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Considerations on Data as Global Commons

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Sommario

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Abstract

Cultural and social progress, the resilience of democratic systems, the effectiveness of fundamental rights, and economic development today—more than ever—depend on control over data and the legislative policy choices that shape it. Considering data as global commons means restoring to society the vast and valuable data heritage it has helped generate and continues to produce. It allows collective intelligence to harness this resource, unlocking its full cultural, social, political, and economic value.

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1. The Need for Data Openness and Sharing at a Global Level to Extract Knowledge.

Our era is defined by the datafication of reality, where all phenomena are converted into data to be analysed and calculated. In this digital landscape, all things, including individuals themselves, become flows of computable data.

Digital and globalized communication technologies enable the generation of vast amounts of data that expand exponentially at every moment through the contributions of billions of users worldwide[1].

This enormous volume of data drives the development of increasingly rapid and powerful computational systems, particularly algorithms[2]. When combined with the speed and power of algorithmic computation, such a vast amount of data facilitates advancements in machine learning and artificial intelligence[3] that reshape our society and our way of living[4].

Across both public and private domains, enormous and heterogeneous data sets, or big data, are collected and analysed though computational methods for diverse purposes.

Today, algorithmic analysis of big data forms the foundation of knowledge acquisition, both scientific and otherwise.

Moreover, decision-making processes throughout public and private sectors increasingly depend on algorithmic analysis of big data and the knowledge it extracts. These processes encompass everything from political decisions to numerous other decisions that may profoundly impact individual lives and society, potentially determining critical outcomes, such as whether someone will be granted bank credit or permitted to leave prison on bail[5].

Furthermore, algorithmic analysis of big data and the knowledge it generates underpin today's production of innovative goods and services, and thus economic

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[1] V. ZENO-ZENCOVICH, *Dati, grandi dati, dati granulari e la nuova epistemologia del giurista*, in *Media Laws*, 2019, p. 32.

[2] E. DIETRICH, *Algorithm*, in R.A. WILSON, F.C. KEIL (eds.), *The MIT Encyclopedia of the Cognitive Sciences*, The MIT Press, Cambridge, 1999, p. 11 s.

[3] M.I. JORDAN, S. RUSSELL, *Computational Intelligence*, in R.A. WILSON, F.C. KEIL (eds.), *The MIT Encyclopedia of the Cognitive Sciences*, The MIT Press, Cambridge, 1999, p. xxiii ss.

[4] L. FLORIDI, *The Fourth Revolution. How the infosphere is reshaping human reality*, Oxford University Press, Oxford, 2014; V. MAYER-SCHONBERGER, K.N. CUKIER, *Big Data: A Revolution That Will Transform How We Live, Work, and Think,* Houghton Mifflin Harcourt, Boston, 2013.

[5] R. KITCHIN, *The Data Revolution. Big Data, Open Data, Data Infrastructures & Their Consequences*, Sage, Los Angeles, 2014; R. KITCHIN, G. MCARDLE, *What Makes Big Data? Exploring the Ontological Characteristics of 26 Datasets*, in *Big Data & Society*, 1, 2016, p. 1 ss.; D. BOLLIER, *The Promise and Peril of Big Data,* The Aspen Institute, Washington, DC, 2010, p. 12 ss.

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development. Data are now widely defined as "the oil of the 21st century"[6], essential resources that fuel the global economy much as oil powered the industrial economy in the past two centuries.

Algorithmic analysis of big data has revolutionized how we comprehend reality and make decisions. One of the most significant aspects of big data lies in their volume and heterogeneity, which permit the comparison, aggregation, and integration of data of diverse types from multiple sources. This feature uncovers correlations between phenomena that were previously invisible to researchers. Such correlations forge pathways to new knowledge and discoveries that would otherwise remain inaccessible[7].

It becomes evident, therefore, that opportunities to extract knowledge from data depend critically on data openness and mobility, particularly on the possibility to access, share and reuse data at a global level[8].

2. The Need for Social Participation in Big Data Management and Analysis to Extract Reliable and Socially Sustainable Knowledge.

