

The right to obtain an explanation of the decision-making procedure in an individual case under Article 86 (1) of the Artificial Intelligence Act – selected problems

Prawo do uzyskania wyjaśnienia
na temat procedury podejmowania decyzji w indywidualnej sprawie
na podstawie art. 86 ust. 1 Aktu o sztucznej inteligencji – wybrane problemy

Право на получение разъяснений, касающихся процедуры
принятия решения по индивидуальному делу на основании статьи 86 (1)
Закона об искусственном интеллекте – избранные вопросы

Право на отримання пояснень щодо процедури прийняття рішення
в індивідуальній справі на підставі статті 86 (1) Акту про штучний інтелект –
окремі питання

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Abstract: The purpose of this paper is to analyse and evaluate the regulation of the right to obtain an explanation of the decision-making procedure in an individual case contained in Article 86 (1) of the Artificial Intelligence Act (AIA). At the outset of the study, Article 22 (1) of the GDPR is also analysed in order to then establish what the interplay between the two provisions is. This will also make it possible to identify the potential risks associated with the exercise of the right established in Article 86 (1) of the AIA. The analysis carried out has allowed for the formulation of final conclusions, which show, inter alia, that the subjective and objective scope of Article 86 (1) of the AIA is broader than Article 22 (1) of the GDPR, the consequences of individual decisions justifying the use of Article 86 (1) of the AIA are so broad that in practice they can apply to almost every partial or complete ADM issued using a high-risk AI system. The paper uses a law-comparative method.

Keywords: AI systems, automated decision, AI Act

Streszczenie: Celem niniejszego opracowania jest analiza i ocena regulacji odnoszących się do prawa do uzyskania wyjaśnień dotyczących procedury podejmowania decyzji w indywidualnej sprawie, zawartych w art. 86 ust. 1 Aktu o sztucznej inteligencji (AIA). Na wstępie przeanalizowano również art. 22 ust. 1 Ogólnego rozporządzenia o ochronie danych osobowych (RODO), aby następnie ustalić, jaka jest wzajemna zależność między tymi dwoma przepisami. Umożliwiło to ponadto zidentyfikowanie potencjalnego ryzyka związanego z korzystaniem z prawa ustanowionego w art. 86 ust. 1 RODO. Przeprowadzona analiza pozwoliła na sformułowanie wniosków końcowych, z których wynika między innymi, że zakres podmiotowy i przedmiotowy art. 86 ust. 1 AIA jest szerszy niż art. 22 ust. 1 RODO, jak również, że konsekwencje poszczególnych decyzji uzasadniających zastosowanie art. 86 ust. 1 AIA są na tyle szerokie, iż w praktyce mogą mieć zastosowanie do decyzji całkowicie lub częściowo zautomatyzowanych, wydanych z wykorzystaniem systemu AI wysokiego ryzyka. W artykule zastosowano metodę prawnoporównawczą.

Słowa kluczowe: systemy AI, decyzje zautomatyzowane, Akt o sztucznej inteligencji

Резюме: Целью настоящего исследования является анализ и оценка положений, касающихся права на получение разъяснений относительно процедуры принятия решений по индивидуальному делу, содержащихся в статье 86 (1) Закона об искусственном интеллекте (AIA). На первом этапе также анализируется статья 22 (1) Общего регламента по защите персональных данных (RODO), чтобы затем установить взаимосвязь между этими двумя положениями. Кроме того, это позволило выявить потенциальные риски, связанные с использованием права, установленного в статье 86 (1) RODO. Проведенный анализ позволил сформулировать окончательные выводы, из которых, в частности, следует, что субъектный и объектный охват статьи 86 (1) AIA шире, чем статьи 22 (1) RODO, а также что последствия отдельных решений, обосновывающих применение статьи 86 (1) AIA, настолько широки, что на практике могут применяться к полностью или частично автоматизированным решениям, принятым с использованием системы ИИ высокого риска. В статье использован правовой сравнительный метод.

