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Access to data for academic purposes under the *Digital Services Act*

Jarosław Greser, *Vrije Universiteit Brussel (Brussels, Belgium), Warsaw University of Technology (Warsaw, Poland)*
E-mail: jaroslaw.greser@pw.edu.pl
https://orcid.org/0000-0002-1021-6142

Abstract
The growth of the digital economy has resulted in unprecedented increase of the amount of data generated by mankind. This vast volume and variety of data is a significant source of knowledge that allows researchers to open new research fields and to analyse existing problems more precisely. It is particularly important for scientists employing machine learning techniques in their studies. From a legal standpoint, however, the data typically belongs to the entity that collected it. In practice, there can be entities such as the owners of social networks (e.g. *Instagram – Meta*), online services (e.g. *YouTube – Google*), or Internet of Things devices like fitness bands. This data is protected by private law, thus, the rules on re-use of public data cannot be applied to it. Therefore, access depends on the will of the data holder. This fact has several adverse effects on the development of science and society. Attempts have been made at the European Union level to create legal instruments that facilitate access to privately owned data for academic purposes. One such instrument is the *Digital Services Act*. This article presents the analysis of the regulation in terms of balancing the interests of scientists and data holders, as well as the practical problems that may arise from its application.
Keywords: Digital Services Act, access to data, EU law, VLOP/VLOSE, open science

Dostęp do danych dla celów naukowych na podstawie *Aktu o usługach cyfrowych*

Streszczenie
Rozwój gospodarki cyfrowej doprowadził do bezprecedensowego wzrostu ilości i różnorodności danych generowanych przez ludzkość. Tym samym bazy danych stanowią bardzo cenne źródło wiedzy, umożliwiając eksplorację nowych obszarów badawczych oraz bardziej precyzyjną analizę istniejących problemów. Szczególnie istotne są one dla naukowców, korzystających w badaniach

z metody uczenia maszynowego. Jednak z perspektywy prawnej dane najczęściej należą do podmiotu, który je zgromadził. W praktyce mogą to być właściciele sieci społecznościowej (np. *Instagram – Meta*), serwisu internetowego (np. *YouTube – Google*), czy urządzeń Internetu Rzeczy (jak opaski treningowe). Dane te są chronione przepisami prawa prywatnego, a więc nie stosuje się do nich przepisów o ponownym wykorzystywaniu danych publicznych. Dostęp do nich w celach naukowych zależy od decyzji właściciela, co prowadzi do licznych negatywnych konsekwencji dla rozwoju nauki i społeczeństwa. Na poziomie Unii Europejskiej podjęto więc próby stworzenia instrumentów prawnych, ułatwiających naukowcom dostęp do danych zgromadzonych przez podmioty prywatne. Jednym z takich instrumentów jest *Akt o usługach cyfrowych*. W niniejszym artykule przeanalizowano tę regulację pod kątem wyważenia interesu naukowców i posiadaczy danych oraz praktycznych problemów, które mogą się pojawić na tle jej stosowania.
Słowa kluczowe: Akt o usługach cyfrowych, dostęp do danych, prawo UE, VLOP/VLOSE, otwarta nauka

The aim of this article is to examine the solutions adopted for using privately held data in scientific research. The measures adopted in the *Digital Services Act* (DSA), the first legal act of the European Union's legislation introducing a specific solution for this purpose, will be analysed.

The article is divided into four parts. Firstly, I analyse the context and aimes of above-mentioned regulations, followed by the subjective and objective restrictions concerning access to the data. Then, I discuss the possibilities of using it for academic purposes. Finally, I summarise the findings.

The analysis is focused on the following **research questions**:

1) has the legislator properly balanced the interests of researchers and data holders?
2) will the adopted solutions raise problems in their practical application?

In this article, I use **doctrinal research methods**, in particular systematic analysis and interpretation of the *Digital Services Act.*

1. Context of the problem

In digital era, data has become a crucial factor in determining the competitiveness of the private sector and the quality of public service delivery. It is now considered as a strategic resource at both the company and state level. The phrase "data is the new oil" accurately reflects its importance for modern society. The *European strategy for data* (European Commission 2020) reflects the discussion on this topic within the European Union. The document highlights the potential benefits of increasing access to data generated by both public and private sectors, such as stimulating economic growth, creating new products and services, and improving the competitiveness of the European economy.

