party (2018). Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, 17/EN WP 251rev.01: 21.

⁵¹ Gil González, De Hert (2019): 614.

exercise of this authority will nevertheless be relevant only on the condition that it is able to assess the selection and structure of the input data, assess the operation of the applied algorithm, and explain to the data subject how the input data led to the final decision.⁵² This perspective can be seen confirmed by the A29WP, which indicated that to qualify as human involvement any oversight of automated decisions must be performed by someone who has the authority and competence to change the decision, while the entirety of the relevant data should be taken into account as part of the re-examination of the case.⁵³

Given the above, determining the relationship between the right to human intervention and the principles established by the Polish CAP is challenging, as the CAP does not include concepts that could as a whole be considered to form a functional equivalent. However, considering that the main purpose of the right to human intervention is to bring about a second-step decision based on, among other things, correcting biases and considering all the relevant data by a human agent,⁵⁴ it may be concluded that this right at least partly overlaps with the ‘objective truth principle’ established by the CAP. According to this principle, administrative authorities are obliged to undertake, ex officio or upon application, any actions necessary to accurately clarify the facts of a case during administrative proceedings.⁵⁵ To achieve this objective, administrative authorities are also obliged to exhaustively collect and evaluate *all* the evidence pertinent to a given case.⁵⁶ The duty to collect all the evidence concerning a particular case actually entails the gathering of all the facts that are relevant to the case at hand. Those facts are determined by the administrative authority based on the provisions of substantive law applicable to the given case.⁵⁷

Administrative authorities cannot exclude any gathered evidence, but may refuse particular pieces if they doubt their credibility, provided that such doubts are substantiated.⁵⁸ They are responsible for undertaking all the procedural steps necessary for gathering evidence and comprehensively examining it so as to develop a comprehensive overview of the facts of the case in order to apply the law correctly. A failure to incorporate a relevant fact into the decision-making process constitutes a procedural error.⁵⁹

Beyond any doubt both the objective truth principle and the right to human intervention serve the same purpose of adequately establishing and taking into account the totality of the relevant facts of a case. However, while the right to human intervention can be – but does not necessarily need

⁵² Gil González, De Hert (2019): 614; Malgieri (2019): 25.

⁵³ Article 29 Data Protection Working Party (2018). Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, 17/EN WP 251rev.01: 21.

⁵⁴ Malgieri (2019): 22.

⁵⁵ Article 7 CAP.

⁵⁶ Article 77 § 1 CAP (emphasis added).

⁵⁷ Adamiak (2019).

⁵⁸ Judgment of the SAC, 24 January 2017, II OSK 1052/15.

⁵⁹ Judgment of the SAC, 23 October 2019, II OSK 2991/17.

to be – invoked by the party (data subject), the duty of care principle applies to all administrative action as a general principle of Polish administrative law. Then again, the circumstance that the GDPR provides both a right to human intervention and a right to contest automated decisions suggests that data subjects are entitled to exercise the right to human intervention, for example endeavouring a re-evaluation of the employed input data, during ongoing proceedings, before a decision is officially issued. In contrast, the CAP only guarantees the right to an administrative appeal, which may be invoked against a decision that has actually been issued. The Polish legislator may therefore feel compelled to introduce a new form of oversight specifically dedicated to ADM.

VI. THE RIGHT TO CHALLENGE THE DECISION

Article 22(3) GDPR obliges data controllers to safeguard data subjects' rights, freedoms and legitimate interests in the context of ADM, by implementing, among other things, the right to contest such decisions. Although some authors suggested that the broad language of the GDPR does not allow the specific contents of this right to be determined,⁶⁰ others decisively argue that its substance comes down to forcing a controller to make a new decision.⁶¹ In this regard, the right to contest a decision should not be understood as a right to question a particular result but rather as a right to have the entire decision-making process reviewed.⁶² In this context Mario Martini submitted that the right to contest a decision guaranteed in the GDPR should not only be understood as the traditional hierarchical administrative or judicial review, but also include the obligation on the part of the data controller to re-evaluate the input data, their processing and the outcome.⁶³ Consequently, it should not be subject to unreasonably high (formal or substantive) requirements that might produce deterrent effects.⁶⁴

Moreover, much attention was paid to the relationship of the right to contest an automated decision to the overall GDPR-framework designed to safeguard data subjects' rights, in particular the right to be informed. Several authors argue that enabling data subjects to exercise their right to contest a decision is directly dependent on the information or explanation concerning the decision provided by the data controller.⁶⁵ This information, however, should not be limited to a mere disclosure of the source code behind the applied algorithm, as it presumably will turn out to be too complex for most in-

⁶⁰ Politou, Alepis, Patsakis (2019): 322.

⁶¹ Wachter, Mittelstadt, Floridi (2017): 91.

⁶² Mednis (2019): 183.

⁶³ Martini, Nink (2017): 4.

⁶⁴ Martini, Nink (2017): 4.

⁶⁵ Selbst, Powles (2017): 236; Gil González, De Hert (2019): 614.

dividuals to be able to exercise their right to contest the automated decision.⁶⁶ Thus, as mentioned above, the information should be processed to a degree that is meaningful to a non-expert.

