

# **PROFILING THE UNEMPLOYED IN POLAND:**

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## **SOCIAL AND POLITICAL IMPLICATIONS OF ALGORITHMIC DECISION MAKING**



**FUNDACJA  
PANOPTYKON**

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## TABLE OF CONTENTS

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Introduction.....	5
1. The reasons for the introduction of profiling in labor offices .....	7
a. Economic crisis and public finances.....	7
b. Profiling as “modernizing” .....	7
c. Work efficiency and quality of assistance .....	8
2. Political debate on profiling.....	8
a. Inspector General for Personal Data Protection (IGPDP) .....	9
b. Social organizations .....	9
c. Members of Parliament .....	9
d. The Ombudsman .....	10
3. The profiling process: legal framework and practice .....	10
a. Basic information .....	10
b. Scope of collected data .....	11
c. Manner of determining the profile .....	12
d. Categorization and access to services.....	13
e. Lack of transparency.....	16
f. Change of the profile.....	17
4. Profiling of the unemployed vs. human rights.....	18
a. Right to Privacy .....	18
i. General standard of protection .....	18
ii. Rights of data subjects .....	19
b. Principle of equal treatment and non-discrimination .....	20
i. General standard of protection .....	20
ii. Rights of an individual .....	21
c. Social human rights .....	22
d. Right to an effective redress measure and good administration .....	22
5. The practice of profiling .....	23
a. Insufficient resources.....	23
b. Difficult access of people considered “distant from the labor market” to ALMP ...	25
c. Illusory standardization of profiling interviews.....	27
d. Exceptions from automated decision-making: rare changes of profiles and re- profiling .....	28
e. Asymmetry of power: position of the unemployed in the profiling process.....	30
6. Key problems related to algorithmic decision-making and recommendations.....	33
a. Key problems.....	33
i. Non-transparent rules of distributing public services .....	33
ii. Shortcomings of computer systems as a trigger for arbitrary decisions .....	34
iii. Gap between declared goals and practice.....	35
iv. System based on the “presumption of guilt” .....	35
v. Categorization as a source of social stigma.....	36

vi.	Risk of discrimination .....	37
b.	Recommendations .....	37
i.	Legal, procedural and practical safeguards ensuring full transparency .....	37
ii.	Evidence-based policy making at the stage of the legislative process and evaluation of the real impact of public policy in the context of its original goals .....	38
iii.	Reasoned decisions made by humans instead of “blind” algorithms .....	38
iv.	Additional, specific safeguards preventing risks related to algorithmic decision-making .....	38
v.	Additional legal safeguards preventing the risk of discrimination in the public policy .....	39
	Bibliography .....	40
	Books, journal articles, reports, newspaper articles.....	40
	Ministry of Labor and Social Policy documents.....	41
	Other documents.....	41
	Parliamentary interpellation: .....	42
	Legal acts and court cases: .....	43
	Annex 1: The questionnaire .....	44
	Annex 2: A note on methodology.....	48

## **List of abbreviations:**

MLSP – Ministry of Labor and Social Policy

ALMP – Active labor market programs

IGPDP – Inspector General for Personal Data Protection

PUP – local labor office, *powiatowy urząd pracy*

## INTRODUCTION

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In May 2014 the Polish Ministry of Labor and Social Policy (MLSP), which is responsible for shaping the policy in the area of employment and combating unemployment, introduced a system based on data collection and profiling. Profiling involves dividing all unemployed into 3 categories, taking into account their individual characteristics. Assignment to a given category determines the type of labor market programs that a particular person can receive from the local labor offices (e.g. job placement, vocational training, apprenticeship, activation allowance). This categorization is based on data collected during a computer-based interview with the unemployed. 24 different dimensions are reported in the electronic database and each of them is assigned with a score. The final score—and the category to which a given unemployed should be assigned—is determined by the algorithm. At the same time the logic behind the profiling and the algorithm itself are treated as confidential information. As a result, the unemployed does not know how certain individual features or life circumstances affect his/her chance of being assigned to a given category.

The profiling program run by the PES involves the processing of data of about c.a. 1.5 million citizens who are registered as unemployed. This number amounts to a significant part of the Polish population. The program is operated by a network of 341 local labor offices. All of them use the same IT system and are subjected to the same legal framework which were developed by the MLSP. On the other hand, there are significant differences in local practices and the way the profiling program has been implemented across the country. This is due to unclear legal provisions combined with significant differences among local labor offices in terms of staff, available resources and organizational culture.

Official justification behind introducing the new system of distributing labor market programs for the unemployed was to rationalize expenditure on labor market services and improve their quality by adapting these services to individual needs of the unemployed. However, the actual impact of the reform turned out to be much more ambiguous and problematic. While, due to the aforementioned differences in implementation, it seems difficult to assess the overall impact of the reform, certain common problems—including lack of clarity of the legal framework and insufficient fundamental rights safeguards—can be identified.

In this case study we will try to assess how distribution of labor market programs based on profiling affects various categories of the unemployed and whether it may have a negative impact on their fundamental rights. In addition, we will identify social and legal risks related to the use of big data and algorithmic decision-making by the state while shaping its social policy in other areas. Since the Polish government presented this system as a model example of rational allocation of public resources, it should not be seen as an isolated experiment, but rather a stepping stone into greater use of data and algorithmic decision-making in public policy.

We hope that this analysis will contribute to a broader debate about various approaches to managing scarce resources—such as labor market programs—by modern, democratic states. With the arrival of big data, which enables sophisticated statistical analysis and encourages prediction, new dilemmas emerge. Should the state be allowed to correlate data it has on each individual with observations drawn from big data analytics in order to shape its public policies? If so, what safeguards should be provided in order to ensure transparency and fairness of this process? To what extent decisions taken by public officials can be determined or influenced by operations performed by computers? How can fundamental rights, including positive obligations of the state towards its citizens, be reconciled with efficiency-based approach to managing public

resources? Will this trend, in the longer run, inevitably lead to new forms of discrimination and social exclusion?

Danielle Citron and Frank Pasquale have summarized these concerns in the following words: “Automated systems are claimed to rate all individuals in the same way, thus averting discrimination. But this account is misleading. Because human beings program predictive algorithms, their biases and values are embedded into the software’s instructions, known as the source code and predictive algorithms. (...) We should also ask ourselves, as a society, whether this method of judging and categorizing people—via a secretive, panoptic sort—is appropriate” (Citron & Pasquale, 2014: 4).

In our case study we will focus on the following issues related to the use of big data and algorithmic decision-making by the state:

- 1)** transparency of the data collection, profiling and the decision-making process;
- 2)** availability of legal safeguards for those subjected to profiling (in particular the right to human intervention);
- 3)** the logic behind the algorithm and its impact on how labor market programs are distributed in practice;
- 4)** clarity and sufficiency of the legal framework (i.e. whether all issues that might have impact on the rights of the unemployed are regulated by the act of law);
- 5)** discriminatory potential related to the way this system has been designed and implemented.

This case study has been divided into 6 chapters. In the first chapter we analyze official justification behind introducing the new system of distributing labor market programs for the unemployed in Poland. In the second chapter we look at arguments and statements used by various actors who took part in the political and public debate, including the Inspector General for Personal Data Protection (IGPDP), the Ombudsman, Members of the Parliament, trade unions and civil society organizations. In the third chapter we analyze the regulatory framework for profiling of assistance, which is based both on binding legislation and guidelines developed by the MLSP. Chapter fourth deals with human rights concerns related to the existing regulatory framework. Chapter fifth describes the practice of profiling as seen by the unemployed and frontline staff working in labor offices, including their problems, concerns and coping strategies. The last chapter builds on the problems identified in two previous chapters and summarizes key risks and systemic issues related to the profiling of the unemployed, as implemented in Poland, as well as the use of algorithmic decision-making in public policy in general. It also contains a list of recommendations on how these problems could be solved.



# 1. THE REASONS FOR THE INTRODUCTION OF PROFILING IN LABOR OFFICES

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The Ministry of Labor and Social Policy (MLSP) in 2012 began working on the reform of the functioning of labor offices (*powiatowe urzędy pracy*, PUP). The very reform entered into force in May 2014. One of its significant elements was to implement profiling of assistance for the unemployed in the form of active labor market programs. Apart from that solution there have been implemented i.e. new methods of monitoring the labor market, institutional changes in the employment policy and new forms of assistance<sup>1</sup> for the unemployed. The MLSP specified that the main reasons for the introduction of profiling was to counteract unemployment more effectively, increase the efficiency of labor offices and guarantee public services of a higher quality. Also, profiling was to be an innovative tool which would contribute to the modernization of public offices, as well as make it possible to adjust their standards of operation to those functioning in countries more developed economically.

## a. Economic crisis and public finances

According to the official justification, the reform of labor offices was primarily meant to minimize the negative effects of the economic slowdown and the world financial crisis. The deteriorating economic situation has directly affected the situation of the labor market in Poland—the level of employment decreased and the demand for active labor market programs (ALMP) of support by the state for the unemployed increased. Additionally, the reform was meant to minimize the structural problems of the unemployment in Poland, i.e. among others, low professional and territorial mobility; high risk of leaving the labor market in the case of women who decide to start a family; remaining without work for a long time (MLSP, 2013: 1-2).

In the opinion of the labor ministry such a situation required i.e. that new forms and principles of distributing public resources are introduced. Profiling was to safeguard a more efficient management of the budget allocated for the policy of the labor market. The MLSP announced that along with the new categorization a principle will be introduced according to which more funds are to be allocated for those who are particularly distant from the labor market, and less for those who are able to handle finding a job easier (MLSP, 2013: 86).

## b. Profiling as “modernizing”

Profiling was presented by the MLSP as a modern method, in line with the global trends. The institution referred to the positive examples from OECD countries, such as Australia, Germany, Great Britain or Finland. According to the labor ministry, profiling is also recommended by the European Employment Strategy (MLSP, 2013: 86). Moreover, in the official documents it has been underlined that the applied form of profiling of the unemployed is based on scientific methods—a combination of an individual “examination” of a person and econometric elements (Minutes of the session of the Social Policy and Family Committee 2014). Profiling has also been incorporated into the general project of informatization of the state. In this context, profiling was

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<sup>1</sup> In this report we use terms “assistance”, “support” and “active labor market programs (ALMP)” interchangeably.



referred to as an “innovative” way of using the data collected so far and analyzing the life situation of Polish citizens (MLSP, 2014b).

### **c. Work efficiency and quality of assistance**

The MLSP asserted that profiling will ensure a higher quality of service at employment offices and guarantee higher transparency in accessing the services offered by them (MLSP, 2013: 82). New solutions were to increase the efficiency and ensure the effectiveness of functioning of the offices themselves and, in consequence, a better planning and work organization. It was also of significant importance to standardize the principles of granting specific forms of support for the unemployed (Justification of the draft bill 2014: 84). Profiling was to guarantee that specific forms of ALMP will be adjusted to the life situation of the unemployed (determined on a central level). In that context, the labor ministry introduced the key notion of “individualization” (e.g. Topolska, 2014a; Response to a parliamentary interpellation, 2014a), despite the fact that in practice profiling was based on assigning particular persons to very wide categories. According to the MLSP, profiling was, however, meant to enable a labor office to pose a better diagnosis of problems of the unemployed and adjust the offered active labor market program to the situation of a specific person (MLSP, 2013: 84).

The MLSP has also underlined that profiling is meant to lead to a unification and standardization of services offered by various labor offices. In an official message it has been underlined that labor offices had done a form of “profiling” of the unemployed earlier (Response to a parliamentary interpellation, 2014b). However, it had not been structured and it relied on the experience and good intent of particular frontline labor office workers<sup>2</sup>. Therefore, it could have been the case that the standard or principles of assigning specific active labor market programs to the unemployed varied in different offices. What is important, the provisions which were in force earlier also provided for the category of “special” unemployed who require additional support, e.g. persons before the age of 30 or persons unemployed for a long time. However, in practice the criteria of allocation to the group of those in need of a special assistance were flexible to that extent that even as much as 90% of the unemployed were included in that category. These observations, according to the MLSP, testified to the reasonability of introducing a methodology of categorization of the unemployed uniform for all labor offices (MLSP, 2013: 11).

## **2. POLITICAL DEBATE ON PROFILING**

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Legal acts on profiling and the reform of labor offices were the subject matter of the political debate in the government and the parliament (including the Social Policy and Family Committee and a special sub-committee). However, profiling—one of more controversial elements of the reform—was not subjected to many critical remarks formulated at the stage of public consultations or parliamentary works.

Legal acts regarding profiling of assistance were subjected to a standard procedure of drafting new regulations. When presenting drafts of new legal acts, Polish ministries are obliged to conduct formal consultations with other public institutions, labor unions, employer associations and non-governmental organizations. However, any opinions submitted in such course are not binding for drafters of legislative acts. On the other hand, on the level of parliamentary works the

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<sup>2</sup> In this report we use additional terms to describe different types of labor office workers : “the frontline office worker”, “client counselor”, “labor market office managers” and “street-level workers”.

most significant role is played by particular Sejm committees. Representatives of social organizations and other public institutions—usually as guests—may take part in their works. Nevertheless, their opinions also on that stage have no direct influence on how the regulations are shaped.

### **a. Inspector General for Personal Data Protection (IGPDP)**

Fundamental reservations as to the profiling of assistance for the unemployed have been formulated by Inspector General for Personal Data Protection (IGPDP, 2013a). IGPDP is a Polish institution safeguarding the protection of personal data protection regulations. Usually, s/he takes an active part in legislative works, issuing his/her relevant opinion. As for profiling, IGPDP filed reservations as to the compliance of the new solutions with the Polish Constitution. First of all, it has been stated that the regulations on profiling are not precise enough. Also, there have been claims as to the lack of adequate guarantees for the protection of the right of privacy and personal data—i.e. there being no transparent, legally regulated procedure enabling a change of the assigned profile. The correspondence of the IGPDP with the MLSP on profiling was very intensive—exceptional in comparison to other social consultations. In the course of the entire process over 14 different official letters have been exchanged. Despite that fact, the finally accepted solution has not proven satisfactory for the IGPDP (IGPDP, 2013b).