Ключевые слова: системы ИИ, автоматизированные решения, Закон об искусственном интеллекте

Анотація: Метою цієї статті є аналіз та оцінка положень, що стосуються права на отримання пояснень щодо процедури прийняття рішення в індивідуальній справі, які містяться в статті 86 (1) Акту про штучний інтелект (AIA). На початку також проаналізовано статтю 22 (1) Загального регламенту про захист персональних даних (RODO), щоб згодом визначити взаємозв'язок між цими двома положеннями. Це також дозволило визначити потенційні ризики, пов'язані з використанням права, встановленого в статті 86 (1) RODO. Проведений аналіз дозволив сформулювати остаточні висновки, з яких, серед іншого, випливає, що суб'єктний та об'єктний обсяг статті 86 (1) AIA є ширшим, ніж обсяг, передбачений статтею 22 (1) RODO, а також що наслідки окремих рішень, які обґрунтовують застосування ст. 86 (1) AIA, є настільки широкими, що на практиці можуть поширюватися на повністю або частково автоматизовані рішення, прийняті з використанням системи ШІ високого ризику. У статті застосовано порівняльно-правовий метод.

Ключові слова: системи ШІ, автоматизовані рішення, Акт про штучний інтелект

Introduction

The purpose of this paper is to analyse and evaluate the regulations on the right to obtain clarification on the decision-making procedure in an individual case as set forth in Article 86 (1) of the Artificial Intelligence Act (AIA).

Artificial intelligence systems (AI systems) can be used in various ways. The result of their operation can be used to make a decision that triggers a “legal effects concerning him or her or similarly significantly affects him or her.”

This can happen in two ways. First, the end result of the AI system's operation can be used to make a human decision (partially automated decision – partially ADM). Second, such a decision can also be made in an automated manner without human involvement, and therefore based solely on the operation of an algorithm (automated decision – ADM). In both cases, the person affected by the decision has the right to obtain an explanation of the procedure for making the decision, and thus also to what extent the AI system contributed to the decision, or what the rules of the AI system were. Article 86 (1) of the AIA includes the right to obtain an explanation of

the decision-making procedure in an individual case. In contrast, Article 22 (1)¹ the GDPR² included the right to obtain information from the controller about automated data processing (ADM), including profiling. As a result, one may wonder what the interplay is between these provisions. In addition, it needs to be determined whether Article 86 (1) of the AIA applies to ADM and partially ADM. The personal scope of Article 86 (1) of the AIA is also analysed, including its relation to Article 22 (1) of the GDPR, the consequences the decision has, and the scope and risks regarding the right to clarification from this provision.

Accordingly, the research intention undertaken in this paper is to discuss and analyse Article 86 (1) of the AIA, to compare its scope with Article 22 (1) of the GDPR, and to identify risks that may hinder the realisation of the right included therein. The paper uses a legal-comparative method.

1. Definitions of the terms AI system, high risk AI system and deployer included in Article 86 of the AIA

The analysis of Article 86 of the AIA should begin with a discussion of the definitions of the legal terms that are included therein, i.e. AI system, high-risk AI system and deployer. This is because it is necessary for further interpretation of the law included therein.

The first of these terms, the AIA system, is defined in Article 3 (1) of the AIA. According to this provision, 'AI system' means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. As J. Rzymowski points out, in this definition, A is a feature of an AI system. It is a feature of a system that is machine-based, so it is a feature of an installed computer program that aims to operate at different levels of autonomy. AI in this definition is characterised by post-implementation adaptation (system learning) and the ability to make inferences that occur for explicit or implicit purposes. Based on input data, the system

¹ See also Article 15 (1) (h) of the GDPR.

² Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence and amending regulations: (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and directives: 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJ L 409, 4.12.2020.

is expected to generate results belonging to one of the groups listed in Article 4 (3) of the AIA.³ In turn, deployer according to article 3 (4) of the AIA “means a natural or legal person, public authority, agency or other body using an AI system under its authority except where the AI system is used in the course of a personal non-professional activity.”

For the purpose of determining the essence and scope of the right under Article 86 (1) of the AIA, it is necessary to focus on the concept of a high-risk AI system, since it is the result of the operation of these systems alone that allows the exercise of the right included therein.