Big data promise to accelerate and enhance knowledge acquisition. However, navigating this vast ocean of data, even with the most advanced computational tools and methods, poses a growing challenge in distinguishing what constitutes reliable and trustworthy knowledge[9].

Reliability and trustworthiness depend on data quality, impartiality, and integrity, and on the theoretical assumptions, methods, and purposes of data analysis. All these factors imply fundamental choices that form and inform big data management and analysis processes. These choices are not merely technical in nature as they have important social consequences, generating knowledge and decisions that impact individuals, businesses, and society.

Despite the increasing automation of analytical processes by algorithms, humans retain and must embrace the intellectual responsibility to know, understand, and

[6] In 2006, Clive Humby, an English data scientist and mathematician, coined this slogan which, over time, has proven to be increasingly true to reality.

[7] D. BOYD, K. CRAWFORD, *Six Provocations for Big Data*, in *Data & Society Paper*, 2011; S. LEONELLI, *La ricerca scientifica nell'era dei Big Data*, Meltemi, Milan, 2018, p. 29 ss.

[8] B. WESSEL, R. FINN, T. SVEINSDOTTIR, K. WADHWA, *Open Data and the Knowledge Society*, Amsterdam University Press, Amsterdam, 2017; SCIENCE INTERNATIONAL, *Open data in a big data world. An international accord*, ICSU, ISCC TWAS, IAP, Paris, 2015.

[9] S. LEONELLI, *La ricerca scientifica nell'era dei Big Data*, Meltemi, Milan, 2018, p. 9 ss., 113 ss.

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direct these processes. This includes maintaining human control over key choices and evaluating their social implications[10].

In democratic societies, these choices and evaluations cannot disregard the social contexts in which they will produce their effects, nor the individual and collective interests at stake. Consequently, big data management and analysis processes should incorporate adequate forms of social participation[11].

3. Digital Enclosures and Their Social, Political, and Economic Risks.

While billions of users worldwide contribute to generating data, only few entities centralize these data. These include public institutions operating at international, supranational, national and local levels, as well as private entities, such as multinational corporations that dominate their markets through their management of large digital platforms facilitating diverse online user interactions.

Public entities have accumulated a vast and valuable data heritage while performing their functions, but they have progressively lost their traditional role as information holders. Digital platforms have taken on this role, having accumulated more data than many governments and public institutions worldwide. Consequently, a small number of private entities now control an enormous and valuable heritage of user-generated data.

Data are goods that economists define as "non-rival", since they constitute a resource that multiple parties can simultaneously use in different contexts and for different purposes, without depleting their value or utility. Digital platforms, however, appropriate data exclusively to maximize profit, thereby denying researchers, public entities, other businesses, and society in general the ability to derive value from them.

These knowledge oligopolies, veritable digital enclosures, represent a significant political, social, and market failure.

Furthermore, the involvement of powerful private and public interests in big data algorithmic analysis processes creates risks in the selection of which data to analyse, what knowledge to extract, and which decisions to derive. In such environments, political or economic convenience may prevail over scientific and social considerations. This prioritization generates multiple risks: distorted representations of reality, surveillance, manipulation of ideas, influence over choices (including

[10] L. FLORIDI, *The Fourth Revolution. How the infosphere is reshaping human reality*, Oxford University Press, Oxford, 2014.

[11] S. LEONELLI, *La ricerca scientifica nell'era dei Big Data*, *cit.*, p. 100 ss.; C. HESS, E. OSTROM (eds.), *Understanding Knowledge as a Commons. From Theory to Practice*, The MIT Press, Cambridge-London, 2007; J. SHKABATUR, *The Global Commons of Data*, in *Stanford Technology Law Review*, 22, 2019, p. 354 ss., esp. p 385 ss.

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electoral decisions, as evidenced by the Cambridge Analytica case) and unjust, discriminatory outcomes[12].