It is crucial to recognise the potential of data for the public benefit, including national defence, public health, climate change mitigation, evidence-based policy-making, and public services (Hazelkorn, Gibson 2019: p. 260). Academic institutions, which are

dedicated to conducting research for the public good, have a special role to play in this process (Prettner, Werner 2016: p. 1075–1090).

In numerous fields, particularly in the social sciences and humanities, the quality of research relies on the accessibility of data and the capacity to use and re-use it (European Commission 2020: p. 7). This is especially important with the increasing use of tools based on unsupervised machine learning techniques, where "a model is trained on a large data set without any labeled examples, allowing it to learn the underlying structure and patterns in the data" (Lund, Wang 2023: p. 26). In this context, access to privately held data is important. For example, *Facebook* in 2014 generated 4 petabytes of data daily (see: Wiener, Bronson 2014). Additionally, 510,000 comments and 136,000 photos are posted on this platform every minute (Osman 2024). Although this raises ethical and legal questions (Park 2021), the collected data is treated as private property. This issue is especially evident in the case of co-generated data within the Internet of Things (Greser 2020: p. 4–11) and social media. Simultaneously, there are arguments in the literature that the lack of access to privately held data is inconsistent with other EU legislation (Savin 2021: p. 15). It impedes the performance of public tasks (Giedrimaite 2019), scientific research (Bruns 2019: p. 1544; Favaretto et. al. 2023), and reduces consumer protection (Olbryk 2022: p. 90). Additionally, it is considered as one of the causes of data abuses, as exemplified by the scandal between *Facebook* and *Cambridge Analytica* (Rehman 2019).

The *European strategy for data* and other EU policy documents address these issues. However, legislative initiatives taken by the European Commission based on these documents were focused solely on data from public sources. This legislation includes acts regulating data management, such as Regulation (EU) 2022/868, or the creation of a data space, such as the *Proposal for a Regulation on the European Health Data Space* (European Commission 2022). The Commission's actions are assumed to complement previously adopted regulations on access to public information and re-use of public data, such as Directive (EU) 2019/1024. Additionally, EU legislation, such as the *Digital Services Act* (Regulation (EU) 2022/2065) and the *Data Act* (Regulation (EU) 2023/2854), has started to provide solutions for accessing data collected by private parties.

2. *Ratio legis* for access to data in the *Digital Services Act* (DSA)

The DSA is a legislative act aimed at regulating the online environment in the European Union. According to Article 1(1), its aim is to introduce harmonised rules for a safe, predictable, and trusted online environment. The Commission emphasises that its main goal is to prevent illegal and harmful activities online, as well as the spread of disinformation (European Commission 2024a). Recital 96 highlights the necessity of accessing data held by private parties to effectively monitor compliance with the DSA (see: Regulation (EU) 2022/2065). However, it is important to note that this is not directly linked to the objectives outlined in the *European strategy for data*. Article 40 of the DSA contains specific solutions related to this issue. This provision governs public entities' access to data necessary for monitoring and evaluating compliance with the DSA (see: Regulation

(EU) 2022/2065: art. 40, par. 1–2, 7, 13) and information on the performance of algorithmic systems (Regulation (EU) 2022/2065: art. 40, par. 3). Additionally, it includes specific regulations regarding researchers' ability to obtain data (Regulation (EU) 2022/2065: art. 40, par. 4–13), which will be analysed later in this article.

The EU legislator decided that data sharing obligations would only apply to providers of very large online platforms (VLOPs) and very large online search engines (VLOSEs), as defined in Article 33 of the DSA. According to the Commission's information as of 25 April 2023, 17 entities were included in VLOP, two of which challenged the Commission's decision in court (Tar 2023), while two entities were included in VLOSE (European Commission 2023).