### **b. Social organizations**

Critical arguments on profiling have also been presented by Panoptikon Foundation. Apart from the arguments convergent to those of the IGPDP regarding the protection of privacy, the organization has noticed that profiling may lead to a violation of non-discrimination regulations and the very right to work and social protection (Panoptikon Foundation 2014). On the other hand, labor unions expressed their reservations as to the transparency of granting assistance and the uncertainty experienced by particular unemployed individuals in connection with profiling (NZZ “Solidarność”, 2014). However, representatives of employers underlined that profiling is a good and modern tool which will increase the efficiency of labor offices (Lewiatan, 2013). A critical expertise has been presented by the Polish Committee of the European Anti Poverty Network (Polski Komitet Europejskiej Sieci Przeciwdziałania Ubóstwu EAPN Polska) (Sztandar-Sztanderska, 2013). In the document, its authors emphasized the fact that profiling may lead to stigmatization and restriction of the rights of persons remaining in a difficult life situation.

### **c. Members of Parliament**

The parliamentary debate regarding the reform to a small extent concerned the issues connected with profiling. Critical remarks have been submitted by the same entities which have criticized the proposed solutions earlier (i.e. IGPDP or Panoptikon Foundation). Certain doubts were laid down by deputies of opposition parties (Law and Justice/Prawo i Sprawiedliwość), however, this has not had any effect on the later results of the voting over the draft (Minutes of the session of the Social Policy and Family Committee 2014). That fact was later used on certain occasions by the MLSP as proof of the common acceptance for the adopted formula of profiling (Response to the interpellation 2014b).

Members of Parliament, however, expressed certain doubts as to profiling in the form of parliamentary interpellations. Interpellations are written questions posed by Members of

Parliament, directed to specific government officials. Profiling was the subject matter of 10 such statements. The interpellations concerned mainly the lack of possibility to change the assigned profiles, the transparency of the process itself and the limited access to active labor market programs of those qualified to Profile III (e.g. Parliamentary interpellation, 2014). The MLSP responded quite vaguely to the majority of doubts raised, alleging that those criticizing (e.g. IGPDP or Panoptykon Foundation) have no experience and expertise in the subject (e.g. Response to interpellation 2014b).

#### **d. The Ombudsman**

The issue of profiling was also dealt with by the Ombudsman who sent to the MLSP two statements in that case (The Ombudsman 2014, 2015). They primarily revealed doubts as to the transparency and clarity of the provisions, as well as to the issues of personal data protection and right to privacy. Responding to these claims, the MLSP underlined that they had commenced works on another project regulating data processing in the area of the labor market policy (MLSP 2015). The new regulation is aimed at introducing precise principles of collecting and using data of the unemployed by labor offices and relevant government authorities. In his response, the Ombudsman suggested that the works over that legal act should be a priority.

### **3. THE PROFILING PROCESS: LEGAL FRAMEWORK AND PRACTICE**

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#### **a. Basic information**

Profiling of active labor market programs for the unemployed was introduced in May 2014 along with the amendment to the Act on the Promotion of Employment and Labor Market Institutions (Act on the Promotion of Employment 2004), as well as the adoption of the ordinance on the profiling of assistance for the unemployed (Ordinance on the Profiling of Assistance). Irrespective of these two legal acts an additional instrument exists which outlines the framework of profiling—*Profiling of Labor Market Programs for the Unemployed. A Handbook for Local Labor Offices* (MLSP, 2014a) (hereinafter: The handbook). The handbook has been prepared by the MLSP. Although it is not legally binding, it contains key guidelines and instructions of conduct for frontline staff when conducting an interview on profiling and using computer applications for the purposes of profiling.

Profiling of assistance by virtue of the amended provisions became one of the new responsibilities imposed on labor offices (Act on the Promotion of Employment 2004: Article 33 Section 2b). However, the aforementioned legal acts enigmatically determine what a profile is and how the procedure for its determination looks like. That lack of clarity in the act and ordinance has actually been noted by IGPDP and the Ombudsman. The most important issues—i.e. the manner of determination of the profile of assistance or its modification—are laid down in the ordinance, which is an act of a lower tier (Act on the Promotion of Employment 2004: Article 34a Section 3c). The ordinance may therefore be quite freely modified by the labor ministry outside the parliamentary procedure. In the act itself the term of “a profile” was defined very enigmatically as “the scope of forms of assistance appropriate with respect to the needs of an unemployed” (Act on the Promotion of Employment 2014: Article 33 Section 2b). The scope of personal data taken into account in the course of profiling and the scope of forms of assistance

assigned to specific profiles were also specified (Ordinance on the Profiling of Assistance: para. 2). The handbook is more detailed and contains specific questions which should be asked in the course of profiling, the manner of determining profiles and a user's manual for computer tools.

In the process of profiling frontline office workers use a special tool introduced in the framework of the IT system, which has been already functioning earlier, named "Syriusz Std", created by the IT Department at the MLSP. Syriusz processes data on persons registering in employment offices, on employees of these offices and their activities (MLSP, 2011). For the purposes of profiling of the unemployed, new functionalities have been introduced to Syriusz, enabling one to carry out interviews and use any personal data collected earlier (MLSP, 2014a). Basic technical aspects of profiling have been introduced by the Polish company Sygnity. Our research shows that labor offices have at their disposal various versions of computer tools compatible with the application of Syriusz, including add-ons which can be purchased from Sygnity. The basic version of the software does not allow i.e. for generating statistics regarding the demographic structure of specific profiles. Such possibilities are available to 50% of the offices under our research. Therefore, there is a significant number of labor offices which have no technical possibility to obtain the detailed statistical data that result from profiling (e.g. the number of disabled persons assigned to profiles, division of profiles according to their age, period of being without work, etc.).

## **b. Scope of collected data**

In accordance with the provisions, determination of a profile is effected through an analysis of the situation of an unemployed and his/her chances on the labor market (Ordinance on the Profiling of Assistance: para. 2). Two variables are taken into account: "distance from the labor market" and "readiness to enter or return to the labor market". To each variable there is assigned a specific scope of data obtained from the database of Syriusz and in the course of the interview. In the case of "distance from the labor market" therefore the factors which make it difficult for an unemployed individual to enter or return to the labor market are taken into account. These are: age, sex, education level, skills, licenses and authorizations and professional experience, degree of disability specified by the medical certificate on disability, duration of remaining without work, place of residence in terms of remoteness from potential workplaces and access to modern forms of communicating with the local employment office and employers (e.g. e-mail).

On the other hand, when analyzing "readiness to enter or return to the market" certain factors are taken into account which testify to the need and willingness of an unemployed individual to undertake employment: "engagement in seeking employment on one's own, readiness to meet the demands of the labor market, flexibility, reasons for undertaking employment, reasons for registration at the local employment office, earlier and current readiness to cooperate with the local employment office, other institutions of the labor market or employers".

In its response to the critical remarks, the MLSP emphasizes that labor offices are meant to profile only the assistance, and not the person (Response to the interpellation, 2014b). However, the fact that all the data processed in the course of profiling are personal data leads to entirely different conclusions. The scope of data specified in the regulations is actually meant to assess in quite a comprehensive manner the life situation of each individual who registers at a labor office. According to IGDP, profiling at employment offices means both the profiling of assistance, and of a specific person (Niklas, 2015).

### **c. Manner of determining the profile**

The profile is determined by using a special questionnaire which has been incorporated into Syriusz IT system. According to the statute, a condition for assigning a profile is a consent of the unemployed individual (Act on the Promotion of Employment 2004: Article 33 Section 4 Item 1a). Yet, in practice, there is no space for the unemployed to make a voluntary declaration of will and a real choice—if an unemployed person refuses to grant such consent, as a penalty s/he is deprived of the status of the unemployed for a specified time: 120 days in the case of the first refusal, 180 days in the case of the second refusal, 270 days in the case of the third and each subsequent refusal (Act on the Promotion of Employment 2004: Article 33 Section 4 Item 3). Loss of the status of an unemployed may be very painful and involve i.e. deprivation of the entitlement to public health insurance or unemployment allowance.

In the process of profiling 24 questions are taken into account, contained in the so called “Profiling questionnaire” (attached as Annex 1). 12 out of them examine the distance from the labor market (variable O), while 11 concern the readiness to enter or return to the labor market (variable G). One question examines both variables (MLSP, 2014a: 6-7). The data analyzed in the course of determining the profile come from two sources. On the one hand, the information collected during the registration of the unemployed person at the labor office is used. It includes data such as age, disability, level of education or degree of disability (8 questions altogether). In the process of profiling it is generated automatically from Syriusz system. The remaining 16 questions are answered by the unemployed person in the course of a structured interview, carried out by a client's counselor (MLSP, 2014a: 8-9).

Many questions are built in such a manner which may suggest their open-ended character. Nevertheless, the scope of answers is closed. For instance, to the question regarding the causes making it difficult to undertake employment, the questionnaire provides 22 possible answers, which, however, do not account for various, often very complex and interrelated life problems (MLSP, 2014a: 39-44). When the unemployed person does not understand a question, the labor office worker should explain it in a neutral and directionless manner. If the unemployed person on his/her initiative wishes to return to any of the previous questions and correct them - the frontline office worker should make it possible for him/her. Moreover, the handbook clearly underlines that when determining the profile, frontline workers should remain objective and neutral in their assessment of the unemployed (MLSP, 2014a: 15-16).

On the basis of the provided answers, the computer system calculates “employment potential” of a given unemployed. That term means “a balance which may be drawn up, taking into account both the advantages and disadvantages of an unemployed person from the point of view of his/her situation on the labor market, as well as objective factors affecting how easily he or she may emerge from unemployment and undertake a job” (MLSP, 2014a: 6). To each answer given by the unemployed a specific number of points is assigned ranging between 0 and 8. The higher the number of points, the higher the level of remoteness from the labor market and lower readiness to undertake employment. Hence, a high score suggests very low employment potential, while a very low score – high one (MLSP, 2014a: 7-8).

As a standard, towards the end of each interview, the labor office worker should press the button “Determine the profile”. Then the system calculates the points and automatically determines the profile. Once that operation is performed, the possibility to make corrections in the answers is blocked. The next stage is to approve the profile by pressing the button in the application “End the examination” (MLSP, 2014: 45-49).

#### **d. Categorization and access to services**

After the determination of the profile, an unemployed individual should receive information on which active labor market programs may be offered to him/her (Ordinance on the Profiling of Assistance: para. 6). This is important, as under legal provisions a different scope of labor market programs is assigned to each of the three profiles. These regulations do not determine, however, which reasons (features of a person) condition the fact of being assigned to a specific profile. The handbook drafted by the ministry is more detailed in that scope: it determines characteristic features of each profile and examples of persons to whom a given category may be assigned.

Profile I covers mainly active, mobile persons, having appropriate professional qualifications and interpersonal skills. They do not have serious life problems which would make it impossible for them to find a job (MLSP, 2014a: 16-19). The MLSP assumed that such persons do not need intensive support from labor offices. Legal provisions allow for offering 13 various forms of support to those persons: including, i.e. funds for establishing a business, vouchers for trainings, refunds of costs of transportation or intermediary job services.

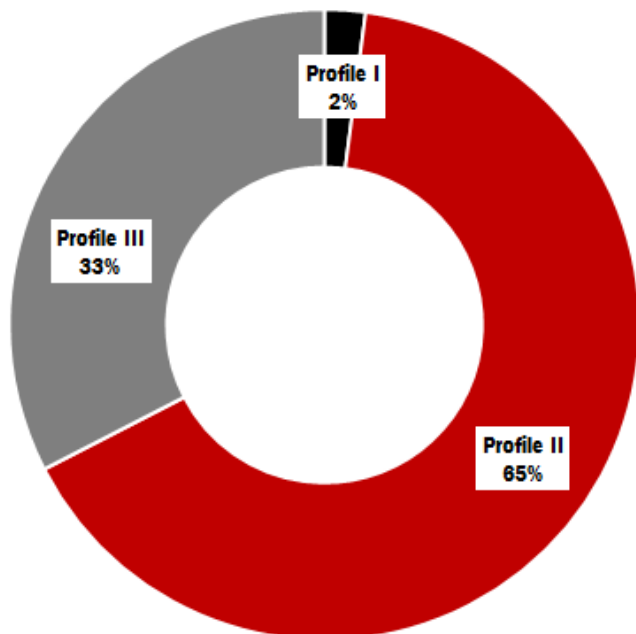
Profile II typically includes persons who have certain professional skills, but unfortunately are redundant on the labor market, or worked for a very long time in one company. They lack ideas on how to solve their problems, frequently do not have the skill of autopresentation (MLSP, 2014: 19-21). Persons qualified to Profile II may be offered a wide range of various active labor market programs. The statute provided that the labor office in the case of these persons may apply as many as 29 programs financed from public funds, including: apprenticeships, trainings, bonds, obtaining various licenses, exams or postgraduate studies, refunding the costs of childcare, etc.

On the other hand, Profile III comprises persons with serious life problems or those who do not want to cooperate with the employment office. According to the handbook, these are passive persons who are supported by social assistance institutions, have no education or little experience and i.e. health issues. When describing this group of persons, the handbook often uses stigmatizing language, stating, among others that unemployment is their choice and is grounded in their “mental character”. The handbook suggests placing under that category disabled persons, single women raising children and persons registering themselves only because of the need to obtain health insurance, or persons from small towns having no easy connection to a larger center (MLSP, 2014a: 22-24).