Algorithmic decision-making processes can produce unjust and discriminatory results, even when using algorithms designed without any discriminatory purpose. This occurs, for example, when existing societal discrimination becomes embedded in the data analysed, and algorithms detect and replicate these patterns, potentially amplifying them[13]. Such circumstances create a troubling paradox: the most innovative technology often replicates and consolidates the existing social order, perpetuating old forms of discrimination or giving rise to new ones. Addressing this complex and significant social issue cannot be left to or entrusted with private companies that manage large digital platforms. Data openness would help overcome, at least partially, the current difficulties encountered in observing and understanding the complex functioning of algorithmic calculations, thereby preventing their unjust and discriminatory outcomes[14].

4. The Need for Uniform Legal Principles that Consider Data as Global Commons.

As a source of knowledge, data are essential goods for advancing scientific and social progress, maintaining effective democratic systems, protecting fundamental rights, and driving economic development.

Considering data as global commons[15] means defining uniform legal principles that ensure openness, sharing, and reuse of data at a global level by as many subjects as

[12] S. ZUBOFF, *The Age of Surveillance Capitalism: The fight for human future at the new frontier of power*, Profile Books, New York, 2019; ID., *Big other: surveillance capitalism and the prospects of an information civilization*, in *Journal of Information Technology*, 30, 2015, p. 75 ss.; J.E. COHEN, *Law for the Platform Economy*, in *UC Davis Law Review*, 2017, 51, p. 133 ss.; Z. BAUMAN, D. LYON, *Liquid Surveillance: A Conversation*, Polity, Cambridge, 2012; E. PARISER, *The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think*, Penguin Books, New York, 2012; C. CROUCH (eds.), *Post-democracy*, Polity, Cambridge, 2004; R. BRANDOM, *Facebookopens up "overwhelming data set" for election research*, in *The Verge*, 2018; J. ZITTRAIN, *Engineering an Election*, in *Harvard Law Review Forum*, 8, 2014, p. 335 ss.

[13] FEDERAL TRADE COMMISSION REPORT, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues*, 2016; S. BAROCAS, A.D. SELBST, *Big Data's Disparate Impact*, in *California Law Review*, 104, 2016, p. 671 ss.; B.W. GOODMAN, *Economic Models of (Algorithmic) Discrimination*, 29th Conference on Neural Information Processing Systems, Barcelona, Spain, 2016.

[14] J. SHKABATUR, *The Global Commons of Data*, in *Stanford Technology Law Review*, 22, 2019, p. 354 ss.

[15] J. SHKABATUR, *The Global Commons of Data*, in *Stanford Technology Law Review*, 22, 2019, p. 354 ss. In the vast legal literature on the subject of common goods, E. OSTROM, *Governing the commons*, Cambridge University Press, Cambridge, 1990; C. HESS, E. OSTROM (eds.), *Understanding Knowledge As a Commons*, The MIT Press, Cambridge, 2007; S. RODOTA`, *Un terribile diritto. Studi sulla proprieta` privata e i beni comuni*, il Mulino, Bologna, 2013; ID., *Verso i beni comuni*, in *Rivista critica del diritto privato*, 4, 2017, p. 495 ss.; A. SOMMA, *Democrazia economica e diritto privato. Contributo alla riflessione sui beni comuni*, in *Materiali per una storia della cultura giuridica*, 2/2011, p. 461 ss.; U. MATTEI, *Beni comuni. Un manifesto*, Laterza, Rome-Bari, 2011; ID., *Prime note critiche sull'informazione come bene comune*, in *Rivista critica del diritto privato*, 1-2, 2020, p. 75 ss.; M.R. MARELLA, *Il diritto dei beni comuni. Un invito alla discussione*, in *Rivista critica del diritto privato*, 1, 2011, p. 103 ss.; ID. (a cura di), *Oltre il*