A high-risk AI system, to which explicit reference is made in Article 86 (1) of the AIA, are listed in Annex III, with the exception of systems listed under point 2 thereof. Moreover, an AI system will always be considered to be high-risk where the AI system performs profiling of natural persons (Article 6 (2) (3) of the AIA). Significantly, an AI system referred to in Annex III shall not be considered to be high-risk where it does not pose a significant risk of harm to the health, safety or fundamental rights of natural persons, including by not materially influencing the outcome of decision making (art. 6 (3) of the AIA).

If an AI system does not pose a significant risk of harm to health, safety or fundamental rights, including by not significantly affecting the outcome of the decision-making process, it is not classified as a high-risk AI system. In such a case, Article 86 of the AIA does not apply. The legal definition of risk is included in Article 3 (2) of the AIA as “the combination of the probability of an occurrence of harm and the severity of that harm.” This is the sense in which risk is to be understood under Article 86 (1) of the AIA. However, it can be problematic to determine whether a particular AI system “does not pose a significant risk to the health, safety or fundamental rights of individuals. The provision uses the phrase “significant risk,” so it should be a risk greater than the typical average risk in a given situation. In addition, it must concern health, safety or fundamental rights.

Another problem related to the application of Article 86 of the AIA may be the possibility of changing the list of AI systems classified in Annex III to the AIA as high-risk systems. Such changes may be made by the Commission pursuant to Article 7 (1) of the AIA by adding high-risk AI systems to Annex III or by modifying their use cases once the conditions set forth in that provision are met together. Changes to AI systems of high-risk systems through modifications to Annex III may result in the following difficulties in exercising the right under Article 86 of the AIA, due

³ J. Rzymowski, *Definicja prawnicza sztucznej inteligencji na podstawie rozporządzenia PE i Rady (UE) 2024/1689 w sprawie sztucznej inteligencji*, Przegląd Prawa Publicznego 2024, no. 11, pp. 56–63.

to, for example, the classification of the AI system in question as a high-risk system and the lack of practice related to its application.

2. Personal scope of Article 86 (1) AIA

According to the 86 (1) of the AIA the right to explanation of individual decision-making has “any affected person subject to a decision which is taken by the deployer on the basis of the output from a high-risk AI system.” With the addressee of this provision so defined, clarification is required as to how the phrases should be interpreted “any affected person subject to a decision” and decision “taken by the deployer on the basis of the output from a high-risk AI system.” In the case of the subject of such a decision, the wording above indicates that the right under Article 86 (1) of the AIA is vested in any person (physical and legal) who is the addressee of such a decision. The essence of the decision, on the other hand, is that the basis for the decision is the result (output) of the high-risk AI system. Thus, it is a decision made by the deployer based on the output of the high-risk AI system. One should favour the interpretation of Article 86 (1) of the AIA, according to which it applies to both of the above-mentioned situations. The following arguments support this interpretation of this provision.

First, the provision of Article 86 (1) of the AIA refers to clarifying the role of a high-risk AI system in the decision-making process. The phrase used in this provision, “decision which is taken by the deployer on the basis of the output from a high-risk AI system” indicates that the output from a high-risk AI system is the basis for a partial ADM or ADM. In the case of ADM, reference can be made to Article 22 (1) of the GDPR,⁴ according to which the data subject has the right not to be subject to a decision which is based solely on ADM of personal data, including profiling, and which produces legal effects with respect to the data subject or similarly significantly affects the data subject.⁵ ADM in light of this provision should be distinguished from profiling. First of all, ADM is a decision-making process based solely on automated data processing without human involvement. Profiling, if it

⁴ 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 (General Data Protection Regulation), OJ L 119/1, 4.05.2016.