One may risk an assumption that in the system of support for the unemployed there appeared a category of “junk people” whom the employment office may not really help or those who (in the opinion of officials) do not deserve to be granted such assistance. According to legal provisions those qualified to the third profile may be granted 10 types of forms of assistance – including being assigned to the Program of Activization and Integration (PAI) or a special program, or being directed to work in a social cooperative. The launching of PAI or a special program at a particular employment office allows for granting to those qualified to Profile III additional forms of assistance in the form of vouchers or trainings. Nevertheless, these forms of support are costly and difficult to be organized, and in effect, labor offices unwillingly launch them (Topolska, 2015). This is confirmed by the statistics according to which as many as 38% of labor offices do not organize any of these programs. In such a situation persons belonging to Profile III actually may not be offered any attractive form of assistance. 49% of employment offices organize either PAI or a special program, while 12% of these offices – both forms of assistance. Nevertheless, even in these offices which organize either PAI or a special program that form of support is directed only to a small group of persons (from 230 to 10).

During our research we collected statistical data on the distribution of active labor market programs (based on profiling) from 104 local labor offices (out of total 341 offices), which provide support to more than 600 thousand unemployed people in Poland<sup>3</sup>. 2/3 of people registered in these offices were assigned to Profile II, 1/3 to Profile III and only 2% to Profile I.

Graph 1. Percentage of the unemployed assigned to each profile in the average labor office



However, there is a strong variation in the proportion of people assigned to particular profiles among different labor offices. It is especially noticeable as far as the structure of Profiles II and III is concerned. The table below illustrates this problem. It turned out that the percentage share of the unemployed assigned to Profile II in the entire group of the unemployed varies among particular labor offices and ranges from 33% to as much as 96% in some offices. In the case of Profile III, this ratio ranges from 4% to 33%.

Table 1. Percentage of the unemployed in labor offices as distributed among the three profiles: minimum, maximum and standard deviation (in percentage points)

Percentage of the unemployed in the profile	Minimum	Maximum	Average	Standard deviation (in percentage points)
Profile I	0%	9%	2%	2
Profile II	33%	96%	65%	11
Profile III	4%	65%	33%	10

We also tried to examine how specific groups (women, men, people over 50, people with disabilities, etc.) are divided into the profiles. Our data indicates that in most of labor offices the number of women qualified to specific profiles is comparable to that of men. However, in 17 local labor offices we observed the apparent predominance of women (60-70%) assigned to Profile III.

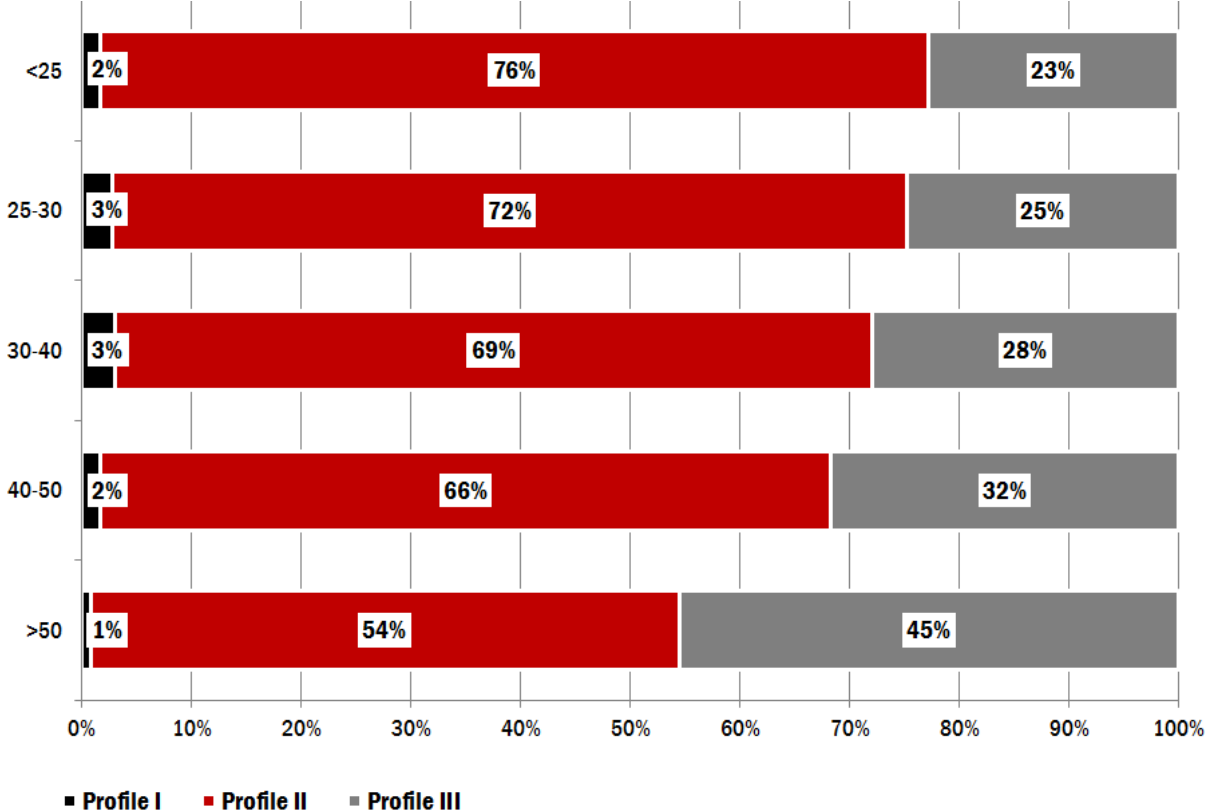
Differences in the age structure of particular profiles are clearly visible. We noticed that older persons have significantly greater chances of being assigned to Profile III. While among

<sup>3</sup> See Annex 2.



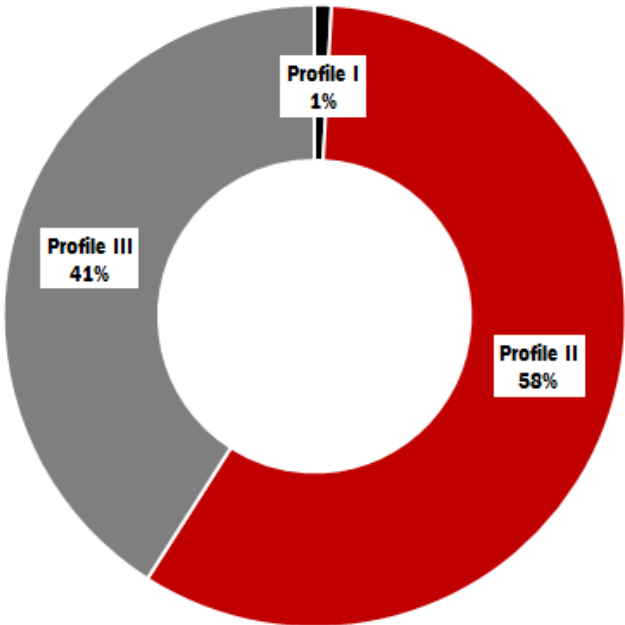
those under 25 years of age only every fifth individual was assigned to Profile III, more than 40% among the people over the age of 50 were qualified to this category.

Graph 2. Age structure of the unemployed as distributed among the three profiles



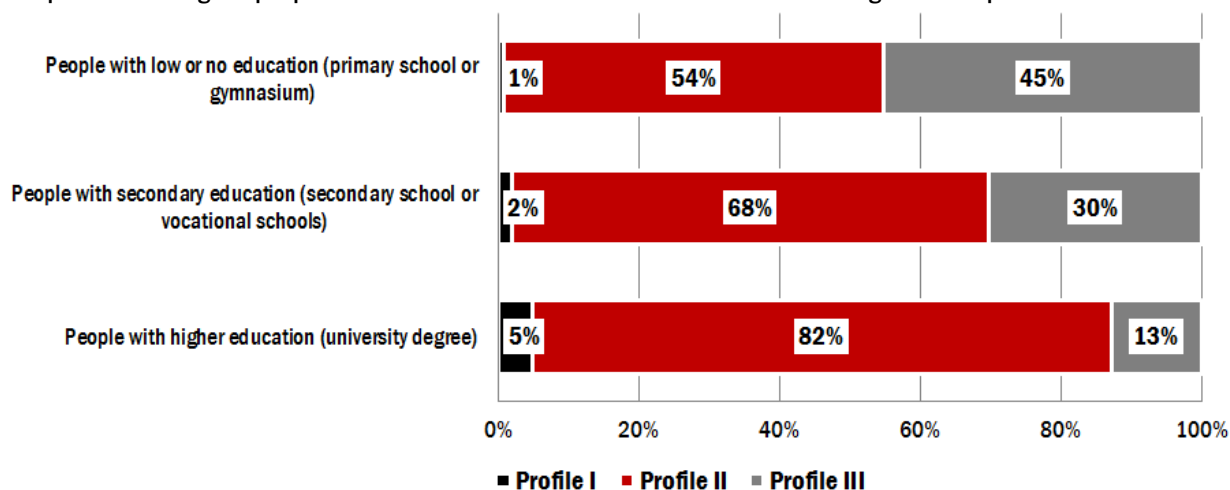
Our research also showed that in most of labor offices people with disabilities are almost equally divided between Profiles I and II -58% of them are qualified to Profile II and 41% to Profile III.

Graph 3. Percentage of people with disabilities as distributed among the three profiles



We also looked at whether the level of education influences qualification to certain profiles. It turned out that the unemployed with the lowest level of education were in almost equal proportions allocated to Profile II (54%) and III (45%), while the percentage of the unemployed with higher education was significantly higher in Profile II. Our data confirms that there is a relationship between the level of education and the likelihood of being assigned to Profile III (it decreases with the level of education).

Graph 4. Percentage of people with a certain level of education as distributed among the three profiles



### e. Lack of transparency

Legal regulations do not provide for the manner in which a specific active labor market program is determined. Apart from the enigmatically drawn scope of processed data, one cannot determine the manner of conducting the profiling process. The above described handbook is of an internal document. Therefore, officially the unemployed have no access to any information on what questions are asked in the course of profiling, what is the scope of possible answers, how many points they are given and in what manner a particular answer affects the determination of a given profile. In addition, as it has been underlined in the handbook, in the course of the interview, the employee of the labor office and the unemployed person should sit in front of each other. It is so in order to make it impossible for the unemployed person to follow which items are marked by the client counselor in the questionnaire (MLSP, 2014a: 37).

In 2014 Panoptikon Foundation requested the MLSP to make available only the list of questions posed in the course of profiling. The MLSP made this list available, however, under a reservation that it grants no consent for making it public. An argument was posed that making the questions available to the general public will lead to a situation where the unemployed will learn how to answer the questions and thus, to manipulate the process of categorization. Finally, however, the list was made public at the website of Panoptikon Foundation (Niklas & Szumańska, 2014). In turn, in November 2014 a web-based periodical Dziennik Internautów published the handbook, containing answers to the questions asked in the course of the interview (Maj, 2014). In July 2015 Panoptikon Foundation again filed a request for public information regarding the course of the profiling process—that time requesting the information on how specific answers asked in the course of the interview are credited. Then the MLSP refused to answer, providing an argument that the information of that type does not constitute “public information” (MLSP, 2015e).

## **f. Change of the profile**

When introducing profiling to labor offices, the MLSP specified that the adopted model will have two facets – “hard profiling” and “soft profiling”. The former means categorization using a questionnaire and computer-based tools. The latter, however, is to serve as a certain “safety valve”, protecting against an unjust decision reached by the computer. When the labor office worker thinks that in a particular case the person should be categorized to a different profile, he or she may change the decision generated by the computer system, according to their own observations (MLSP, 2013: 85). Such an opportunity, however, is not grounded in legal regulations. These only set forth that a profile of assistance is determined on the basis of processed data and using a computer system (Ordinance on the Profiling of Assistance: para. 4).

The handbook provides that the client's counselor has a chance to change the profile between the moment of pressing the button “Determine the profile” and “End the examination” (MLSP, 2014a: 46-49). What is important, that may be done only if the client counselor deems that there are justified reasons to do so. Each change of the profile requires a written justification for which a special rubric has been created in the system. The handbook asserts that one of such justified reasons is “a dissonance emerging between the attitude of the unemployed in the course of the interview, and his/her answers to the questions”. It refers to a situation in which the counselor notices that the unemployed person manipulates the answers and gives dishonest answers. According to the handbook's logic, the typical reason for giving such false answers is “a preconception [of the unemployed person] that owing to that he or she would gain certain benefits or avoid situations he or she finds inconvenient” (MLSP, 2014a: 48). The handbook specifies that giving false answers by an unemployed is not the only reason for changing the profile, however, it does not describe any other situations which would justify the using of such option. That leads to a conclusion that a change of the profile is rather meant to serve as a punishment for a lie than to correct and adjust the profile to the actual life situation of a given unemployed person. What is worth mentioning, this option is treated as exceptional and it is hardly ever used in practice (according to official statistics only in 0.58% of all cases) (MLSP, 2015f).

As we have noted, legal regulations do not lay down a procedure to change the profile, however, they provide for the possibility to determine it again, if the situation of the unemployed changes (Ordinance on the Profiling of Assistance: par. 9). Both the unemployed person and the official may request that the profile be determined anew. This is, however, an exceptional procedure, reserved for significant changes in the life situation, e.g. when a person gains additional qualifications, changes his/her place of residence or becomes a parent. The law does not provide for a possibility to demand that the profile be changed or re-verified in the case, when the unemployed person him/herself thinks that they should be qualified to another profile or that an error has been made in the course of its determination. In the answer to the question posed by us, 60% of employment offices stated how many changes of profiles have been made in their system (irrespective of the reason and applied procedure). The specified numbers ranged between 0 and 1199.