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possible worldwide and with minimal obstacles of various kinds. These principles should transcend the boundaries between public and private spheres[16] and prioritize the socio-economic function of data over formal ownership of data[17]. Furthermore, they should provide for effective and incisive forms of social participation in big data utilization processes[18]. Such participation would ensure that big data are used to derive reliable and trustworthy knowledge, based on control of data quality and correctness of data management and analysis methods. It would also lead to socially sustainable decisions, through consideration of the interests involved and evaluation of social implications[19]. Such uniform legal principles should protect the various legitimate interests involved in big data utilization, including the legitimate economic interests of digital platforms. However, they must establish the right balance, ensuring primarily that data are used in the general interest and for the benefit of future generations. They should aim at achieving objectives of general relevance, such as preventing unjust and discriminatory outcomes from algorithmic

pubblico e il privato. Per un diritto dei beni comuni, Ombre Corte, Verona, 2012; A. LUCARELLI, *Beni comuni*, in *Digesto delle Discipline Pubblicistiche*, dir. Rodolfo Sacco, 2021, p. 21 ss.; ID., *Costituzione e Beni Comuni*, Diogene, Naples, 2013; ID., *La democrazia dei beni comuni*, Laterza, Rome-Bari, 2013; ID. (ed.), *Beni Comuni. Proprietà, gestione, diritti*, in *Rassegna di diritto pubblico europeo*, 1/2007; ID., *Note minime per una teoria giuridica dei beni comuni*, in *Quale Stato*, 2007, p. 87 ss.; G. RESTA, *La privatizzazione della conoscenza e la promessa dei beni comuni: riflessioni sul caso "Myriad Genetics"*, in *Rivista critica del diritto privato*, 2, 2011, p. 281 ss.; P. CACCIARI, (ed.), *La società dei beni comuni*, Ediesse, Rome, 2010; A. CIERVO, *I beni comuni*, Ediesse, Rome, 2012; S. RANGANATHAN, *Global Commons*, in *European Journal of International Law*, 3, 2016, p. 693 ss.; A. QUARTA, M. SPANÒ (eds.), *Beni comuni 2.0 Contro-egemonia e nuove istituzioni*, Eterotopie, Milan, 2016; F. PONTE, *I big data come common goods*, in *Ciberspazio e diritto*, 1, 2017, p. 31 ss.; A. IULIANI, *Prime riflessioni in tema di beni comuni*, in *Europa e diritto privato*, 2, 2012, p. 617 ss.; A. ALGOSTINO, *Riflessioni sui beni comuni tra il "pubblico" e la Costituzione*, in *Costituzionalismo.it*, 3, 2013; L. RAMPA, Q. CAMERLENGO, *I beni comuni tra diritto ed economia: davvero un tertium genus?*, in *Politica del diritto*, 2, 2014, p. 253 ss.; G. CARAPEZZA FIGLIA, *Premesse ricostruttive del concetto di beni comuni nella civilistica italiana degli anni Settanta*, in *Rassegna di diritto civile*, 4, 2011, p. 1061 ss.; R. BRIGANTI, *Oltre la funzione sociale della proprietà nell'esercizio dei servizi pubblici. Verso la categoria giuridica dei beni comuni*, in *Rassegna di diritto pubblico europeo*, 1, 2012, p. 83 ss.; L. D'ANDREA, *I beni comuni nella prospettiva costituzionale: note introduttive*, in *Rivista AIC*, 3, 2015, p. 1 ss.; S. LIETO, *"Beni comuni", diritti fondamentali e stato sociale. La Corte di Cassazione oltre la prospettiva della proprietà codicistica*, in *Politica del diritto*, 2, 2011, p. 331 ss.; P. MADDALENA, *I beni comuni nel codice civile, nella tradizione romanistica e nella Costituzione della Repubblica italiana*, in *federalismi.it*, 19/2011, p. 1 ss.; C. IANNELLO, *Beni pubblici versus beni comuni*, in *Forum di Quaderni costituzionali*, 2013; E. VITALE, *Contro i beni comuni. Una critica illuminista*, Laterza, Rome-Bari, 2013.

[16] M.R. MARELLA, *Il diritto dei beni comuni*, *cit.*, p. 105.

[17] A. LUCARELLI, *Proprietà pubblica, principi costituzionali e tutela dei diritti fondamentali*, in ID. (ed.), *Beni comuni*, Edizioni Scientifiche Italiane, Naples, 2007, p. 17.