⁵ See also Article 22 (2) (3) (4) of the GDPR.

precedes such a decision, also does not involve a human being.⁶ Profiling is defined in Article 4 (4) of the GDPR as “any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person’s performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements”. Thus, profiling is a process of collecting personal data in the course of which their characteristics, behavioural patterns are assessed in order to place them in a certain category or group, in particular for the purpose of analysis, prediction concerning, for example, interests. Importantly, under Article 22 (1) of the GDPR, a person will not be subject to ADM if the person has a real influence on the content of the decision made in this process. Such a decision may be suggested by an automated mechanism, but the final choice as to its content should be made by the person.⁷

Second, Article 6 (3) of the AIA clearly indicates that high-risk AI systems listed in Annex III shall not be considered to be high-risk where it does not pose a significant risk of harm to the health, safety or fundamental rights of natural persons, including by not materially influencing the outcome of decision making. Therefore, if an AI system does not materially affect the health, safety, or fundamental rights, it is not a high-risk AI system within the meaning of this provision. Meanwhile, it is clear from the wording of Article 86 (1) of the AIA that the right to clarify the decision-making procedure established therein applies only to high-risk AI systems. As indicated earlier, it may be problematic under Article 6 (3) of the AIA to determine whether a high-risk AI system listed in Annex III to the AIA is, in fact, not one, because “it does not pose a significant risk of harm to the health, safety or fundamental rights of natural persons, including by not materially influencing the outcome of decision making.” This is important because if the system is not a high-risk AI system, a person will not be entitled to Article 86 (1) of the AIA.

⁶ Grupa Robocza Art. 29 ds. Ochrony Danych, Wytyczne dotyczące zautomatyzowanego podejmowania decyzji w indywidualnych przypadkach i profilowania dla celów rozporządzenia 2016/679, 2018, p. 20.

⁷ Cf. M. Ciechomska, *Prawne aspekty profilowania oraz podejmowania zautomatyzowanych decyzji w ogólnym rozporządzeniu o ochronie danych osobowych*, Europejski Przegląd Sądowy 2017, no. 5, p. 40; F. Geburczyk, *Kryteria dopuszczalności decyzji zautomatyzowanych w świetle brzmienia art. 22 ust. 1 RODO*, Przegląd Ustawodawstwa Gospodarczego 2022, no. 5, p. 37.

3. Consequences of individual decisions justifying the use of Article 86 (1) of the AIA

Article 86 (1) of the AIA sets forth the consequences of a deployer's decision based on "the output from a high-risk AI system." Such a decision "produces legal effects or similarly significantly affects that person in a way that they consider to have "an adverse impact on their health, safety or fundamental rights." In analysing the above implications, clarification is needed on how to understand the phrases "legal effects or similarly significantly affects that person" and "to have an adverse impact on their health, safety or fundamental rights." The first phrase used in Article 86 (1) of the AIA is analogous to the definition of the effects of an automated decision in Article 22 (1) of the GDPR, i.e. "legal effects concerning him or her or similarly significantly affects him or her." When applying Article 22 (1) of the GDPR, it is necessary for ADM to have legal effects or other significant impact on a person,⁸ i.e. a situation in which its effect is the creation, modification or termination of a legal relationship, triggering a change in legal or contractual rights or obligations. On the other hand, "other significant impact" on a person in the case of Article 22 (1) of the GDPR in the literature, as a rule, is described quite casuistically. On the other hand, in practice, it can raise difficulties of interpretation due to the fact that it is a vague criterion, and therefore dependent on the context-dependent.⁹

These considerations remain valid also in the case of Article 86 (1) of the AIA, since the consequences of the decision are described therein analogously to those of Article 22 (1) of the GDPR, which means that their definition may raise interpretative difficulties here as well. Some guidance may be provided by the scope of the consequences triggered, that is, their significant impact on health, safety and fundamental rights. Importantly, it will be the person affected by the decision who will decide whether the goods, rights have been violated, as indicated by the use of the phrase "in a way that they consider." Thus, it will be a subjective assessment made by an individual or legal entity (as Article 86 (1) of the AIA uses the phrase, "anyone").

The second phrase under review "an adverse impact on their health, safety or fundamental rights" requires interpretation of each of the terms used in it. Helpful in interpreting these terms may be found in the preamble of the AIA, where they are repeatedly used. Recital 8 of the AIA clearly emphasises the need to implement harmonised AI rules that will, on the one hand, promote the development of AI

⁸ Ibidem, p. 40.