The legislator's motivation in limiting the possibilities for conducting research is evident in the adoption of such construction. This limitation can be applied to both the sources of research and the purpose, for which its results can be used. Recital 96 of the DSA reinforces this reasoning by emphasising the importance of the researchers' work and indicating that their research is to be carried out for the systemic risk analysis. Recital 97 of the DSA requires that access to data "should be proportionate and appropriately protect the rights and legitimate interests, including the protection of personal data, trade secrets and other confidential information, of the very large online platform or of the very large online search engine and any other parties concerned, including the recipients of the service" (Regulation (EU) 2022/2065: 97). It is important to note that commercial interests should not prevent access to data. The preamble, while not normative, should still reflect the legislator's objectives when interpreting the provisions (Zieliński 2017: p. 297–300). Based on the objectives expressed in cited recital, it can be assumed that the shared data can be used for various types of research, including basic research, applied research, or development work. However, it cannot be used for purposes beyond those outlined in the DSA, which are intended to protect the rights of individuals, VLOP and VLOSE. It is important to acknowledge that such restrictions may have an impact on academic freedom, which is protected by various international declarations and charters, including Article 13 of the *Charter of Fundamental Rights of the European Union*, Article 27 of the *Universal Declaration of Human Rights*, and Article 15 of the *International Covenant on Economic, Social and Cultural Rights.* At the same time, none of these rights are absolute. In a conflict situation, the interpretation of legislation requires taking into account both values by balancing them (Kordela 2012: p. 265).

3. Limitations on the scope of acceptable research

The principle of limited use of data for research purposes is supplemented by regulations in Article 40(4) of the DSA. These regulations can be divided into two groups: subject restriction and research field restriction. The subject restriction allows the release of information only to vetted researchers. Research fields are restricted to the scopes indicated in the provision.

3.1. Status of vetted researchers

To grant a vetted researcher status, the Digital Services Coordinator of establishment VLOP or VLOSE (hereinafter the Coordinator) will make a decision. There are two forms of application provided by the DSA. The first option is for researcher to apply directly to the Coordinator. The second option, provided for by Article 40(9), is to submit the "application to the Digital Services Coordinator of the Member State of the research organisation to which the [researchers] are affiliated" (Regulation (EU) 2022/2065: art. 40, par. 9). The Coordinator will carry out an initial assessment and send its conclusions, along with the application, to the Digital Services Coordinator of the establishment. It is important to note that the Coordinator is not bound by the initial assessment, although they should take it into account.

When making a decision, the establishment's Digital Services Coordinator must consider whether the applicant has fulfilled the criteria listed in Article 40(8) of the DSA. These criteria consist of seven groups of prerequisites that must be met cumulatively. It is important to note that the Regulation (EU) 2022/2065 places the burden of proof on the applicant to demonstrate that they have met these prerequisites. This fact may alter the provisions of the national procedure that the Coordinator follows when making decisions. In this situation, the Coordinator must decide whether to give precedence to the national rules or the regulation. This decision should take into account the hierarchy of legal acts, and the principle of the primacy of Union law over national law. The Coordinator should make further decisions in accordance with the chosen rule.

To obtain a vetted researcher status, the first requirement is membership in research organisation as defined in Article 2(1) of Directive (EU) 2019/790. To determine if the designated organisation meets the required status under national law, fulfilment of this condition is necessary. However, failing to meet this condition under national law does not necessarily mean that a specific entity cannot be considered to meet the conditions outlined in Directive (EU) 2019/790. This may be applicable to an entity whose primary objective is to conduct scientific research or educational activities that involve scientific research. The literature suggests that coordinators should maintain a list of research organisations to determine if a condition has been met (Edelson et al. 2023: p. 61). It is important to note that such a list can only be supportive and not conclusive, because the legislation does not provide for the issuance of such a document. However, it appears that such a list cannot be conclusive but only subsidiary, because the legislation does not provide for the issuance of such a document. Therefore, relying on it would negate the right to demonstrate that a particular entity can be considered as research organisation even if national legislation does not provide for it. Furthermore, as stated in Recital 97 of the DSA, research organisations may also encompass "civil society organisations that are conducting research with the primary goal of supporting their public interest mission". This is particularly relevant for think tanks that are often outside the higher education system, with which research organisations are typically associated.

The criteria for membership in research organisation should be interpreted more broadly than simply verifying employment status. The goal is to obtain affiliation, which

may be based on regulations, internal norms, or customary rules. As a result, this group should generally include academics, doctoral students, post-doctoral lecturers, visiting researchers, and members of research teams. It should be noted that meeting this criterion is not evaluated on its own merits. Therefore, an application cannot be rejected based on a lack of competence or experience in conducting the research applied for. Additionally, an application cannot be rejected based on the applicant's affiliation with research organisation outside of the EU or their nationality (Husovec 2023: p. 1).