[18] P. CACCIARI, *Introduzione*, in ID. (ed.), *La società dei beni comuni*, *cit.*, p. 12 ss.; C. CROUCH, *Postdemocrazia*, Laterza, Rome-Bari, 2004, p. 23 ss.; C. HESS, E. OSTROM (eds.), *Understanding Knowledge as a Commons. From Theory to Practice*, The MIT Press, Cambridge-London, 2007; J. SHKABATUR, *The Global Commons of Data*, in *Stanford Technology Law Review*, 22, 2019, p. 354 ss., 385 ss.

[19] S. LEONELLI, *La ricerca scientifica nell'era dei Big Data*, *cit.*, p. 100 ss.; C. HESS, E. OSTROM (eds.), *Understanding Knowledge as a Commons*, *cit.*

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decision-making processes, in accordance with fundamental rights and the principle of substantive equality[20].

5. The Challenge of Opening Private Sector Data while Protecting Intellectual Property.

Open data have gained traction across many countries for public sector data and scientific research data[21], but they face considerable challenges in extending to private sector data.

The principal difficulties arise from conflicts between data openness and intellectual property protection. Throughout recent decades, both in Europe and across the Western world, intellectual property rights have undergone continuous expansion, resulting in a contraction of the public domain of knowledge[22].

The trend toward strengthening intellectual property protection[23] has not been challenged by the 2019 European Directive on Copyright and Related Rights in the Digital Single Market[24].

Due to intellectual property protection, digital platforms have maintained exclusive control over data through exclusive rights that safeguard private investments in database creation and algorithm development. Furthermore, exclusive contractual rights and technical protection measures grant forms of exclusive control over data that operate outside the balancing mechanisms established by intellectual property law[25].

6. Contradictions in European Union Legislative Policy: The Prevalence of Intellectual Property Protection over Data Openness.

[20] A. SOMMA, *Democrazia economica e diritto privato, cit.*, p. 461 ss.

[21] G8 Open Data Charter and Technical Annex, 2013; International Open Data Charter, 2015.

[22] G. MAZZEI, *Propiedad intelectual y dominio público del conocimiento*, in *Revista General de Derecho Público Comparado*, 12, 2013, p. 3 ss.

[23] R. CASO, *Il conflitto tra diritto d'autore e ricerca scientifica nella disciplina del text and data mining della direttiva sul mercato unico digitale*, in *Il diritto industriale*, 2, 2020, p. 118 ss.; G. RESTA, *La privatizzazione della conoscenza e la promessa dei beni comuni: riflessioni sul caso "Myriad Genetics"*, in *Rivista critica del diritto privato*, 2, 2011, p. 281 ss.

[24] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, in OJ L 130, 17.5.2019, pp. 92 ss.

[25] R. CASO, *La rivoluzione incompiuta. La scienza aperta tra diritto d'autore e proprietà intellettuale*, Ledizioni, Milan, 2020, p. 39.

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Over the past decade, the European Union has demonstrated its full intention to play a driving role by defining legal models that serve as global benchmarks[26] for promoting a digital society where the primacy of the individual, fundamental rights, security, solidarity, and social inclusion are safeguarded.

This is the common thread of an intensive period of legislative activity, ranging from the General Data Protection Regulation[27] to the Artificial Intelligence Act [28], including the Digital Markets Act[29], the Digital Services Act[30], the Data Governance Act[31] and the Data Act[32].

These recent initiatives, while moving in the same direction as the Regulation on the free flow of non-personal data[33] and the Open Data Directive[34], represent a significant shift in approach and substantially strengthen the principles of data openness and sharing.

However, these regulatory interventions—particularly the Open Data Directive[35] and the Data Governance Act[36]—fail to establish the primacy of data openness and sharing principles over intellectual property protection.

This creates a paradoxical risk whereby open data may further empower digital platform oligopolies. With their enormous computational capabilities, these platforms can collect accessible data, aggregate them into new databases protected by sui generis rights, and analyse them using algorithms shielded by trade secrets[37].