⁹ See F. Geburczyk, *Kryteria...*, p. 38 ff.

in the EU market and, on the other hand, ensure a high level of protection of such public interests “such as health and safety and the protection of fundamental rights [...]”. In order to protect these values, as well as derive the greatest possible benefit from the use of AI systems, entities such as providers, deployers and affected persons with the necessary notions to make informed decisions regarding AI systems should be equipped (Recital 20). An important consideration for classifying an AI system as high risk is the extent to which it has an adverse impact on the fundamental rights protected by the Charter, e.g. protection of personal data, the right to non-discrimination, consumer protection (Recital 48).¹⁰

In the case of the terms health and safety, reference can be made to their lexical meanings. Health in this sense is “the state of a living organism in which all functions are running properly.”¹¹ In Article 86 (1) of the AIA, this premise applies to physical and mental health.¹² While security is a “state of not being threatened.”¹³ For the term “fundamental rights,” refer to the EU Charter of Fundamental Rights,¹⁴ which includes rights relating to dignity, freedom, equality, among others. The Charter, despite its controversies and few drawbacks, has advantages such as, among others, the creation of a mechanism for the protection of fundamental rights within the EU and the guarantee of rights already present in national legal orders.¹⁵ Due to the broad scope of the rights included in the Charter, the right under Article 86 (1) of the AIA will also be able to be exercised broadly, as it will be enjoyed by anyone whose fundamental rights meet the requirements of this provision, if the decision poses a significant risk to the aforementioned fundamental rights.

As indicated at the outset, one may wonder what is the relationship between the right to obtain an explanation under Article 86 (1) of the AIA and the right to information under Article 22 (1) in conjunction with Article 15 (1) (h) of the GDPR. The scopes of the two provisions differ, and consequently, Article 86 (1) of the AIA may supplement the regulation of Article 22 (1) of the GDPR, which in turn should be interpreted in conjunction with Article 15 (1) (h) of the GDPR. According to Article 15 (1) (h), the data subject shall have the right to obtain from

¹⁰ See also Recital 67 and 171 of the AIA.

¹¹ Term “health”, *Słownik języka polskiego PWN*, <https://sjp.pwn.pl/szukaj/rowie%20.html> [access: 10.03.2025].

¹² See Recital 29 of the AIA.

¹³ Term “safety”, *Słownik języka polskiego PWN*, <https://sjp.pwn.pl/sjp/szukaj/bezpiecze%C5%84stwo> [access: 10.03.2025].

¹⁴ Charter of Fundamental Rights of the European Union, OJ C 202/389, 7.06.2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016P/TXT> [access: 10.03.2025].

¹⁵ I. Malczyk, *Znaczenie Karty praw podstawowych Unii Europejskiej dla Polski*, *Kortowski Przegląd Prawniczy* 2012, no. 1, pp. 28–29.

the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information of the existence of automated decision-making, including profiling, referred to in Article 22 (1) and (4) of the GDPR and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject,¹⁶ The information is to be provided “in a concise, transparent, intelligible and easily accessible form, using clear and plain language” (Article 12 (1) of the GDPR), so it cannot, for example, be worded in an abstruse manner or use specialised language. In the case of Article 86 (1) of the AIA, the explanation is to be “clear and meaningful.” The clear explanation requirement can also refer to the use of clear language.

The material scope of the two provisions is also different. Article 22 (1) of the GDPR will not apply to ADM in two situations. First, when personal data are not processed, even if they lead to legal effects or have a similar effect (e.g. anonymous GPS data), or the decision is partially automated. Second, when “the decision does not lead to legal effects or does not have a similar significant effect, such as when an algorithm, based on an IP address, automatically decides on the language in which a particular user will be displayed on a web portal page.”¹⁷ In the former case, you will be able to exercise your right under Article 86 (1) of the AIA to receive clarification on the role of the high-risk AI system at various stages of decision-making.¹⁸ These will be situations where the decision will be partially automated, or personal data will not be processed, but the decision will have a legal effect or other significant impact. This may therefore be the basis for obtaining a clarification to the deployer regarding the role of the high-risk AI system in the decision. Article 86 (1) of the AIA is therefore complementary to Article 22 (1) of the GDPR. In particular, Article 86 (1) of the AIA (as opposed to Article 22 (1) of the GDPR), explicitly establishes the right to obtain clarification, and this also applies to partial ADM.