## **4. PROFILING OF THE UNEMPLOYED VS. HUMAN RIGHTS**

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Profiling of assistance for the unemployed undoubtedly qualifies as personal data processing, conditioning the possibility to obtain specific forms of support from an labor office. From that point of view, profiling of the unemployed may lead to infringement of several fundamental rights and freedoms. What seems particularly significant is the influence of that process on the right to protection of privacy and personal data (including specific rights arising from the Act on Personal Data Protection, referring to automatic data processing), applying the principle of equal treatment and guaranteeing the appropriate standard of protection of the right to work and social protection. According to the Polish legal standards, profiling should not lead to discrimination in the access to specified active labor marker programs with regard to e.g. gender or disability, and the criteria of granting specified forms of support should be transparent for those whom this process concerns.

### **a. Right to Privacy**

#### **i. General standard of protection**

The Polish constitution clearly provides that everyone has a right to privacy and protection of his/her personal data. Public institutions tamper with these rights, if they process data concerning individuals (Constitution: art. 51 Section 2). The Constitution provides that individuals have a right to decide on whether and to whom they may disclose their personal data. Of course, the right to privacy and data protection is not absolute and may be restricted, if it proves necessary for the protection i.e. of security, public order, health or freedoms and rights of others (Constitution: art. 51 Section 1 and 5 in conj. with Article 31 Section 3). The conditions and principles of data processing by public authorities must always be precisely laid down in legal regulations. The core legal act on data protection in Poland is the Act on Personal Data Protection of 1997 (Act on Personal Data Protection 1997). It determines the basic definitions, principles of data processing, rights of the data subject, obligations of the administrator and competences of the data protection authority–i.e. IGPD. In accordance with this statute, personal data may only be processed according to the law and collected solely for strictly specified purposes. Additionally, the scope of their processing must be adjusted to these purposes, and the period of storage not longer than necessary (Act on Personal Data Protection 1997: Article 26). The grounds for data processing include: a consent of the person, specific legal provisions, performance of an agreement or a legitimate purpose of the data administrator (Act on Personal Data Protection 1997: Article 23).

In the framework of profiling of assistance, labor offices process 18 various categories of data (Ordinance on the Profiling of Assistance: para. 2). Legal provisions define categories of data which can be processed in a very general way e.g. as “reasons for registration at the local labor office”. This lack of clarity in itself constitutes a problem and could serve as a basis for questioning the regulations as unconstitutional. On the other hand, an analysis of the handbook leads to a conclusion that in the process of profiling additional types of data are obtained–even if there is no unequivocal basis for such processing set forth in legal provisions. The way the profiling process has been designed requires collecting and storing such data as: the possibility to commute to the workplace (question no. 12), reasons making it difficult to undertake a job

(including health restrictions, taking care over children and continuation of education) or the circumstances increasing the chances of undertaking employment (MLSP, 2014a: 40-42). Legal regulations also do not determine the manner of data processing, in particular that the correlation between collecting specific data and the determination of the profile. These shortcomings may serve as a basis for questioning whether the existing legal provisions are consistent with the Polish Constitution, which clearly specifies that any statutory provisions that provide for the limitation of the right to privacy and/or data protection must be clear and detailed (art. 51).

As we have noted (see chapter 3 section c), according to the law, a formal basis for determining the profile is consent of the unemployed person (Act on the Promotion of Employment 2004: Article 32 Section 4). From the point of view of the public institution, the use of that basis of data processing is quite comfortable – the alternative would entail introduction of precise grounds for data processing in legal provisions themselves. The adoption of such a solution in the Act on the Promotion of Employment is, however, in contradiction with the definition of consent to personal data processing and conditions which should be met by such declaration of will, grounded in the legal doctrine. In a situation of an obvious imbalance between the citizen and the public authority such declaration of will may not be deemed as expressed freely and voluntarily (and therefore should not be regarded as consent!). The sanction for a refusal to grant consent is being deprived of the status of an unemployed and, in turn, of such benefits as health insurance or unemployment allowance (Act on the Promotion of Employment 2004: Article 32 Section 4). Dismissing the arguments concerning the consent to data processing as a legal basis for profiling, the MLSP often underlined that in Poland no-one has the obligation to use the assistance of labor offices (Response to the interpellation 2014b). That, however, is quite an arrogant assertion. There indeed are situations when public assistance is essential in the course of remaining without work. Citizens should also have the possibility to use such support without having their freedom additionally restricted. In the offices examined by us until now 429 persons have been de-registered as a punishment on account of a refusal to grant consent for profiling (as many as 394 such cases have been recorded in one office).

## **ii. Rights of data subjects**

The Act on Personal Data Protection gives individuals (data subjects) specific rights which may be applied in the case of profiling of assistance, among others, the right to obtain exhaustive information on who processes the data, what is the scope and the manner of data processing and the source of its origin and to whom it is made accessible. A person whom the data concerns may also demand that the personal data incorrect or incomplete be supplemented, updated or corrected (Act on Personal Data Protection 1997: Article 31). These rights, when applied to the profiling process, should allow the unemployed to review the answers given in the course of the interview and to possibly correct them. In the absence of established jurisprudence and any specific provisions on the Act on the Promotion of Employment it is nonetheless difficult to prejudge whether an unemployed person also has the right (on the basis of general provisions) to access information on how many points have been allocated to a given response made in the course of profiling.

The rights of a data subject are accompanied by the responsibilities of a data controller – in this case, as a principle, local labor offices. So, at least in theory, individuals may direct to labor offices all or any requests concerning data processing in the course of profiling, e.g. a motion to receive information on the scope and manner of data processing in the course of profiling. If an unemployed person was not able to exercise his/her rights, s/he may file a complaint with IGPDP.

Until now, however, IGPDP did not receive any complaint with respect to profiling in employment offices (Niklas, 2015), which suggests that the unemployed might not even be aware of this possibility.

In the context of the process of profiling, another important provision of the Act on Personal Data Protection seems to be Article 26a, which formulates the general prohibition of reaching final decisions in an individual matter exclusively on the basis of automatic personal data processing in a computer system. There are additional rights of the data subject connected with the general prohibition of taking decisions of this kind. This primarily is the right to obtain information on the prerequisites for taking the final decision in a case. In practice it means that a person should be able to familiarize him/herself with the “logical outline and structure of automatic data processing” (Barta et al., 2011: 597). Another right is to demand “human intervention” and re-examination of a case that was resolved with a breach of Article 26a (although, of course, the very result of that re-examination does not have to be favorable for an individual).

The key problem, however, is that in the absence of the established jurisprudence and any special provisions in the Act on the Promotion of Employment it is unclear whether or not Article 26a of the Act on Personal Data Protection can be applied in the case of profiling of the unemployed. Even IGPDP itself underlines that this provision is very rarely applied and it has almost no experience with its practical interpretation (Panoptikon Foundation 2015). In order to apply Article 26a Act on Personal Data Protection to profiling of the unemployed, it will be of key importance to answer the question whether the decision reached on the basis of automatic data processing in this particular context is “final”. In accordance with the doctrine, a “final” holding may not be subject to approval by a human (Barta et al., 2011: 545). Therefore, in order to apply Article 26a, full automation in the process of profiling is required. Unfortunately, legal regulations concerning profiling of the unemployed do not resolve to what extent such full automation takes place: to what extent the system generates allocation to a given category, and to what extent it fulfils an “advisory” role, while the final decision is made by a client counselor. As we have described above (see chapter 3 section f), the handbook on the one hand provides for an active role of a client counselor in that process, on the other—it treats a change of the profile generated by the computer system as an exceptional procedure. In the light of a relatively short and varied practice of labor offices and lack of jurisprudence, it is difficult to unequivocally assess that mechanism in terms of possible application of Article 26a.

## **b. Principle of equal treatment and non-discrimination**

### **i. General standard of protection**

One of the fundamental principles of each system of protection of rights of an individual is the principle of equality and non-discrimination. The Polish Constitution establishes the rule of non-discrimination due to any reason (art. 32) and points out to equal rights of women and men (art. 33). That principle translates into a requirement of identical treatment of persons irrespective of e.g. gender, disability, ethnic origin, age or views. However, different treatment is allowed when: a) there is a reasonable justification of unequal treatment; b) the principle of proportionality is observed; c) unequal treatment has its grounds in the virtues and principles of constitution (Constitution Tribunal, 2001). The Constitution also allows for the application of the so-called affirmative action. An example of such allowed unequal treatment is e.g. lower retirement age for women. The Constitution Tribunal deemed, however, that such privileged status may only be of exceptional nature and be based on the principle of social justice (Constitution Tribunal, 2010) .

On the statutory level major anti-discrimination provisions are included in the act implementing the EU regulations in the scope of equal treatment (Anti-discrimination Act 2010 ). If applied to the services offered by labor offices, this legal regulation prohibits unequal treatment due to gender, race, ethnic origin, nationality, religion, denomination, world view, disability, age or sexual orientation (Anti-discrimination Act 2010: Article 8 Section 1 Item 4). An analogical guarantee has also been provided for in the Act on the Promotion of Employment (Act on the Promotion of Employment 2004: Article 2a).

It is important to note that in accordance with the law, unequal treatment may take the form of both direct discrimination and indirect discrimination. The former means that a person is treated in a worse manner than another person in a comparable situation only because e.g. she is a woman. On the other hand, indirect discrimination is understood as applying seemingly neutral criteria which in fact lead to the creation of a situation unfavorable for a given person due to e.g. disability or age.

In our opinion in the process of profiling the unemployed may lead to unlawful discrimination. The scope of active labor market programs offered by the employment office to a given unemployed person is a result of qualifying him/her to a specific profile. e.g. persons from Profile III have a very limited scope of access to ALMP offered by the labor office (Act on the Promotion of Employment 2004: Article 33 Section 2c). As we mentioned above, labor offices often do not organize any programs addressed specifically to Profile III. Additionally, even when they are launched, they are dedicated to a very limited number of people. In consequence then, a person qualified to Profile III may have no opportunity to receive any form of support. Allocation to a given profile is determined on the basis of such features as: age, gender or disability. In practice it may be the case that the situation of specific unemployed individuals is differentiated on the basis of the criteria listed above, which may be considered forbidden discriminatory practices.

Profiling of assistance for the unemployed may also lead to indirect discrimination. Our analysis of the questionnaire shows that among the reasons for which a person is unable to find a job is the fact of raising a child or taking care of a dependent person (MLSP 2014a: 41). Such circumstances statistically more often concern women. If the very fact of their emergence affects the determination of the profile, such a mechanism of taking decisions may lead to unequal treatment of women.

## **ii. Rights of an individual**

If an individual deems that s/he has been subjected to discrimination in the area of access to the instruments or services of the labor market, s/he may demand compensation before a civil court (Anti-discrimination Act 2010: Article 13). In the proceedings before the court the principle of the so-called reverse burden of proof will be applied (Anti-discrimination Act 2010: Article 14). It means that the entity which is charged with violation of the principle of equal treatment must prove that it had not been the case. An unemployed person should “merely” make the fact of such a violation probable. That means that such person must prove that there is a probability that due to e.g. gender, age or disability s/he has been offered a limited access to a specific active labor market program. In the case of profiling it may, nevertheless, be difficult to make discrimination probable. While access to specified ALMP offered by labor offices depends on the profile to which a given person has been qualified, the criteria determining such classification are not publicly available, and the unemployed person has no access to the detailed assessment of his/ her answers.



### **c. Social human rights**

Another aspect important for the assessment of profiling of the unemployed from the point of view of human rights is the protection of social rights. The European Social Charter imposes on states the obligation to guarantee to everyone access to the service of employment and vocational counseling, trainings and vocational re-adaptation (art. 1 Section 3 and 4). Article 6 Section 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) obliges governments to fully execute the right of a human to work i.e. through ensuring programs of technical and vocational consulting and trainings (ICESCR: Article 6 Section 2). When performing in practice the right to work, states have to observe the principle of non-discrimination.

As we mentioned earlier, in the case of profiling of the unemployed the equal treatment principle may be infringed. In the context of ICESCR this would mean a breach of Poland's core obligations which are of a qualified nature (i.e. their violation would constitute a special breach of CESCR 2006: par 31). ICESCR allows for applying differential treatment as long as such measures lead to an improvement of an unwanted situation, are of temporary nature and are consistent with the principle of necessity and proportionality (CESCR 2009: par. 13). Nevertheless, an analysis of the provisions on profiling and the practice applied by labor offices leads to a conclusion that the Polish system may actually result in limiting the access to specified active labor market programs for disadvantaged groups of the unemployed. In such cases, profiling does not fulfill the role of a measure of affirmative action, accounting for specific needs of persons who have difficulties finding employment.

According to the ICESCR, the rules determining who can gain certain forms of assistance from the government should be justified, proportional and transparent. Limitations of access to such resources should be based on precise legal provisions, appropriate justification and transparent procedures (ICESCR, 2008: para. 23-27 and 70). In the case of profiling of assistance, the unemployed do not know in what manner a given feature e.g. gender or health situation, influence their assignment to a specific profile, and in effect, their access to a specific ALMP. Such situation remains in contradiction with the described standards which should be binding when determining the criteria or limitations as regards access to public assistance.

### **d. Right to an effective redress measure and good administration**

The Polish Constitution guarantees the right to appeal against rulings handed down in "the first instance" (Constitution: Article 78). At the same time Article 2 of the Constitution specifies the principle of a democratic legal state from which it is possible to derive the right of citizens to good administration. In its jurisprudence, the Polish Constitutional Tribunal underlined that all proceedings carried out by public authorities in order to resolve individual cases should ensure a comprehensive and diligent examination of the circumstances crucial for the resolution of the matter, making it possible to examine the case within a reasonable timeline. Additionally, Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to an effective remedy. If domestic law does not provide for a procedure according to which the person concerned would be able to question the measure applied toward him/her, the standard arising from the convention is infringed.