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[26] A. BRADFORD, *The Brussels Effect: How the European Union Rules the World*, Oxford University Press, New York, 2020.

[27] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), in OJ L 119, 4.5.2016, p. 1 ss.

[28] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), in OJ L, 2024/1689, 12.7.2024.

[29] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act), in OJ L 265, 12.10.2022, p. 1 ss.

[30] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services (Digital Services Act), in OJ L 277, 27.10.2022, p. 1 ss.

[31] Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance (Data Governance Act), in OJ L 152, 3.6.2022, p. 1 ss.

[32] Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data (Data Act), in OJ L, 2023/2854, 22.12.2023.

[33] Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, in OJ L 303, 28.11.2018, p. 59 ss.

[34] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, in OJ L 172, 26.6.2019, p. 56 ss.

[35] *Whereas* (54), (55), (56); art. 1(2)(5), Directive (EU) 2019/1024.

[36] *Whereas* (17); art. 5(3), Regulation (EU) 2022/868.

[37] N.M. RICHARDS, J.H. KING, *Three Paradoxes of Big Data*, in *Stanford Law Review*, 66, 2014, p. 41 ss.

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7. Applicability of Public Utility Principles to Digital Platforms.

Currently, digital platforms have no obligation to open their data and share them with external entities. They generally resist such sharing to preserve their competitive advantage derived from exclusive control over vast quantities of data. In the few instances where they do share data, platforms choose which data to open and selectively open limited datasets while imposing stringent contractual conditions on data reuse[38].

The Data Act establishes certain data openness and sharing obligations for businesses (exempting small and micro enterprises). These include the obligation to share data with public entities in exceptional cases where such data are necessary to address public emergencies, provided that these data cannot be promptly obtained through market mechanisms or existing regulations, and provided that the public entity's requests remain proportionate and respect the interests of the business making the data available[39]. The Act additionally mandates sharing data generated through the use of products or related services, such as Internet of Things products and services[40].

These represent significant advances and steps in the right direction by the European Legislator. However, substantial progress remains necessary. The regulatory framework should enable considerably broader possibilities for opening and sharing private sector data. As in the public sector, data openness in the private sector should constitute the standard practice rather than the exception.

One approach to imposing general data openness and sharing obligations on digital platforms involves applying legal principles regarding public utilities[41]. Such principles aim to ensure social oversight of large private companies that provide essential services. They are aimed at ensuring fair and non-discriminatory access to these services while preventing unfair practices that could generate or intensify opportunity disparities as well as economic and social inequalities.

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[38] L. TAYLOR, *The ethics of big data as a public good: which public? Whose good?*, in *Philosophical transactions. Series A, Mathematical, physical, and engineering sciences*, 2016, p. 1 ss.

[39] Chapter V, Regulation (EU) 2023/2854.

[40] Chapter II, Regulation (EU) 2023/2854.

[41] J. SHKABATUR, *The Global Commons of Data*, in *Stanford Technology Law Review*, 22, 2019, p. 399 ss.; K.S. RAHMAN, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, in *Cardozo Law Review*, 39, 2018, p. 1621 ss.

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Current practices implemented by digital platforms that do not allow access to data appear as unfair practices, particularly as these data represent a source of knowledge and are increasingly essential for individuals, businesses, and society[42].

Cultural and social progress, the resilience of democratic systems, the effectiveness of fundamental rights, and economic development today—more than ever—depend on control over data and the legislative policy choices that shape it.

Considering data as global commons means restoring to society the vast and valuable data heritage it has helped generate and continues to produce. It allows collective intelligence to harness this resource, unlocking its full cultural, social, political, and economic value.

[42] Cfr. T.B. NACHBAR, *The Public Network*, in *CommLaw Conspectus: Journal of Communications Law and Technology Policy*, 17, 2008, p. 113; S. CRAWFORD, *First Amendment Common Sense*, in *Harvard Law Review*, 8, 2014, p. 2343, 2369.

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