A comparison of the scopes of Article 86 (1) of the AIA and Article 22 of the GDPR leads to the following conclusions.

¹⁶ K. Kelder, *On the Relative Importance of the AI Act Right to Explanation*, 2024, <https://digi-con.org/on-the-relative-importance-of-the-ai-act-right-to-explanation/> [access: 10.03.2025]; judgement of the Court of Justice of 7 December 2023, C-634/21, LEX no. 3634999, par. 56; see also M. Kupiec, *Nowe spojrzenie na zautomatyzowane podejmowanie decyzji w rozumieniu art. 22 RODO – glosa do wyroku Trybunału Sprawiedliwości z 7.12.2023 r., C-634/21*, Europejski Przegląd Sądowy 2024, no. 3, pp. 33–39.

¹⁷ M. Czerniawski, in: *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, eds. E. Bielak-Jomaa, D. Lubasz, 2018 [LEX database], Article 22.

¹⁸ K. Kelder, *On the Relative Importance...*, passim.

First, Article 86 (1) of the AIA has a broader scope of subject matter than Article 22 (1) of the GDPR, as it applies to both natural and legal persons.

Second, the entities that are required to implement the law are different. In Article 86 (1) of the AIA it is the deployer, while in Article 22 (1) (3) of the GDPR it is the controller.

Third, the subject matter scope of the two provisions is different. The scope is broader in the case of Article 86 (1) of the AIA, as it can be an automated decision and a partially automated decision, while in Article 22 (1) of the GDPR it is only an automated decision. Article 86 (1) of the AIA covers both situations when personal data are processed and when they are not processed (including when such decisions lead to legal consequences or have a similar effect). In addition, a decision under Article 86 (1) of the AIA has “an adverse impact on their health, safety or fundamental rights,” and the provision applies only to high-risk AI systems.

Fourth, the scope of the right and its form in the two provisions are different. In Article 86 (1) of the AIA, the recipient is to receive “explanations of the role of the AI system in the decision-making procedure and the main elements of the decision taken” communicated in a clear and meaningful form. In contrast, in Article 22 (1) in conjunction with Article 15 (1) (h) in conjunction with Article 12 (1) of the GDPR, the clarification is supposed to be about “at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision” and is to be “in a concise, transparent, intelligible and easily accessible form, using clear and plain language.”

4. Scope and risks of the right of explanation under Article 86 (1) of the AIA

Article 86 (1) of the AIA stipulates that any person affected by a decision and based on the result (output) of a high-risk AI system has the right to obtain from the deployer: clear and meaningful explanations of the role of the AI system in the decision-making procedure and the main elements of the decision taken. Guidance on the interpretation of this provision is provided by the content of Recital 171 of the AIA, which explicitly emphasises the right to affected persons to obtain the explanation which “should be clear and meaningful and should provide a basis on which the affected persons are able to exercise their rights.” Explanations of the role of the AI system in the decision-making process provided by the deployer should therefore be clear and meaningful. Depending on the role of the high-risk AI system in the decision, i.e. an ADM or partial ADM, there may be different difficulties in

meeting this criterion, depending on the degree of the algorithm's involvement in the final decision. According to Article 86 (1) of the AIA, the requirement to provide an explanation of the role of the AI system that is clear and meaningful must be met in both of these cases. Reference should also be made to Article 14 of the AIA, which sets forth the principles of human oversight so that high-risk AI systems are designed and supervised during their use, that they will be effectively overseen by natural persons.¹⁹ Among the risks for the addressees of decisions that may hinder the exercise of the right under Article 86 (1) of the AIA are examples formulated in the literature.

First, the black box problem, which makes it impossible to clearly indicate the rationale that the AI system took into account in issuing a particular decision.²⁰ This can lead to algorithmic discrimination, which can manifest itself in many ways. It can be based on *biased* agents (e.g. historical data),²¹ feature selection, discrimination through proxy variables and masked attributes,²² discrimination in targeted advertising and pricing, disparate impact discrimination.²³

Second, the risk of automation *bias*, which is supposed to be countered by, among other things, the way in which a high-risk AI system is made available to an entity using in such a way that natural persons to whom human oversight is assigned are enabled, as appropriate and proportionate “to remain aware of the possible tendency of automatically relying or over-relying on the output produced by a high-risk AI system (automation *bias*), in particular for high-risk AI systems used to provide information or recommendations for decisions to be taken by natural persons” (Article 14 (4) (b) of the AIA).