The second condition requires the applicant to act independently of commercial interests. This condition is aimed to protect VLOP and VLOSE from using the obtained information in a way that constitutes unfair competition. However, Recital 97 states that consideration of providers' commercial interests should not result in a denial of access to data necessary for the research objective. The Coordinator will face a significant challenge in balancing these values. According to the European Data Protection Supervisor, the Commission should propose standards for determining researcher independence criteria (European Data Protection Supervisor 2021: p. 17). However, this suggestion was not included in the final version of the regulation. The mentioned prohibition applies solely to commercial activities that may harm the commercial interests of VLOP or VLOSE. Therefore, engaging in commercial activities in other areas or non-commercial activities, such as scientific research that portrays VLOP or VLOSE negatively, cannot be used as the basis for rejection.

The following premise is related to data security and confidentiality. Vetted researchers must demonstrate their ability to meet requirements concerning data security and confidentiality, as well as to safeguard personal data, including the technical and organisational measures that have been introduced (Vermeulen 2022: p. 7). The assessment is conducted for each application. Therefore, the Coordinator evaluates the fulfilment of the condition with respect to the requested data in each case. The evaluation of the risks identified in relation to the data being acquired is the starting point for the assessment. It is determined whether the measures taken adequately address the identified risks and properly mitigate them. The provision does not state that the applicant should conduct such analysis, and it appears that the Coordinator cannot demand it. However, in most cases, the absence of such analysis will hinder a reliable assessment of whether the indicated conditions have been met. Additionally, it may be difficult to determine whether the proposed measures meet the minimum legal standards. Verification of obligations imposed by national law, such as the regulations implementing the NIS2 Directive, may be resource-consuming. This stands in contrast to issues regulated at the EU level, such as the General Data Protection Regulation (GDPR), where verification is feasible. It is important to note that the use of subjective evaluations should be avoided unless clearly marked as such. It is important to note that rejecting an application basing solely on failure to meet non-legal standards, such as industry guidelines or internal VLOP or VLOSE regulations, may be deemed unacceptable without providing a detailed justification from the Coordinator.

The requirement for vetted researchers is to make "their research results publicly available free of charge within a reasonable period after the completion of the research"

(Regulation (EU) 2022/2065: art.40, par. 8(g)). This means that interested parties should not have to pay to access the research results. However, it does not necessarily require the preparation of a scientific publication. The results can be published through various means such as a dedicated website, online videos, blog posts, or social media. If traditional forms are used, they should offer open access, which may result in significant additional costs for the researcher (Van Noorden, 2013: p. 426–429). It cannot be assumed that accessing an article hidden behind a paywall, for example, in a scientific library, fulfils the condition of free accessibility. The date of publication should be within a reasonable period after the completion of the research, which should be evaluated based on the proposed form of publication. Furthermore, it is important to consider the rights and interests of the recipients of the service, particularly with regards to the protection of their personal data. This emphasis appears to reflect the legislator's values, because the obligations in this respect are specified in other regulations.

Additionally, the Coordinator must confirm that data access, time frames, and research activities align with the purpose outlined in Article 40(4). These requirements are linked to restricted research opportunities and will be further discussed in the following subsection.

It must be reiterated that meeting the cumulative conditions mentioned above is necessary to attain the status of a vetted researcher. Due to the evaluative nature of this provision and the interpretive doubts surrounding it, the Coordinators' understanding will play a significant role. It is important to note that there may be differences in the approach to certain issues among the Member States. The activities of the European Board for Digital Services will assist maintaining the decision uniformity. Simultaneously, it will not directly influence the decisions made by Member States' courts, provided that the adopted decision-making procedure permits challenges through this route. However, it should be noted that this problem may have little practical significance, because the binding decision is always issued by the Coordinator with jurisdiction over the location of VLOP or VLOSE. Territorial jurisdiction of the Coordinator limits the use of forum shopping by applicants. Additionally, it is worth noting that most companies are based in Ireland (European Commission 2024b).

3.2. Limitations on the use of the provided data

When creating rules for accessing VLOP and VLOSE data, the EU legislator established restrictions on its use in research, in addition to subject criteria. These restrictions are outlined in Article 40 (4) and Article 40 (8) (e) and (f). Research can only be conducted if it "contributes to the detection, identification, and understanding of systemic risks in the Union, as set out pursuant to Article 34(1), and to the assessment of the adequacy, efficiency, and impacts of the risk mitigation measures pursuant to Article 35" (Regulation (EU) 2022/2065: art. 40, par.4).