Determination of a profile of assistance is a unilateral act of a state authority (represented by a labor office worker), which affects the situation of the unemployed and his/her opportunity to obtain support from the state. The fact that there are no clear-cut and precise procedures for appealing against the determined profile of assistance and that the unemployed affected by such determination cannot even express his/her opinion regarding this decision nor

request re-verification of the assigned profile, constitutes a violation of the standards of the so-called procedural justice.

## 5. THE PRACTICE OF PROFILING

In this chapter we will analyze how a new model of distributing labor market programs based on profiling is practiced at the frontline of local labor offices and how it is experienced by those who are affected by this procedure. Even though the findings are of an exploratory character and further empirical investigation should be carried out<sup>4</sup>, we were able to draw certain conclusions about the risks inherent in this process. The particular attention is paid to discrepancies between the practice of profiling and officially pronounced policy goals, such as: “transparency” and “standardization” of rules of access to labor market programs, targeting of intervention “to the needs of particular unemployed persons”, rationalization of spending through allocation of “more resources for people particularly distant from the labor market” leading to a “real assistance” and a quick activation of this group, referred to in ministerial documents as “early intervention” (MLSP, 2013: 6, 84, 86).

### a. Insufficient resources

A basic critique of the new model of distributing labor market programs based on profiling, which was pronounced by representatives of labor offices already at the initial stage of legislative process (e.g. Sztandar-Sztanderska, 2013), concerns inadequate resources they have for its implementation. While part of the staff of local labor offices is generally in favor of this new tool, employees emphasize difficulty to devote enough time and money for the unemployed, in particular in the case of persons categorized as “requiring support” (i.e. Profile II) or “distant from the labor market” (Profile III) (MLSP, 2014a: 6). According to statistics for 2014, these two groups consisted of almost one and a half million people and constituted 95.7% of all unemployed, who had been subjected to the procedure of profiling.

Table 2. Categorization of the unemployed according to a profile (data for the end of 2014)

	Profile I	Profile II	Profile III
<b>Number of the categorized unemployed</b>	66 585	1 038 625	441 567
<b>Percentage of each among all categorized</b>	4.3%	67.1%	28.5%

Source: (MLSP, 2015a: 7)

One of the interviewed labor market office managers, who was generally in favor of the new principles of distribution of labor market services, criticized its feasibility in the current financial situation of labor market offices in the following way: “So what if someone gives me a car, if I’m not given fuel to tank it up”. According to this manager, approximately three out of four of the unemployed will not be provided a proper vocational activation: “if nothing changes here in the near future, then, no matter how we call it: profiling or other story, then simply—according to my estimates—we will let a million, a million and two hundred [unemployed] people lie fallow (...) It

<sup>4</sup> For information on methodology, see Annex 2. Further research should in particular take into account the differences between local labor offices and include interviews with the staff of social assistance centers and non-governmental organizations.

is a wasted calling” – the interviewee summarized [PUP 1, August 2015]<sup>5</sup>. This description refers to problems caused by inadequate resources for labor market programs (allocated by the Minister of Labor and Social Policy through the Labor Fund), as well as insufficient staffing of local labor offices and their poor infrastructure (the expenditure on the latter two issues fall under the responsibility of local authorities). All these concerns were also raised by labor office workers in the public debate (see, for instance, Topolska, 2014a).

Insufficient resources from the Labor Fund limit the availability of labor market services and make difficult, if not impossible, the provision of comprehensive services tailored to individual needs. Subjective opinions of labor office workers on this subject can be backed up by data on resources devoted to active labor market programs (ALMP). In 2014, the average yearly spending on ALMP<sup>6</sup> per an unemployed person was at the level of 2068 PLN, which is equivalent to €485 or USD 590 (own calculations based on: MLSP, 2015c)<sup>7</sup>. According to the budgetary plan for 2015, the total spending for ALMP will rise by 10%<sup>8</sup>. However, one should also keep in mind that ALMP availability for the unemployed is also limited seasonally (Sztandar-Sztanderska, 2015). In fact, the recruitment for labor market programs continues to be performed only during a few months in a year [e.g. PUP 2, UNEMPL 4], which prolongs the waiting time for any intervention in the case of persons who register in PUP in the second half of the year. To sum up, contrary to official goals which include better and quicker targeting of support, access to active labor market programs remains hindered or at least delayed due to insufficient resources from the Labor Fund and a yearly budgeting system.

The second problem concerns human resources. The last reform introduced new obligations for street-level workers without improving difficult staffing situation in PUP [e.g. PUP 1, 2, 3, 5, August 2015]. In fact, the number of all workers slightly decreased in 2014, although, it is also true as regards the number of the unemployed (MLSP, 2015b). According to official statistics, in 2014 on average there were 234 unemployed per one “client counselor”, i.e. a new type of frontline worker that should be responsible for direct contact with the unemployed and managing their activation process (MLSP, 2015b: 26). Our data suggests that this already high ratio is significantly understated due to data manipulations<sup>9</sup>. We might also anticipate multifold local variations of this indicator<sup>10</sup>.

In offices with staff shortages—as it was the case in the PUP selected for the qualitative study—profiling might become a quick “technical activity” [PUP 1] instead of a presumed “diagnosis” of individual needs (MLSP, 2013: 84). The interviewed client counselors estimated that on a daily basis they meet with 60-70 persons, which leaves them approximately 7 minutes per one profiling interview [PUP 3]. Such a brief interaction discourages the unemployed from

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<sup>5</sup> All interviews and posts on the forum were attributed acronyms and numbers. The acronym [UNEMPL] refers to an unemployed person, while the acronym [PUP] to employees of local labor office interviewed. Posts on the forum were indicated as [FORUM], while a non-participant observation as [OBSERVATION].

<sup>6</sup> The calculation does not include spending on ALMP addressed to other target groups than the unemployed and jobless, such as refunds of salaries of juvenile workers or postgraduate practice of doctors, nurses and midwives (MLSP, 2015c).

<sup>7</sup> Average exchange rate of the National Bank of Poland as of 31st December 2014 was used for the calculations.

<sup>8</sup> The calculation does not include spending on ALMP addressed at other target groups than the unemployed and jobless (MLSP, 2015c).

<sup>9</sup> It is an open secret that the data on the number of client counselors is not reliable. Actually, there might be even twice or three times fewer counselors than officially declared in some offices [PUP 1]. This practice of data manipulation is quietly accepted by the Ministry which pays bonuses to offices with better numbers and boasts publicly the success for having improved the employment situation.

<sup>10</sup> The Ministry of Labor and Social Policy does not provide data on local differences with regard to this particular indicator. However, there are similar measurements which show significant differences between local labor offices in terms of case load. In 2014, there was 206 unemployed per one “key worker” (which stands for all employees responsible for activation, including “client counselors”) (MLSP, 2015b: 22). However, this number varied from 57 to 479 unemployed persons per “key worker” depending on a staffing situation in a particular office.

asking questions or giving more elaborate answers, not to mention discussing more sensitive issues that might be relevant for their labor market situation [e.g. UNEMPL 1,3]. The unemployed repeatedly characterize their exchange with the counselor during the profiling process as abrupt and strictly official with no room for discussion:

“You know a crude question, a crude answer, no additional comments, actually.” [UNEMPL 6]

“It is not a conversation... It was not like with you, so to say, that you ask more thorough questions and I have a feeling that you listen to me. It was rather: a question, I answer something, and so on, next, and so on, without... [Interviewee starts describing her counselor] It was not a person who was committed to make it better than in a standard way.” [UNEMPL 1]

The other factor influencing the interaction between the client and the counselor is the organization of space in which profiling takes place. Meetings are usually held in an open space office or a room shared with other street-level workers. Due to poor standards of some premises provided by local authorities, neither privacy nor confidentiality can be guaranteed, contrary to what is required by legal regulations: “It is a small room, three counselors and three clients. Sometimes there are six people in a room and we drown out each other. It is hard. (...) Sometimes, clients overhear what the other client says (...). Unfortunately, it is not possible to preserve this rule of confidentiality” [PUP 6].

To summarize, these conditions of conducting profiling interviews hinder deeper understanding of what makes difficult for a given person to improve his/her situation on the labor market. At the same time, this hastily obtained information on the unemployed becomes an administrative truth about who they are and what might be an appropriate intervention in their case. Scraps of information gathered during appointments that last from a few to a dozen minutes are used to categorize each unemployed. The key issue in terms of our further analysis is that this categorization serves as grounds for refusing entitlement to some of the labor market programs.

## **b. Difficult access of people considered “distant from the labor market” to ALMP**

Contrary to initial declarations of the Ministry of Labor and Social Policy (MLSP, 2013: 6, 84, 86), people categorized as “distant from the labor market” (Profile III) generally receive less attention than those assigned to other profiles: both in terms of time devoted to them by frontline staff and resources for ALMP.

First of all, client’s counselors tend to meet with the unemployed assigned to Profile III less frequently (even as rarely as twice a year), since they prioritize meetings with those assigned to Profile II (in rare cases even up to once a week) [PUP 3]. As we will demonstrate below, local labor offices’ staff generally believe that it is in the best interest of the unemployed assigned to both these groups. Frontline staff in labor offices seem to believe that most of the unemployed who are categorized as “III” applied for the unemployment status only to obtain free healthcare insurance without being “interested in office support” or in job search [PUP 1, PUP 3]. This is why, as a consequence of the reform of labor offices, they are not required to regularly come to PUP for obligatory meetings or to visit employers’ premises, unless they specifically inquire about it. However, less obligations also means that frontline staff feel absolved from responsibility for members of this group, which can be illustrated by the following citation from an interview with a client counselor:

**“For me, personally, it is a big plus that persons with this third profile (...) maybe I will tell it briefly, I don’t have to take care of them. Meaning: they have their obligatory visit from time to time. I ask them if anything had changed, that maybe they are interested in something [that PUP offers] (...) and if not, I appoint them another date. This visit is short (...) and I don’t waste time (...) Because a person might not be interested in taking up a job (...) for various reasons. It doesn’t matter if she doesn’t want to or if, if she is ill, for instance, and she can’t. It is like I don’t waste my time and I don’t waste hers (...) And I have time for these people who I can help.” [PUP 3]**

Second of all, as noted above (see chapter 3, section d) specific ALMP meant for people assigned to Profile III (such as programs called Activation and Integration or special programs) are facultative instruments, not necessarily available in all local labor offices. According to our interviews [PUP 4], as well as press statements of other local labor offices (Topolska, 2015), they are more difficult to organize. Some of them require non-standard tools or cooperation with other institutions (social assistance centers, non-governmental organizations, private employment agencies), which is why they are usually considered attractive and more adapted for the unemployed with complex socio-economic difficulties or psychological problems [PUP 4] (see also Topolska, 2014b). However, almost one to four offices included in our quantitative study did not organize either a program called Activation and Integration or a special program<sup>11</sup>. It means that people who are considered to be “distant to labor market” are being excluded by local public institutions, because they have lower chances to receive any support whatsoever. Furthermore, the place of residence becomes an important factor, since there are many local territorial units (poviats - in Polish: *powiaty*) that offer no intervention targeted at people assigned to Profile III.

Besides organizational difficulties and staffing problems, there is an additional explanation why specific programs addressed to the unemployed with Profile III are so rare. Our interviewees pointed out that in many local labor offices activation of this group is not treated as a priority due to growing importance of so-called efficiency indicators [PUP 1]. These indicators incentivize managers and staff to work with those people who might produce quick effects in terms of what is measured and rewarded by the Ministry of Labor and Social Policy. This phenomenon is called in street-level bureaucracy literature “make the number strategy” (Brodkin, 2011) or “creaming” (Lipsky, 1980), since frontline workers tend to spend resources on people who match the administrative criteria of success. In this case, it simply means that the unemployed considered to be “in the most difficult situation” and/or “lacking motivation to take up work” are denied access to any labor programs whatsoever in many local territorial units, because (as we explained above) programs dedicated for them simply are not organized there. The system of rewards created by the Ministry discourages labor offices from organizing those programs, since the “efficiency” in their case would always be lower than the “efficiency” of programs addressed at the unemployed with Profile I or II. The logic behind this system seems to be based on the assumption that public money should be “invested” in those social groups that will be able to pay it back and not given to those that have bigger needs.

Marginalization of the group perceived as “distant from the labor market” is also reflected in a planned distribution of resources from the Labor Fund for 2015 (MLSP, 2015c: 367-368; Budget Act, 2015). Total expenditure for specific ALMP that can be offered to people belonging to Profile III<sup>12</sup> (although not exclusively), was planned at the level of PLN 260 000 000 (Budget Act, 2015). While in the end of 2014, this group constitutes almost 28.5% of all

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<sup>11</sup> For information on methodology, see Annex 2.

<sup>12</sup> The calculation includes socially useful works, non-standard tools in special programs and outsourcing to private agencies.

unemployed, the planned expenditure for programs dedicated to this group in 2015 constitutes only 7% of all ALMP expenses<sup>13</sup> (MLSP, 2015c).

For the above mentioned reasons, we concluded that the way the new model of distributing active labor market programs (based on profiling) leads to marginalization or even exclusion of those who are considered to be in the weakest position on the labor market and at the same time are willing to participate in ALMP<sup>14</sup>. This discrimination also has a clear territorial aspect, since there are offices that do not provide any labor market programs targeted at Profile III.

### **c. Illusory standardization of profiling interviews**

We will now turn to the analysis of how profiling interviews are being conducted. Our preliminary findings suggest that it is problematic to think about a profiling interview as a uniform, standardized and transparent procedure that produces objective knowledge. It seems that there are important differences between local labor offices, individual counselors or maybe even more or less busy periods in terms of how interviews are conducted and profiles assigned.