¹⁹ See e.g. Article 14 (5) of the AIA.

²⁰ See F. Zuiderveen Borgesius, *Discrimination, Artificial Intelligence and Algorithmic Decision-Making*, Council of Europe, Strasbourg 2018, p. 15.

²¹ See also I. Ajunwa, *The Paradox of Automation as Anti-Bias Intervention*, *Cardozo Law Review* 2020, vol. 41, pp. 1671–1742; D.K. Citron, F. Pasquale, *The Scored Society: Due Process for Automated Predictions*, *Washington Law Review* 2014, vol. 89, pp. 1–33.

²² See also T.B. Gillis, J. L. Spiess, *Big Data and Discrimination*, *University of Chicago Law Review* 2019, vol. 86, pp. 459–488.

²³ X. Wang, Y. Cheng Wu, X. Ji, H. Fu, *Algorithmic Discrimination: Examining Its Types and Regulatory Measures with Emphasis on US Legal Practices*, *Frontiers of Artificial Intelligence* 2024, vol. 7, pp. 3–5; see also S. Barocas, A.D. Selbst, *Big Data's Disparate Impact*, *California Law Review* 2016, vol. 104, pp. 671–732; F. Zuiderveen Borgesius, *Discrimination, Artificial Intelligence and Algorithmic Decision-Making*, Strasbourg 2018, passim; K. Crawford, J. Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, *Boston College Law Review* 2014, vol. 55, pp. 93–128; K. Ciosk, *Model systemowego przeciwdziałania dyskryminacji algorytmicznej – uwagi na tle projektu Aktu w sprawie sztucznej inteligencji*, *Roczniki Administracji i Prawa* 2022, no. 2, pp. 317–332.

Third, the risk of violating the right to privacy with, for example, by violating the principles of personal data processing at various stages of the algorithm (Article 5 (1) (a) of the GDPR), such as the principle of fairness and transparency, further processing and purpose limitation, minimisation, regularity, storage limitation (Article 5 (1) (a–e) of the GDPR).²⁴

The explanation set forth in Article 86 (1) of the AIA is also intended to cover “the main elements of the decision.” It may be helpful to determine which elements of the decision are relevant under Article 86 (1) of the AIA to determine the elements that an administrative decision should contain. Among the elements of the decision listed in Article 107 (1) of the Code of Administrative Procedure²⁵ in this context, mention the citation of the legal basis, the decision, the factual and legal reasons,²⁶ which can be considered main elements of Article 86 (1) of the AIA. The citation of the legal basis is important because it can indicate whether there is a legal basis for the decision at all, which is linked to the performance of the high-risk AI system in the sense of this provision. By way of example, one can point to the law of receiving appropriate explanations regarding the basis of the decision taken (concerning the assessment of creditworthiness) pursuant to Article 105a paragraph 1a of the Act of 29 August 1997 – Banking Law.²⁷ This is, therefore, a right similar in its essence to the right under Article 86 (1) AIA, as it aims to explain the basis of an automated decision. The decision is important due to the precise definition of the role of the high-risk AI system in its adoption. On the other hand, the elements of justification for such a decision may be similar to those specified in Article 107 § 3 of the Code of Administrative Procedure (legal and factual justification). Providing an explanation under Article 86 (1) of the AIA may be problematic if the entity issuing the decision uses the result of the operation of another entity’s AI systems (e.g. when assessing creditworthiness). In this situation, the final decision-maker may have difficulty providing the most important elements of the decision, if, for example, he or she did not have access to the methodology of the algorithm used by another entity.

²⁴ Cf. Grupa Robocza Art. 29 ds. Ochrony Danych, Wytyczne dotyczące zautomatyzowanego podejmowania decyzji..., pp. 8–12.