The DSA does not provide a definition for the term 'systemic risks'. Therefore, it is necessary to refer to interpretation of the concepts developed by researchers who specialize in risk studies. According to the literature, *systemic risks* refer "to the risk or

probability of breakdowns in an entire system, as opposed to breakdowns in individual parts or components. This is evidenced by co-movements (correlation) among most or all parts" (Kaufman, Scott 2003: p. 372; see also: International Risk Governance Council 2018). According to Renn et al. (2022: p. 1903), this may also potentially pose a threat or hazard that could cause disruptions or losses in the multiple connected parts of complex systems. Article 34 of the DSA lists several risks, such as the spread of illegal content, potential harm to fundamental rights, negative impacts on public discourse and elections, threats to public safety, gender-based violence, risks to public health and minors, and serious harm to individuals' physical and mental well-being. Article 34(1) explicitly requires VLOP and VLOSE to diligently identify, analyse and assess any systemic risks in the Union. However, under Article 34(3), subjects are not obligated to publish their risk analyses. This lack of transparency can make it difficult for researchers to determine which areas they can conduct research in.

It is important to note that in the case of risk reduction measures referred to in Article 35, the studies should be limited to assessing the appropriateness, effectiveness and impact of the measures. This includes examining whether the measures adopted are reasonable, proportionate, and effective. It is important to note that the study of these indicators is directly related to the defined risks, and in some cases, obtaining information on them may not be possible. The same issue arises with the applied risk mitigation measures. At the same time, to demonstrate necessity and proportionality (see: Regulation (EU) 2022/2065: art. 40, par. 8 (e)), it is better to avoid requesting access to all data related to risk mitigation measures as it will likely be denied due to its broad scope.

A problem of a different nature is the possibility that research results may relate to areas other than the research objectives stated in the proposal. If these findings align with the other premises outlined in the DSA, they should be considered as part of the research risks. At the same time, there may be two situations: firstly, when the obtained results exceed the premises indicated in Article 40, but the research was conducted within the scope of the purposes indicated in that article; and secondly, when the obtained data will serve other research purposes. For reasons of academic freedom, in both cases it will be possible to publish the research results. In the first case, losing the status of a vetted researcher or requiring the submission of a new application does not seem to be justified by such action. In the second case, it could lead to the termination of access to data, as stated in Article 40(10) of the DSA, and the initiation of legal procedures for unfair competition.

It is essential to note that the regulations do not outline a procedure for amending a proposal that has been approved by the Coordinator. Therefore, throughout the research process, the vetted researcher must adhere to the research plan, which was developed based on hypotheses derived from certain assumptions. It is common practice in scientific work to revise and modify hypotheses, particularly sub-hypotheses, as research findings are revealed. Furthermore, researchers may often require additional analyses or supplementary data sets. However, the current regulations do not appear to consider these peculiarities of scientific work, prioritising instead the precise speci-

fication of the data used. This approach may result in a lower quality of research outcomes. At the same time, research is "important for bridging information asymmetries and establishing a resilient system of risk mitigation", as indicated in Recital 96 of the DSA. This could form the basis for a more flexible interpretation of the regulations by the Coordinators.

4. Access to data for entities that do not meet the prerequisites of a vetted researcher

Article 40(12) of the DSA allows entities other than vetted researchers to access data, provided they obtain a researcher status (see: Regulation (EU) 2022/2065: art. 40, par. 12). To obtain this status, they must meet certain prerequisites, including acting independently of commercial interests, disclosing research funding, meeting data security and confidentiality requirements, and indicating the need to use certain data to achieve the purposes outlined in the regulation. The interpretation of these prerequisites should be the same as that for obtaining a vetted researcher status. However, VLOP and VLOSE are responsible for verifying them, not the Coordinator. It is important to note that any entity with a vetted researcher status meets the conditions for being a researcher. Therefore, it appears that the platform cannot challenge the Coordinator's decision, as long as the scope of the research in question remains the same.

Both the text of the provision itself and Recital 97 of the DSA indicate that such a status can be obtained by individuals, who are not associated with a research organisation. Additionally, individuals conducting research on their own behalf cannot be excluded from obtaining this status. This is particularly beneficial for those involved in the rapidly growing citizen science movement (Balázs et. al. 2021: p. 139–199). However, the provisions restrict researchers to issues that contribute to the detection, identification, and understanding of systemic risk in the Union, in accordance with Article 34(1) of the DSA. Additionally, only publicly available data on the website is subject to release. Information that is not publicly available, such as closed groups on social networks or non-public user profiles, must be excluded from this service. However, this restriction may be too strict and could limit the development of knowledge about VLOP and VLOSE. On the other hand, granting real-time access for dynamic analysis could provide greater research opportunities and should be treated as beneficial for research purposes.