As noted in the previous sections (see chapter 3, section c), in order to determine a profile client counselors conduct an interview with the unemployed person and they are obliged to choose one or more answers from the standardized grid that would reflect the best answer from among those given by an unemployed. This—supposedly standardized—process in practice is carried out in a very different way, when it comes to such basic features as the way of posing questions and interpreting the unemployed persons’ replies. Contrary to the handbook, some counselors show the unemployed standardized responses during the interview [FORUM 5, FORUM 7], read some of them in the case of more ambiguous questions or at least suggest possible answers [PUP 3, UNEMPL 2], while others simply select certain options in the computer system according to their own assessment, without verifying whether the unemployed has understood the question and whether the selected option fully reflects what s/he meant while answering the question [OBSERVATION 1].

The latter approach seems particularly problematic in the case of questions phrased in an ambiguous way, so that the unemployed do not know what kind of answer to provide. For instance, this problem arises in the case of the following multiple answer question (MLSP, 2014a: 42): “What are you able/ready to do in order to increase your chances for employment?”<sup>15</sup> The grid includes, among others, the following options: I am ready/able to:

- “commute for more than 1.5 hrs one way”;
- “work part-time”;
- “work with a flexible schedule”;
- “take up a job even without any contract”;
- “move abroad”.

“This is a question that poses a lot of problems to understand its intentions. We need to explain it a lot, really; we need to make clear what it is about (...) Here we need to steer, because it really is a problem” –an experienced counselor explains her way of dealing with this ambiguity [PUP 6]. It is clear for many street-level workers conducting profiling [e.g. PUP 1, 3, 6] that without

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<sup>13</sup> The calculation excludes spending on ALMP addressed at other target groups than the unemployed and jobless (MLSP, 2015c).

<sup>14</sup> One specificity of the Polish labor market is that free-lancers and people working in the creative industry do not have access to permanent social insurance. For many of them this is the only reason to register as unemployed. In the new system these individuals are categorized as “III”, but at the same time they are *not* willing to participate in ALMP.

<sup>15</sup> In Polish: Co jest Pan/Pani w stanie zrobić w celu zwiększenia szans na podjęcie pracy?

their hints persons subjected to the profiling procedure might not guess that they are supposed to talk about these particular issues (as set above), even if they might actually consider such options. However, in practice it is unlikely that street-level staff will invest time in explaining questions, especially considering high caseloads and time limits for one interview.

The other aspect which we found interesting is how frontline staff in local labor offices simplify more nuanced answers (while selecting options in the computer system) or how they deal with information going beyond a standardized grid. We will provide two illustrations of such difficulties. First of all, in response to the question quoted above, the unemployed might talk about the compromises they are ready to make (such as long commuting to work and moving to another city or country), but unsurprisingly they put it in a context by adding their conditions (e.g. a high salary; a job respecting basic ethics; an interesting position, etc.) [e.g. UNEMPL 2, 6]. While choosing one from all available options in the computer system, counselors have to make quick, arbitrary decisions, for example whether to treat these context-specific declarations as a sign of “readiness” to increase employment chances or not.

Second of all, local labor office workers have to deal with responses not anticipated by a questionnaire that they have to fill in the computer system. For example, it is the case of a question about “reasons making it difficult to take up work”(MLPS, 2014a: 41): the answers available in the questionnaire do not include, for instance, homelessness or criminal record. The first interviewed counselor suggested that if the unemployed admitted to being homeless, she would either chose “too much competition” or “health restrictions” and “lack of job-seeking skills and self-presentation”, depending if the obstacle is only the lack of formal place of residence (“employer does not want to hire persons without a residence address” [PUP 3]) or hygiene (a person “is dirty and stinks” [PUP 3]). The second counselor explained that—since homelessness is usually accompanied by other difficulties—she would try to identify other relevant answers to this question, ignoring homelessness as a specific cause: for instance, “health restrictions” or “a lack of conviction about the necessity to take up a job” [PUP 6]. Another suggested solution was to make sure that a person is eventually included in Profile III as a person “distant from the labor market”, no matter what the result of the automated scoring will be [PUP 3].

These examples show a high risk of arbitrariness in the process of profiling and the range of possible variations in how the interview is conducted and categorizations assigned, even if the grid and scores remain standardized. These empirical illustrations also show that production of supposedly objective knowledge on a given unemployed is based on many problematic simplifications which seem to put outside the administrative interest the real barriers towards labor market integration, as well as other factors important for the unemployed.

#### **d. Exceptions from automated decision-making: rare changes of profiles and re-profiling**

According to statistical data recently made available to PUP by the Ministry of Labor and Social Policy (MLSP, 2015f), while assigning the profile, the majority of street-level workers tend to rely on the score, which is automatically determined by a computer program after completing a questionnaire. Only 49.3% of counselors have decided to use an option “change a profile” at least once. All changes represented only 0.58% of all cases of profiling (MLSP, 2015f: 1).

Such reliance of street-level workers on the automated classification might be partly due to the fact that a change of profile demands time for writing its justification. It also requires decision-making skills and some courage—as one manager put it: “A client counselor can change a profile, but as a bureaucrat he must... I am not afraid of making decisions. Some workers are so



that they are not afraid of making decisions. Others are afraid. If they weren't, they would probably be all like Kulczyk [the name of the former richest Pole]. However, they are bureaucrats; they prefer somebody else to make this decision for them" [PUP 1]. Moreover, the justification required to change a profile is then recorded in the computer system and might be accessed by other people: management of a given PUP, but also possibly the Ministry of Labor and Social Policy, after data transfer (although perhaps without personal data of counselors)<sup>16</sup>.

During external training on how to conduct profiling, counselors were also warned against changes of profiles and reminded about the prospect of controls performed by the Ministry of Labor and Social Policy in this respect [PUP 3]. No matter if a threat of such controls is real; the warning was remembered also in the offices, where managers explicitly decided to disobey these recommendations and instructed workers to change profile, if they do not agree with the automatically generated classification [PUP 1, 2, 3]. As we will show later, data collected during our research suggest that policy adapted by the management in a given office is an important factor, which explains disparate practices.

According to legal regulations, after assignment of a profile, there is also a possibility to conduct re-profiling if the situation of a given unemployed has changed (Ordinance on the Profiling of Assistance: par. 9)<sup>17</sup>. However, there also seem to be important differences between offices in using this possibility. The management of one office selected for the qualitative study, adopted a rather flexible policy in this respect. For instance, they encourage re-profiling, when an unemployed person categorized as "close to the labor market" (i.e. Profile I) encountered difficulties finding a job and after some time he or she expressed his/her willingness to participate in ALMP addressed exclusively for those included in Profile II [PUP 3, 6]. They also changed classification through re-profiling from Profile II to III when an unemployed pregnant woman demanded so, because she was neither planning to search for a job any more, nor to participate in ALMP [PUP 3]. The general policy adopted by this labor office is not to demand any documents from the unemployed: it is enough if a given unemployed or a counselor presents compelling arguments that the unemployed person's life situation has changed (including a change of attitude).

However, the practice of re-profiling differs among labor offices. As the following examples indicate, some offices refuse to introduce changes at all, others encourage the unemployed to deregister and register again (which automatically means a new profiling interview), if they lack proof of change of a person's life situation in the form of documentation. One of the interviewed counselors told us about her surprise, when she found out about differences between offices: "there are some offices that do not change profiles at all (...) I was in a meeting about profiling, this was last year, I guess, and (...) and it turned out that there are offices which never change [profiles]. There was this information from the management that there is no such possibility to change [a profile]" [PUP 3]. The second example concerns a highly educated unemployed woman who was unable to work, because she had no option of childcare and her non-working mom was ill [FORUM 9]. When her mother's health condition improved so much that she could take care of her grandchild, the unemployed woman tried to persuade her counselor to determine the profile once again: "I asked in January if I can change my profile, because my family situation is OK now and my mom is healthy and she can take care of my child, but she said *no* because there is no way she can document it. But I can come and deregister and register again, for instance, 2 days later" [FORUM 9].

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<sup>16</sup> This information needs to be confirmed during further research.

<sup>17</sup> For more see chapter 3 "The profiling process", section f. "Change of the profile".

To summarize, the ministerial statistics show that frontline staff significantly rely on automated categorization, although there seem to be important differences in how often and in what kind of situations profiles are made and re-profiling is carried out. This empirical evidence proves that profiling of labor market programs, as implemented in Poland, is not a transparent procedure and does not lead to “standardization” of rules of access to such programs (MLSP, 2013: 6, 84, 86).

### **e. Asymmetry of power: position of the unemployed in the profiling process**

Another aspect explored in our research was how various individuals experience the fact of being subjected to a profiling interview and being assigned certain categorization. In this section, we will take a closer look at the position of the unemployed in this process and asymmetry of power. The first element of asymmetry of power is that the unemployed are not provided information about the process they are subjected to. Profiling is conducted during a routine appointment in a local labor office. It is often presented as an obligatory “questionnaire”, “survey” or “profiling” [PUP 3, PUP 6, OBSERVATION 1] with brief and ambiguous comments that neither explain clearly what is about to happen, nor what are the stakes and possible consequences for the unemployed. These are examples of how the profiling is presented during the appointment (note that many unemployed do not know what the concept of profiling means):

“I’ll start with a few questions with the aim of profiling.” [OBSERVATION 1]

“[E]ach person who is registered at our office has an obligatory questionnaire in order to indicate a profile of assistance, so I’m going to ask a few questions and please give me answers.” [PUP 3]

“There will be a questionnaire conducted that investigates distance from the labor market and readiness to return to the labor market. We ask for honest statements, well-thought-out answers, because the result has a very significant role.” [PUP 6]

The interviewed unemployed do not recall either being informed about the process of profiling beforehand, or being asked permission to be subjected to it. They talk about it as if it they were just caught by surprise without enough knowledge and time to realize what is happening or ask questions to learn more about this process. To depict this situational asymmetry of power, we will provide two longer excerpts of interviews:

Interviewer: “Have you been notified that this profiling would take place? During the previous meeting?”

Interviewee: No, rather not. These were such standard questions. I didn’t know. (...) He [i.e. the counselor carrying out profiling] didn’t tell me directly: ‘You know, Sir, I will profile you now’. He just simply caught me on the hop, so to speak [laughing]. You can say, unexpectedly.” [PUP 6]<sup>18</sup>

“The profiling process took place during my normal meeting in the labor office, there was no special invitation, only the next visit fell on that day... It happened so smoothly during the meeting... (...) in fact, even besides one short sentence that the lady... the lady who conducted this, let’s call it,

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<sup>18</sup> In Polish: „Nie raczej nie, to były takie pytania takie standardowe, nie wiedziałem, myślałem, że mu potrzebne są, żeby, właśnie, żeby mnie ocenić (...) No to, to, myślałem, że, wie Pani, na tym polega jego proce... procedura w tym momencie (...) On mnie nie powiedział wprost “Wie pan, będę teraz pana profilował”, tylko on po prostu, zrobił to, że tak powiem z partyzanta. [lekki śmiech] Tak się mówi, zniecka” [PUP 6].

interview... I mean I was informed in a short way about profiling (...) I think that for an average man it might happen almost without his knowledge (...) [W]hen I came out [of the office] it started a sort of a [reflexive] process... Because I have some kind of high sense of my personal freedom and I don't like it when somebody does something with me without my consent and without me saying clearly: 'Yes, I want it'. Here, this lady informed me, but so quickly. I had read an article about profiling beforehand, but, in fact, I didn't know what it involved and what it was about. And this lady just turned to asking me questions." [UNEMPL 2]

Many interviewees were confused about fundamental aspects of this process like the consequences of being assigned to a given profile and the way their answers are going to be used. Some of them deliberately retained sensitive information (for instance, about healthcare problems [UNEMPL 1]), because they were not sure whether its confidentiality would be guaranteed or such information would be disclosed to third parties, such as employers [UNEMPL 1]). Others tried to learn from our researchers whether they can change their responses, for instance, regarding declared readiness to take up work for a minimum salary or a job under their qualifications [UNEMPL 6]. Even though our interviewees were not aware of these basic things, they did not ask about them during the interviews and some of them did not plan to do it in future, because they were not convinced that their local labor office can have a positive influence on their lives.

However, those people who did ask about the questionnaire or refused to subject themselves to the procedure were confronted with the choice: submission to the profiling or deregistration [PUP 2], which leads to a loss of the rights of the unemployed such as free healthcare and also in some cases loss of the possibility to apply for means-tested benefits from social assistance. Apparently, there were still some people who refused to be subjected to profiling after being shown legal regulations that provide for their deregistration [PUP 2, 5]. However, the number of complaints and cases of deregistration was smaller than expected by labor office managers [PUP 5]. The staff suspects that the refusal to be subjected to profiling was probably caused by personal negative experiences with some kind of psychological or psychiatric testing [PUP 2]. One unemployed man who insisted on seeing a questionnaire was even referred to the Ministry of Labor and Social Policy and there—according to interviewed PUP manager [PUP 2]—he was refused access to the questionnaire as well. Both the questionnaire and standardized answers were considered confidential in relationship with the unemployed. As we explained above the Ministry of Labor and Social Policy considered the very same questionnaire as public information and revealed it in response to Panoptikon Foundation's request (files under access to public information law), but also advised the Foundation that this document should not be published.