²⁵ Ustawa z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego, consolidated text: Journal of Laws [Dziennik Ustaw] 2024 item 572 as amended.

²⁶ The legal and factual justification should, in particular, include an indication of the facts which the authority considered proven, the evidence on which it relied, and the reasons why it rejected other evidence as unreliable and lacking in probative value, while the legal justification should explain the legal basis for the decision, citing the relevant legal provisions, Article 107 § 3 of the Code of Administrative Procedure. Specific provisions may also specify other elements that the decision should contain, Article 107 § 2 of the Code of Administrative Procedure.

²⁷ Journal of Laws 2024 item 1646 as amended.

This is important because if such a result of the AI system's operation has a decisive influence on the final decision, it will be possible to exercise the right to Article 86 (1) of the AIA. Such a conclusion can be drawn in the context of the judgement of the Court of Justice (CJEU) of 7 December 2023 C-634/2,²⁸ which concerns Article 22 (1) of the GDPR, but concerns ADM, which has the same effects (i.e. "legal effects concerning him or her or similarly significantly affects him or her"). In such a case, in order to attribute a "decision" within the meaning of Article 22 (1) of the GDPR, but also Article 86 (1) of the AIA to a result resulting from an ADM that was made by an entity other than the final decision-maker, it is necessary to have a clear impact of such an operation on the final decision determining the legal or factual situation of a natural person.²⁹

Final conclusions

The analysis of Article 86 (1) of the AIA leads to the following conclusions.

First, the subjective and objective scope of Article 86 (1) of the AIA is broader than Article 22 (1) of the GDPR. Article 86 (1) of the AIA applies to both natural and legal persons, to ADD and partial ADM, as well as to situations where personal data are processed and when they are not processed (also when such decisions lead to legal effects or have a similar effect). Additionally, a decision under Article 86 (1) of the AIA has "an adverse impact on their health, safety or fundamental rights" and this provision applies only to high-risk AI systems. The scope of the law and its form are also different in both provisions.

Second, meeting the requirement specified in Article 86 AIA that the explanation provided by the deployer be clear and meaningful and concern "the role of the AI system in the decision-making procedure and the main elements of the decision taken" may be difficult. Depending on the role of the high-risk AI system in making the decision, i.e. ADM or partial ADM, there may be various difficulties related to meeting this criterion. Among the risks for the addressees of the decision that may hinder the implementation of the right under Article 86 (1) of the AIA, this may include, among others, the black box problem, which prevents a clear indication of the premises that the AI system took into account when issuing a specific decision,

²⁸ LEX no. 3634999.

²⁹ See the judgement of the Court of Justice (CJEU) of 7 December 2023, C-634/21; M. Kupiec, *Nowe spojrzenie...*, pp. 33–39.

which may lead to algorithmic discrimination. Another risk may be the risk of automation *bias*, which the AIA tries to eliminate (Article 14 (4) (b) of the AIA), or the risk of violating the right to privacy, e.g. by violating the principles of personal data processing at various stages of the application of the algorithm (Article 5 (1) (a) of the GDPR).

Thirdly, in practice, it may be difficult to include in the explanation “the main elements of the decision,” especially if the entity issuing the decision will use the result of the operation of another entity’s AI systems and may have difficulty providing the most important elements of the decision because it does not know the methodology of the algorithm. The explanation may also be difficult due to the ignorance of the premises that the AI system took into account when issuing it (the so-called black box problem).

Fourth, the consequences of individual decisions justifying the use of Article 86 (1) of the AIA are so broad that in practice they can apply to almost every partial or complete ADM issued using a high-risk AI system. It is enough that such a decision: 1) “produces legal effects or similarly significantly affects that person” – and, therefore, will have consequences for a natural or legal person in the form of, among others, establishing or terminating a legal relationship, 2) “in a way that they consider to have an adverse impact on their health, safety or fundamental rights” – this impact will be adverse on their physical or mental health, broadly understood security and fundamental rights (the catalogue of which is quite extensive). Such a broad definition of the right from Article 86 (1) of the AIA can, however, be considered its advantage, because it will guarantee a wide spectrum of protection against the effects of using AI systems to issue decisions.

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