It is worth noting that, apart from obtaining a researcher or vetted researcher status, there are no other possibilities in the regulation for accessing VLOP or VLOSE data. Recital 98 suggests that such opportunities may arise as a result of voluntary actions by platforms, particularly through commitments and procedures agreed upon under codes of conduct or emergency protocols. The emergence of specific national legislation providing broader opportunities for access to data or the reinterpretation of public information laws to cover more data cannot be ruled out. However, these possibilities appear to be purely theoretical and not very likely to be implemented.

Conclusions

Regulating the exchange of data collected by private entities with researchers marks a shift from previous legislation, which was focused on the sharing of information processed by public entities. The adoption of the *Digital Services Act*, which aim is to regulate internet services, indicates the legislator's intention to make data available solely for implementing the Regulation's provisions, rather than for general research purposes. This is also explicitly highlighted in the wording of Article 40 of the DSA. Consequently, it seems unlikely that the legislation will be interpreted in a manner that facilitates the utilisation of research findings for purposes other than those, for which they were originally intended. Moreover, the interpretation of the regulations itself is questionable in several aspects. For instance, the lack of clarity regarding the decision-making process of the Coordinators raises doubts, particularly whether such a process is subject to any legal challenge. It is premature to assume that this problem will be resolved, either partially or completely, after the adoption of delegated acts issued on the basis of Article 40(13) of the DSA, as there are no drafts of these acts available at present.

A major problem is also the implicitly indicated requirement to precisely define the scope of the research, which may not be possible to determine before its beginning. It seems necessary for Coordinators to take this circumstance into account and avoid too strict interpretation of the regulations. Consideration of this demand, which is also suggested in the literature (Edelson et. al. 2023: p. 56), will allow better research results and contribute more to the goals of the DSA (see: Regulation (EU) 2022/2065). Similar flexibility should be postulated with regard to changes that may arise in the course of conducting research.

In summary, based on the construction of the regulations, the legislator aimed to balance the private interests of data protection by VLOP and VLOSE with the public interest of the society's better functioning. However, the legislation appears to lack preservation measures and contains numerous general clauses that grant the Coordinator significant discretion in decision-making, potentially impeding research and limiting flexibility. Hopefully, this situation may not always be the case. The practice of applying regulations, including court decisions on granting and revoking the status of vetted researchers and the release of data and its scope, will turn out crucial in this regard.

Jarosław Greser – PhD, affiliated at the *Cyber and Data Security Lab*, *Vrije Universiteit Brussel* (Belgium), as well as Faculty of Administration and Social Sciences, Warsaw University of Technology (Poland). Research interests: new technology law, in particular regulation of medical technology, Internet of Things and cybersecurity. Recent publications: J.Greser, *Zapobieganie atakom adwersarskim na medyczną AI z perspektywy prawnej*, in: A.Gryszczyńska, G.Szpor, W.Wiewiórkowski (eds), *Internet. Hacking*, Warsaw 2023; J.Greser, M.Dymitruk, *EU Artificial Intelligence Act versus authoritarian tendencies in using AI by public authorities*, "Review of International, European and Comparative Law" 2022, vol. XX.

Jarosław Greser – doktor nauk prawnych, pracuje w *Cyber and Data Security Lab*, *Vrije Universiteit Brussel* (Belgia), a także na Wydziale Administracji i Nauk Społecznych Politechniki Warszawskiej (Polska). Zainteresowania badawcze: prawo nowych technologii, w szczególności regulacje technologii medycznych, Internetu Rzeczy oraz cyberbezpieczeństwa. Wybrane publikacje: J.Greser, *Zapobieganie atakom adwersarskim na medyczną AI z perspektywy prawnej,* w: A.Gryszczyńska, G.Szpor, W.Wiewiórkowski (red.), *Internet. Hacking*, Warszawa 2023; J.Greser, M.Dymitruk, *Unijny projekt regulacji sztucznej inteligencji a przeciwdziałanie próbom autorytarnego jej wykorzystywania przez władze publiczne*, „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2022, vol. XX.

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