Summarizing this problem, frontline staff in labor offices do not seem to believe that expectation of transparency or a right to information in the process of profiling is justified. They generally agree with the argumentation of the Ministry of Labor and Social Policy that a profiling interview is not something that unemployed persons should be aware of in advance. As one of the managers put it: "There were these ideas of the unemployed like: 'please give me it on paper and I will prepare myself to these questions'. So we explained, there is no such form of preparation to these questions. It must result from his, sort of, answers and not that he will match [responses] later, because if he gets all questions and knows what is going to be in which profile, then the answer might be biased [PUP 5]. The assumption behind this reasoning is that transparency of a decision-making process does not constitute a civil right. At the same time, it is believed that knowing what the questions are and how answers are scored would result in some sort of manipulation and abuse. As indicated by the previous and the following citation, the interviewed

PUP employees generally believe that the process of profiling remains fair and effective as long as both street-level workers and citizens remain ignorant about its specifics: “Our agents don’t know the measurements and this is good, therefore he [an unemployed person] cannot know. The client must not know” [PUP 4].

The second key element of asymmetry of power is that the unemployed are not permitted to control information about them recorded in the electronic database and processed by the algorithm. They answer orally to the questions posed by counselors, but they are usually not aware of how counselors interpreted their answers and what options counselors selected in the standardized grid. It means that citizens subjected to the profiling are usually not in a position to control their personal data and to correct possible misunderstandings or mistakes. One of the comments posted on Panoptikon Foundation’s website tells a story of an unemployed woman who managed to gain access to her personal data (probably after several meetings and lodging an official complaint), however, this is rather an exception confirming a different rule:

**“I’m 50 years old with a small plus. I was profiled in October. Obviously to the third group [i.e. Profile III]. I was even deprived of hope for an apprenticeship, because in this group I simply do not deserve it. Nobody told me what it involves (...) In fact, they ask a question, but they don’t give answers, so the office worker can write anything in the computer. How can I know what was marked there? (...) I enquired how it is possible that nobody sees what was actually marked there. The matter was escalated to the management. I did not give up. I was read questions and my answers. And guess what?! I found at least three answers that are not true! That I have not expressed! My emotions were high so I’m writing only about three; 100% of this is one giant deceit” [FORUM 5].**

Finally, it is important to note that the main criticism concerning profiling came from those who did not agree with the assigned categorization. They experienced profiling as unfair treatment and a form of domination, since the profiling questions their capacity to define their personal situation, their needs, aspirations and possible solutions to their problems. In other words, the current system of distribution of ALMP relies on the assumption that presumably objective and standardized scoring is more accurate than their own judgment. In our research we found two aspects brought up by the unemployed in this respect particularly interesting.

The first aspect concerned lack of control over how their characteristics on the labor market are defined, in particular when the categorization assigned to them was experienced as stigmatizing. The unemployed interpreted assignment of Profile III as a way of communicating to them that they are “*unadapted*”, “*morons*”, “*requiring psychologist’s support*” [FORUM 3], “*people from the sidelines of society*” [in Polish: *magines społeczny*] “*idlers*” [in Polish: *nieroby*] [FORUM 11], “*people in danger of social exclusion or addiction, social pathologies*” [FORUM 6]. The second aspect concerned disagreement when it comes to types of programs, which (according to the law) were considered unsuitable and made unavailable to people assigned to Profiles I and III. The unemployed categorized as I or III had strong opinions regarding other types of programs they might need. The most dramatic accounts came from those who were already accepted by the employer for a vacancy and afterwards found out that it was a vacancy for a subsidized employment, which is only available to individuals assigned to Profile II [EMAIL 1, 5].

## **6. KEY PROBLEMS RELATED TO ALGORITHMIC DECISION-MAKING AND RECOMMENDATIONS**

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### **a. Key problems**

This part of the case study offers a summary of key risks and problems generated by the new approach to distributing ALMP for the unemployed in Poland. It combines the conclusions which came from our legal analysis and observation of the practice of profiling (through semi-structured interviews and statistical data). We believe that most of these problems are inherently related to the use of algorithmic decision-making by the state, and therefore require systemic answers such as adequate legal safeguards or changes in the very model of distributing public resources. We suggest possible responses and solutions in the final section of this chapter, which is devoted to recommendations.

#### **i. Non-transparent rules of distributing public services**

In this case study we identified a lack of transparency as a systemic problem, which affects every stage of the profiling process, as well as its final result. We will devote more space to explaining various levels on which it occurs, because most of the problems which we describe below are related to, affected or determined by this feature.

In the first place, the existing law fails to specify clear criteria according to which ALMP are distributed. Before the reform, when key decisions were made by street-level workers, such criteria were more specific. Apparently, the former system was based on the assumption that frontline staff need clear guidance as to how ALMP should be distributed and the unemployed need a point of reference in the law to verify whether the decision taken in their case was fair. In the new system, as a matter of rule, it is not the labor office worker who evaluates the situation of a particular unemployed and determines his/her profile, but the computer system, based on the data provided during the interview.

The criteria according to which a certain profile of assistance is attributed to a given person remain unknown to the unemployed throughout the whole process of profiling. In fact, they remain unclear even to the frontline staff involved in this process. Their internal guidelines do not specify how certain answers given by the unemployed determine the final score generated by the computer system and, in the next step, its suggestion regarding the choice of the profile. Labor office workers can only deduct these correlations by comparing answers that they inserted in the computer system with the final result. Finally, the criteria according to which the street-level workers can decide to modify the profile suggested by the computer system are only set out in internal guidelines (not in the law) and are not exhaustive.

The unemployed is deprived of the right to obtain any information about the logic behind profiling, in particular s/he cannot verify how certain features or conditions affected the profile of assistance that was attributed to him/her. In its answer to the request for public information sent by Panoptikon Foundation, the MSLP claimed that information about the logic behind profiling (in particular about the correlation between the answers given by the unemployed and the score generated by the system) does not constitute “public information”. As we explained above (chapter 3, section e), lack of transparency in this area violates international standards of providing public services. According to the International Covenant for Economic, Social and Cultural Rights, the rules determining how public services are distributed should be transparent and set out in the law.

Lack of transparency in the process of profiling in this case is directly related to the choice of the computer system as the main decision-making tool and the decision to keep the underlying algorithm secret (even from the frontline staff who are responsible for carrying out the interview with the unemployed). As long as it is a human being who is responsible for determining access to public services, the criteria behind their distribution have to be known at least to those who apply them (and therefore reflected at least in internal guidelines). Once the key role in the decision-making process is shifted from a human being to a computer system based on the algorithm, it becomes possible to keep the logic of such process confidential.

## **ii. Shortcomings of computer systems as a trigger for arbitrary decisions**

Our case study shows that the introduction of an “objective” or “blind” algorithm in the process of distributing ALMP did not solve the (perceived) problem of arbitrary decisions taken by the frontline staff. As shown by our documentary analysis and the analysis of the public discourse, one of the key justifications behind the reform was the argument that it will provide a more objective assessment of the needs of the unemployed and a better adjustment of the programs. There is an underlying assumption in this argument that a standard interview and a judgment made on that basis by a frontline office worker do not guarantee similar efficiency. In other words, the new system of distributing labor market programs in Poland is based on the assumption that the algorithm will be more objective than an office worker. Our research proves that this assumption failed in practice.

It turned out that the way the computer system has been designed does not allow for a true reflection of various life circumstances experienced by the unemployed. During an interview with the unemployed street-level workers receive open answers to open questions, while the computer system only allows for the choice of one answer from a drop-down menu for every question. As a result, it is for the office worker to decide which one (from the list of pre-defined answers) reflects what has been said by the unemployed person. The second key moment when the office worker can use his/her own judgment comes before accepting the score and the profile suggested by the computer system: if the office worker believes that the suggested profile is not adequate (for example because the unemployed managed to manipulate the answers), s/he can change it. As we described above (chapter 4, section d), this option is treated as exceptional and it is hardly ever used in practice (according to official statistics only in 0.58% of all cases) but, nevertheless, it exists.

Since there is no oversight or transparency in this process, client counselor who carries out the interview has a lot of liberty for using his/her own judgment, to the extent that the whole process can be manipulated. Semi-structured interviews with the unemployed confirmed that various frontline staff use this liberty for making their own judgments in different ways: from conscious attempts to help the unemployed receive a score that opens access to the broadest range of ALMP (Profile II) to harmful decisions based on prejudices or stereotypes (e.g. assuming that a given person should be assigned Profile III only because of one dominating feature—like homelessness or disability).

We believe that this paradoxical result—that more room for arbitrary decisions has been created as a result of introducing a system based on a “blind” algorithm—is not due to the way in which this particular system has been designed, but should be seen as an inherent flaw of the public policy based on algorithmic decision-making. Systems based on statistical analysis and pre-defined algorithms cannot deal with complex and often ambiguous individual situations without generating mistakes or over-simplifications. This shortcoming will naturally generate the need for human intervention, which—unless precisely regulated—will bring back the risk of making

arbitrary decisions. In fact, that risk increases in the situation of a limited transparency which can be seen as another common feature of algorithmic decision-making.

### **iii. Gap between declared goals and practice**

Our case study has shown a troubling gap between declared goals of the reform and its actual impact on the distribution of labor market programs. As we explained before, the reform was supposed to bring more efficiency on the state level and a better adjustment to the needs of the unemployed on the individual level. Official justifications behind the reform refer to this expected result as “individualization”. However, the very way in which the new system has been designed has led to the opposite effect: segregation of the unemployed according to general and vague criteria into three categories. Our research shows that, for example, Profile III includes persons in strikingly different situations—from homelessness and severe disability to a lack of real interest in finding a job (in Polish circumstances this feature is associated with people working in the creative sector who only seek a state-funded health insurance).

Such broad categories do not allow for a real adjustment of ALMP to the actual needs that can only be identified on individual level. The only factual consequence of such categorization was *limiting* the range of labor market programs that are offered to a given unemployed. This is due to the fact that not all programs are available in every profile. On the other hand, assignment to a given profile does not help in getting access to a preferred program even if, according to the law, it should be made available. In practice, due to very limited resources, final decisions as to who should be offered access to a given program is made by the frontline staff on the efficiency basis, namely, the most attractive programs are offered to those unemployed who stand the best chance of finding a job, because it will translate into a positive assessment of the labor office and its performance.

Summing up, the new system of distributing labor market programs, instead of increasing efficiency and enabling “individualization”, has led to the limitation of available options and, in some cases, even exclusion from access to such services. Our case study shows that no matter what the original assumption behind algorithmic decision-making was, its actual impact will be determined by the availability of public resources and the actual policy pursued by those who manage the system. Moreover, the use of algorithmic decision-making can help mask the shortcomings of a given public policy (such as an objective shortage of resources) by limiting options that are available to some categories of citizens and making the management of public resources less transparent.

### **iv. System based on the “presumption of guilt”**

Our research shows that an unemployed in the new system of distributing labor market programs is not treated as an “entitled citizen” but rather as a “suspicious person”. Internal guidelines developed by the MSLP reveal the actual perception of a “typical” unemployed person by the state administration—as somebody who is not motivated to work, demanding public services but not willing to contribute to the system, likely to cheat and manipulate in his/her own best interest. In semi-structured interviews the frontline staff of labor offices also acknowledged that an unemployed who starts asking questions or demanding more transparency will rather be seen as somebody who is trying to manipulate the process rather than somebody protecting his/her own rights.

It seems to be the main reason behind this very limited transparency—in particular, active efforts made by the MLSP to keep the logic behind the profiling confidential. Such a position of an unemployed is aggravated by the lack of adequate legal safeguards, such as the



right to obtain information about key aspects of the profiling process or the right to request a re-evaluation of the profile (if the unemployed believes that s/he has been assigned to a wrong category).

As a result of this logic of suspicion applied throughout the process of profiling, it is the unemployed who has to “prove innocent” in order to gain real access to support. In practice, the best tactic to achieve this result is to manipulate the interview and give answers that reflect the expectations of the other party. Here comes yet another paradox, showing how the underlying assumptions in the process of algorithmic decision-making can have a damaging impact on the public policy and undermine its original objectives.

While we do not perceive this feature as an inherent flaw of algorithmic decision-making, it does seem that this model goes in line with a negative shift in the positioning of a citizen—from a position of entitlement to the situation when a citizen has to justify his/her own claims or, even, prove innocence.

## **v. Categorization as a source of social stigma**

The analysis of semi-structured interviews and statements made both by the unemployed and labor office workers leads us to a conclusion that the new system of distributing labor market programs has generated segregation of individuals into better and worse categories. In particular, very quickly in the enrollment of the reform it became a common understanding among the unemployed and the frontline staff that Profile III is designed for people in difficult situations who often cannot be helped (“junk people”). While it is partly due to objective factors, such as a shortage of public resources to deal with such difficult situations, it can also be argued that the very categorization of people as a method of social management generates the perception that some are better or worse than others.

In the official discourse every profile was presented as “equally good” and, even, tailored to a particular situation of the unemployed (the concept of “individualization” that we described above). Thus, any differences in the range of labor market programs offered to the unemployed were supposed to reflect the differences in their actual needs. However, it turned out that the choice of programs offered to individuals assigned to Profile III is very limited due to the shortage of programs dedicated to those unemployed who find themselves in particularly difficult situations, such as homelessness or disability. Therefore, in practice, the fact of being assigned to this category leads to exclusion from most attractive services.

Because of the negative perception of Profile III and objective factors making this profile less attractive, it became a common practice among the unemployed (as well as among the frontline staff who were trying to help them) to manipulate the process of profiling in order to avoid being categorized as “III”. As a result, the number of people assigned to Profile II by far exceeds the number of those assigned to Profile III. This practice effectively undermines the very purpose of the reform, namely the adjustment of the assistance to the actual needs of the unemployed. In reality these needs are different and should not be merged in one large, meaningless category.

Our case study shows that there is an inherent problem with using categorization of people as a method of social management. No matter what arguments will be used in the official discourse, there will be a tendency among those managing the system and those affected by it to perceive some categories as “worse” and others as “better”. In the next step, being classified to a “worse” category will affect the self-esteem and dignity of the person concerned. This dynamic could, probably, be stopped by an equal distribution of public resources and the use of coherent narratives (i.e. frontline staff and the media using the same positive language with regard to every

category). Unfortunately, in Poland it was only aggravated by the shortage of public resources dedicated to Profile III and a negative perception of this category that was visible even in the internal guidelines used by the frontline staff.