Interestingly, the right to an administrative appeal guaranteed by the CAP⁶⁷ seems to address the above considerations quite adequately. At the outset it should be stressed that while the parties of administrative proceedings are entitled to an administrative appeal, this right may be exercised against a decision that completes a case by ruling on its merits or terminates the proceedings in a different way (e.g. by discontinuing them).⁶⁸ The appeal may be lodged both against negative decisions (i.e. not satisfying the request of the party) and positive decisions.⁶⁹ In particular, to lodge an appeal effectively it is sufficient for the party to indicate dissatisfaction with the decision.⁷⁰ The scope of review by the second instance authority is not determined by the arguments the party may have raised in the appeal and the authority carrying out the review will be required not only to re-evaluate the result of the case but to reconsider the entire decision-making process.⁷¹

What is more, if the administrative authority deciding the case in the first instance comes to the conclusion that the demands of the appeal should be allowed, *before handing the appeal over* to the reviewing authority, it may issue a new decision in which it can reverse its initial decision.⁷² Lodging an appeal may therefore move the case to a higher level authority, but only if the decision appealed against is not reversed in the course of re-evaluation by the first-instance authority in the first place.

Finally, the role that has been attributed to the right to be informed in the context of the right to contest an automated decision suggests that, when exercising the right to contest a decision, the GDPR compels data subjects to justify this by submitting specific grounds. On the other hand, in the Polish model of administrative procedure the formal requirements of an appeal are kept as low as possible. The purpose of the appeal proceedings is to allow for a review of the case in accordance with the intention and interests of the party without unnecessary formal requirements.⁷³ Therefore, parties are not obliged to justify their appeal or present specific demands, and an indication of dissatisfaction with the decision appealed against suffices. Deterrent effects are thus unlikely. Overall the right to an administrative appeal as guaranteed by the CAP seems to not only meet the GDPR-standard, but also offers a higher degree of individual rights protection through a more detailed approach. Its particular relationship to the overall scope of the safeguards required by the GDPR is, however, yet to be determined.

⁶⁶ Edwards, Veale (2017): 67.

⁶⁷ Article 127 § 1 CAP.

⁶⁸ Glibowski (2020).

⁶⁹ Judgment of the VAC in Bydgoszcz, 12 December 2017, I SA/Bd 840/17.

⁷⁰ Article 128 CAP.

⁷¹ Judgment of the SAC, 2 December 2011, II OSK 1774/10.

⁷² Article 132 CAP.

⁷³ Judgment of the SAC, 24 February 2016, II OSK 1569/14.

VII. CONCLUSIONS

The GDPR is principally conceptualized as a directly applicable legal instrument aimed at setting out in detail the rights of data subjects and the obligations of data controllers⁷⁴ irrespective of the circumstance of whether this applies to a private or public context.⁷⁵ Given this purpose, not much space is left to national legislators in order to interpretatively align administrative procedures with its terms.⁷⁶ Then again, the GDPR largely leaves open what the minimum guarantees for automated administrative procedures specifically consist of, yet indicates their necessary content and direction by postulating a minimum level of safeguards.⁷⁷ The particularities of this minimum level are, however, still subject to an intense academic debate.

On the one hand the GDPR will modify certain elements of the Polish administrative procedure either by direct application, or sector-specific regulations and amendments of the CAP introduced by the national legislator. For instance, the GDPR guarantees a right to human intervention which may include the possibility of re-evaluating gathered evidence before an administrative decision is actually issued, and thus influencing an outcome without technically constituting an administrative appeal. Such a right is foreign to the CAP and as of the writing of this article it is unknown whether it will ever be introduced as part of a systematic approach to regulating automated administrative decision-making. Nonetheless, its inclusion in a sector-specific regulation seems conceivable. On the other hand, the broad language of Article 22(3) GDPR leaves room to elaborate its specifics based on the practices hitherto elaborated by the Polish authorities and courts. Although this may be undesirable from the perspective of striving for an EU-standard of protection, it can be concluded that mutual influences between the national and EU legal orders will occur.⁷⁸

As new technologies emerge and calls for stronger regulatory measures to ensure adequate oversight over the development, deployment and use of algorithmic tools intensify,⁷⁹ the Polish legislator will be encouraged to introduce, over time, a general regulatory framework for automated administrative decision-making. The debate concerning the safeguards included in the GDPR and their relationship to the particular elements of administrative due process elaborated in the Polish tradition of administrative law will certainly be an important point of reference for possible responses to this challenge.

⁷⁴ Recital 11 GDPR.

⁷⁵ See, e.g. recital 43 GDPR.

⁷⁶ Council of State of the Netherlands, Ad-hoc advice on the effects of digitization on constitutional relationships [Ongevraagd advies over de effecten van de digitalisering voor de rechtsstatelijke verhoudingen], Parliamentary documents II 2017/18, 26643, no. 557 [Kamerstukken II 2017/18, 26643, nr. 557]: 11.

⁷⁷ Martini, Nink (2017): 3.

⁷⁸ Kaminski (2019): 195.

⁷⁹ Declaration Decl(13/02/2019)1 by the Committee of Ministers on the manipulative capabilities of algorithmic processes.

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DIGITIZING THE PUBLIC ADMINISTRATION AND SAFEGUARDING INDIVIDUAL RIGHTS: AUTOMATED DECISION-MAKING AT THE INTERSECTION OF THE GDPR AND POLISH ADMINISTRATIVE PROCEDURE

Summary

Automating administrative decision-making through the use of algorithms integrated into administrative procedures constitutes a major goal of both the Polish government and the EU. Notwithstanding the undeniable benefits of automated administrative decision-making, the tentative development of the law regulating administrative procedures in this regard translates into risks to important elements of administrative due process. Although a systematic regulatory approach to automated administrative decision-making is lacking, an analysis of the provisions of the GDPR concerning profiling algorithms and automated decision-making may prove rewarding, given that they may directly affect the procedural rights of parties in pro-

ceedings before national authorities. On the other hand, the imprecise language of the GDPR makes it susceptible to interpretations deeply embedded in the hitherto elaborated practices of the Polish administrative procedure. The article analyses the intersection between the GDPR and Polish administrative procedure in order to examine the potential for mutual influences between both frameworks.

Keywords: automated decision-making; digitization; GDPR; administrative procedure