## **vi. Risk of discrimination**

On the basis of a legal analysis we suggested that the way in which the new system of distributing ALMP has been designed creates a risk of discrimination. Allocation to a given profile is determined on the basis of such features as: age, gender or disability, which implies that the situation of specific unemployed individuals (in particular their actual access to labor market programs) is differentiated on the basis of these features. At the same time, the law does not explain how the existence of a certain feature affects the assignment of a given profile.

On the basis of semi-structured interviews we concluded that at least in some cases the very fact of having a disability or being a single mother turned out to be sufficient to assign a person concerned to Profile III. The analysis of statistical data—showing the age or gender structure of each profile—did not display such correlations due to the fact that many other factors may affect the distribution of the unemployed of a certain age and gender in each profile in various cities and regions of Poland but led us to believe that they may exist. However, this hypothesis certainly requires further research.

The risk of discrimination in the Polish case is closely related to the lack of transparency of the whole process. We argue that the burden of proof that discrimination is *not* taking place is on the side of the state, not citizens. It is due to the fact that, on the one hand, it was a political decision to design the new system of distributing support in such non-transparent way and, on the other, the state created a legal and administrative framework that requires collection and processing of sensitive personal data, thus creating a risk of discrimination in that scope.

Since, due to the aforementioned reasons, we cannot establish the existence of discriminatory practices in this particular case. It would also be unjustified to claim that the risk of discrimination is inherent in algorithmic decision-making processes. It certainly depends on the type of data collected and the logic applied in the process. However, we would argue that once sensitive data are involved and the logic behind profiling is not fully transparent, the risk of discriminatory impact increases and should be seen as a problem.

## **b. Recommendations**

On the basis of our research—in particular our definition of the key systemic problems as set out above—we have formulated the following recommendations for the use of algorithmic decision-making in the public policy:

### **i. Legal, procedural and practical safeguards ensuring full transparency**

- All aspects of algorithmic decision-making that might have an impact on the situation of individuals affected by this process (in particular their rights and obligations) should be regulated in legal acts (never in internal guidelines or technical documents). One of this aspects is the logic behind the profiling, including the existence of any correlation between certain categories of personal data and the final result of the profiling.

- Individuals subjected to profiling should have a legal right to obtain detailed information about all aspects of this process that might affect their situation (including the logic

behind it, what data was used and with what result etc.), as well as to be offered human intervention and explanation of the final result.

- Public institutions that use algorithmic decision-making as a tool of their policy should collect and publish detailed statistical data showing the structure of generated categories of people (i.e. age, gender, disability) and the distribution of public resources among them.

## **ii. Evidence-based policy making at the stage of the legislative process and evaluation of the real impact of public policy in the context of its original goals**

- At the stage of the legislative process public institutions which want to introduce algorithmic decision-making should present detailed, evidence-based impact assessment, including human rights-related risks and expected social benefits, as well as justification of its adequacy and proportionality as a tool of achieving certain policy goals.

- Once algorithmic decision-making has been implemented, public institutions should conduct regular and thorough evaluation of its real impact, in particular whether the policy goals envisaged at the outset have been achieved and whether any adjustments are necessary.

## **iii. Reasoned decisions made by humans instead of “blind” algorithms**

- Algorithmic decision-making should never be treated as an equivalent of reasoned decisions made by humans (i.e. public officials or public employees). While big data, statistical analysis and profiling can be used as supporting tools in the process of distributing public resources, such tools cannot replace human assessment.

- In order to prevent arbitrariness of decisions made by public officials or public employees, there should be a clear and detailed legal framework in place, determining the criteria of making such decisions, transparency requirements and revision mechanisms.

- The state should provide adequate resources (such as time or access to necessary information) for public officials and public employees to make reasoned decisions.

## **iv. Additional, specific safeguards preventing risks related to algorithmic decision-making**

- When introducing a public policy which involves algorithmic decision-making, the state should provide additional, specific safeguards protecting individuals against the risks related to this mechanism, in particular a very high standard of transparency and a right to obtain “human intervention” at all stages of the decision-making process (including explanation of what data was used in this process and with what result).

- The algorithm used in the process of decision-making should be subjected to prior approval of an independent body capable of evaluating human rights-related risks (e.g. the Data Protection Authority).

- When implementing a public policy which involves any form of categorization of individuals (division in groups that will be offered a different treatment), public institutions should design appropriate policy and communication measures in order to prevent unequal distribution of public resources among these groups and any form of stigmatization in the official discourse.

## **v. Additional legal safeguards preventing the risk of discrimination in the public policy**

If algorithmic decision-making involves the processing of sensitive personal data or information related to discrimination grounds, which are mentioned in international human rights standards (like: sex, color, race, genetic features, language, religion, membership of a national minority, property, birth, disability, age), the state should provide for additional legal safeguards such as:

- judicial or administrative redress procedure for those individuals who believe that they were subjected to discrimination;
- the right to obtain compensation in the case of personal harm;
- the reverse burden of proof that discrimination occurred (the burden of proof that there was no discrimination is on the side of the public institution, while the individual affected only has to bring evidence showing that such possibility existed).

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## ANNEX 1: THE QUESTIONNAIRE

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Does the unemployed person have current professional authorizations/licenses confirmed by appropriate documents?

- a)** yes\*;
- b)** no.

\*If answer a) then are:

- a)** the licenses useful on the local labor market;
- b)** the licenses useless on the local labor market?

Does the unemployed person have professional skills?

- a)** yes\*;
- b)** no.

\*If answer a) then are:

- a)** the skills useful on the local labor market;
- b)** the skills useless on the local labor market?

Place of residence in terms of distance from potential workplaces.

- a)** urban agglomeration;
- b)** large city with adjacent areas;
- c)** mid-size town with adjacent areas;
- d)** small town;
- e)** village;
- f)** village or settlement significantly distant from the labor market.

Do you have the opportunity to commute to work (including shift work and work on weekends)?

- a)** yes, I have the opportunity to commute to work (I am able to reach a place of work on foot or organize transport on my own);
- b)** yes, I can use public collective transport;
- c)** I do not have the opportunity to commute to work (no opportunity to use any means of transport).

Please specify the reasons making it difficult for you to take up work: /multiple choice/

- a)** no appropriate education;
- b)** inappropriate qualifications;
- c)** no knowledge of foreign languages;
- d)** no professional experience;
- e)** too long a break from work;

- f)** lack of appropriate job offers;
- g)** proposals of work without insurance (non-registered work);
- h)** if there is work, it is only seasonal;
- i)** employers propose only a mandate contract, a specific task contract or cooperation after registering one's own business activity;
- j)** too high requirements of employers;
- k)** too much competition;
- l)** remuneration offered by employers too low;
- m)** difficulties commuting;
- n)** improper age;
- o)** lack of job-seeking skills and self-presentation;
- p)** lack of flexibility--care over children and/or a dependent;
- q)** lack of flexibility--continuation of education;
- r)** health restrictions;
- s)** no possibility of shift work;
- t)** workplace changed too often;
- u)** lack of conviction about the necessity to take up a job;
- v)** no reasons.

In your opinion, will you find a job on your own soon?

- a)** I have great chances of finding a job on my own;
- b)** I have a chance to find a job on my own, but I need assistance from the labor office;
- c)** I have no chances of finding a job on my own, it is the labor office that should find work for me.

What is your main reason for registration at the labor office? /choose one/

- a)** assistance in undertaking a job understood as receiving an appropriate job offer;
- b)** willingness to be granted assistance from the labor office in the form of an internship, training, etc.;
- c)** receiving health insurance;
- d)** seeking help from a social assistance center;
- e)** need to obtain a certification for other purposes;
- f)** issuance of a pre-retirement certification;
- g)** being granted the right to an unemployment benefit.

Are you looking or have you looked for a job on your own?

- a)** yes;
- b)** no.

What do/did you do to look for a job on your own?

- a)** I send my CV and cover letter;
- b)** I browse through job advertisements in newspapers;
- c)** I browse through job advertisements on the Internet;
- d)** I call employers;
- e)** I arrange meetings with employers;
- f)** I use the assistance of the labor office;
- g)** I use the assistance of an employment agency;
- h)** I use the help of my friends, family;
- i)** I participate in work fairs;
- j)** I try to find some apprenticeship or internship, even not paid;
- k)** I serve as a volunteer.

Have you prepared application documents (curriculum vitae, cover letter) within the last month?

- a)** yes;
- b)** no;
- c)** no, because there was no such need.

What are you able/ready to do in order to increase your chances for employment? /multiple choice/

- a)** change the place of residence;
- b)** commute for more than 1.5 hrs one way;
- c)** work part-time;
- d)** work with a flexible schedule;
- e)** perform shift work;
- f)** increase/supplement the qualifications, re-qualify to work in another profession;
- g)** take up a job below your qualifications;
- h)** take up a job even without any contract;
- i)** work under a mandate contract or a specific task contract;
- j)** move abroad;
- k)** be more proactive in seeking a job;
- l)** start business activity;
- m)** I am not ready to do anything.

When offered a choice to undertake a job with minimum remuneration or remaining without work(jobless?), what would you choose:

- a)** take up a job;

- b)** take up a job, but under certain conditions (depending on the workplace, type of work, whether or not in the acquired profession, on the opportunities of professional development, etc.);
- c)** remaining without work (jobless).

How often are you ready to contact the labor office?

- a)** as frequently as possible;
- b)** at least once per week;
- c)** once in two weeks;
- d)** once in a month;
- e)** once in 3-4 months;
- f)** as often as the labor office intends to offer something to me;
- g)** as rarely as possible.

What - apart from income - makes you take up a job? /one choice/

- a)** willingness to be active;
- b)** prospects of professional and personal development;
- c)** necessity to provide for myself/my family;
- d)** others await that from me;
- e)** obtain retirement entitlement;
- f)** nothing apart from gaining income makes me take up a job;
- g)** nothing makes me take up a job (even income).

When can you commence work?

- a)** right away;
- b)** right away, but under certain conditions;
- c)** I am not able to specify that.

Would you - having health insurance from other sources/another entitlement - register at the labor office?

- a)** yes;
- b)** no.

What opportunities to contact the labor office and potential employers do you have?

- a)** my own e-mail address;
- b)** Skype, GG, other communicators;
- c)** landline phone;
- d)** mobile phone;
- e)** none of the above.

## **ANNEX 2: A NOTE ON METHODOLOGY**

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This note summarizes the methodology applied to prepare this report. It identifies the sources and scope of data and other materials analyzed during the research project.

### **Legal analysis:**

For the purposes of this report we analyzed relevant legal acts, especially: Act on the Promotion of Employment and Labor Market Institutions, Ordinance on the Profiling of Assistance for the Unemployed, Act on Personal Data Protection. We also took into account domestic and international legal standards for the protection of fundamental rights and analyzed preparatory works on amendments to the Act on the Promotion of Employment and Labor Market Institutions and Ordinance on the Profiling of Assistance for the Unemployed. This material consists of 250 documents from the years 2014-2015 (minutes of relevant parliamentary committees, official opinions submitted during the legislative process, proposals for amendments). All of them were gathered through online research of the relevant institutions.

### **Media reports:**

We analyzed ca. 150 media reports regarding the new model of distributing labor market programs based on profiling. These materials were published between 2013 and 2015 in two Polish daily newspapers *Gazeta Wyborcza* and *Dziennik Gazeta Prawna*. All of them were gathered through online research.

### **Other documentation:**

During our research we also analyzed the official documentation from the Polish Ombudsman and relevant parliamentary questions (10 questions and 10 answers). All of them were gathered through online research.

### **Data from local labor offices:**

We gathered and analyzed statistical data from 104 (out of a total number of 341) labor offices. We asked for this data to be provided in the form of requests for public information addressed to 150 randomly selected labor offices. The inquiries were shaped in a standardized questionnaire which included 13 questions concerning:

- 1)** general information about the labor market covered by the local labor office (e.g.: unemployment rate, total number of unemployed women, persons with disabilities etc.);
- 2)** demographic structure of specific profiles (e.g.: number of women and men assigned to specific profiles, number of people from a specific age group assigned to specific profiles);
- 3)** information on specific types of active labor market programs offered in a particular office.

## **Semi-structured interviews:**

We conducted 15 semi-structured interviews with: 9 unemployed persons and 6 employees of a local labor office. Each interview lasted on average 46 minutes (from 8 to 82 minutes). Due to the time constraints for the project and limited resources, we have chosen one agency with serious staffing problems (compared to an average situation in Poland, as one caseworker deals with a higher number of the unemployed). The rationale for this choice was that high caseload makes it more difficult for the PES workers to allocate enough time for a profiling interview and include feedback from the unemployed. Therefore, we assumed that in this local labor office, we would be able to observe negative implications of algorithmic decision-making in the area which requires an in-depth analysis of individual circumstances.

The selection of the labor office employees for the purpose of interviews reflects the work distribution in this agency. We interviewed: frontline staff (2 interviews), frontline staff labor office manager (2 interviews) and higher management (2 interviews). Our selection of the unemployed interviewees included people with different education (from primary to higher education), professional experience and life circumstances. We put particular attention to conducting at least some of the interviews with persons whom we might suspect to have multiple barriers hindering their participation in the labor market: 5 unemployed were recruited through a social assistance centre and 1 through a hostel for homeless people.

## **Emails and posts on Panoptykon Foundation Website forum:**

We gathered 30 posts from the Panoptykon Foundation webpage forum and 20 emails addressed to Panoptykon Foundation which were written by unemployed persons. For further analysis we selected those which described problems connected with the profiling process from the perspective of an unemployed person or a frontline staff worker.





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