

## Data Access and the EU Data Strategy: Implications for the Global South

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### ABSTRACT

This study explores the value of data in the digital economy and the challenges surrounding data ownership, access rights, and equitable distribution of the value. It examines the European Data Strategy and highlights its shortcomings as well as its implications for the Global South. This contribution emphasises the need for unlocking the potential of collected data by enhancing accessibility and challenging protectionist measures and discusses the importance of fair competition and innovation. It also discusses the importance of balancing access rights with legitimate privacy concerns, trade secrets, and intellectual property rights. The paper concludes by highlighting the importance for developing countries to introduce tailored regulations that suit their specific needs, empowering them to seize opportunities and navigate the digital economy effectively.

**KEYWORDS:** data, Data Act, intellectual property, unlocking data, de facto exclusivity, inequity

*Cette étude explore la valeur des données dans l'économie digitale et les défis liés à la propriété des données, aux droits d'accès et à la distribution équitable de la valeur. Elle examine la stratégie européenne en matière de données et met en évidence ses lacunes ainsi que ses implications pour les pays du Sud. Cette contribution souligne la nécessité de révéler le potentiel des données collectées en améliorant leur accessibilité et en remettant en cause les mesures protectionnistes, et examine l'importance d'une concurrence équitable et de l'innovation. Elle examine également l'importance d'équilibrer les droits d'accès avec les préoccupations légitimes en matière de protection de données à caractère personnel, de secrets commerciaux et de droits de propriété intellectuelle. Le document conclut en soulignant l'importance pour les pays en développement d'introduire des réglementations adaptées à leurs besoins spécifiques, afin de leur permettre de saisir les opportunités et de naviguer efficacement dans l'économie digitale.*

**MOTS-CLÉS:** données, loi sur les données, propriété intellectuelle, déblocage des données, exclusivité de fait, iniquité

*Este estudio explora el valor de los datos en la economía digital y los retos en torno a la propiedad de los datos, los derechos de acceso y la distribución equitativa del valor. Examina la Estrategia Europea de Datos y destaca sus deficiencias, así como sus implicaciones para el Sur Global. Esta contribución hace hincapié en la necesidad de liberar el potencial de los datos recopilados mejorando la accesibilidad y desafiando las medidas proteccionistas, y analiza la importancia de la competencia leal y la innovación. También analiza la importancia de equilibrar los derechos de acceso con las legítimas preocupaciones por la privacidad, los secretos comerciales y los derechos de propiedad intelectual. El documento concluye destacando la importancia de que los países en desarrollo introduzcan normativas adaptadas a sus necesidades específicas, que les permitan aprovechar las oportunidades y navegar eficazmente por la economía digital.*

**PALABRAS CLAVES:** datos, Ley de Datos, propiedad intelectual, desbloqueo de datos, exclusividad de facto, desigualdad

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### KEY MESSAGES

"When taking a closer look at the practices of Western corporations, further injustices can be observed when considering that these corporations sell their digital products globally and collect user-generated data everywhere. When this data is then locked up in industrialised nations and utilised there, while the Global South is prevented from accessing and sharing the value of this data, this can be likened to the exploitation of natural resource rich countries by Western states and Western industry. A phenomenon that may potentially be regarded as data colonialism."

"While it may be beneficial for developing countries to replicate certain aspects of EU policies, such as GDPR regulations for safeguarding citizens' privacy, not all EU policies are suitable for replication. As elaborated in this contribution, some of the policies are not able to fulfil their aims even within the EU, hence, they may be even less adequate for developing economies. Countries of the Global South should thus thoroughly analyse Western developments in order to formulate and adopt regulations that cater to their own specific needs."

## I. Introduction

Data can be loosely described as a unit containing digital information. While information was always a valuable asset to humanity and thus sensitive for businesses, States and citizens, data can now be defined as a building block in the modern digital economy. (Burri, 2021; Irion, 2021) Indeed, data, or better still, big data, has introduced a new era in global trade, in which data has transitioned into becoming a commodity in itself. (Gervais, 2021) In the modern digital society, exponential amounts of data is continuously generated both by machines and human activity. (Irion, 2021; Storr and Storr, 2017) The digitalisation of society and economy, increasingly also referred to as the Fourth Industrial Revolution, leads to a growing fusion of different technologies that redefines the boundaries between biological, physical, and digital. (Noto La Diega & Derclaye, 2023)

The enormous value of data for the global digital economy raises questions surrounding data ownership, access rights, and the equitable distribution of value among stakeholders in the digital landscape. This study begins with exploring how the value of data can be unlocked, and follows by providing an overview of current European Union (EU) data regulations and the European Data Strategy. Successively, the contribution highlights some of the shortcomings of the European Data Strategy as well as its implications for the Global South. Lastly, the study briefly considers unresolved questions and presents potential future trajectories for developing countries.

## II. Unlocking the value of data

The importance of big data for the digital economy lies in its potential value not just for the original data collector, but for a variety of stakeholders. (Jülicher, 2018) These stakeholders include, for example, the users of smart technology, manufacturers, aftermarket service providers, and health service providers as well as public and private sector researchers. (Jülicher & Delisle, 2018) Big data is thus of enormous economic interest, both for its value as a business asset as well as for the future value that can be derived by unlocking its innovative potential. In this regard, data is also often referred to as the new oil. (Storr & Storr, 2017)

By not only facilitating more efficient business operations but by also fostering better innovation, big data has vast potential to positively serve the public interest. (Burri, 2021) In this respect it is recognised that data is key to achieving sustainability and that adequately unlocking its potential is of enormous value for the common good. Among others, access to and utilisation of data are thus considered a key factor in achieving climate justice and sustainable innovation. (Noto La Diega & Derclaye, 2023) Similarly, health data collected from wearable devices can be utilised to improve personal health, thereby helping to mitigate modern public health issues. (Storr & Storr, 2017)

Competitors on the market and the general public thus have both economic and public interests in accessing and utilising available data. However, those who collect and those who analyse big data tend to seek (legal) protection for their respective interests in the

data and its value. (Gervais, 2021) Overly strong protection, whether through legal mechanisms like intellectual property (IP) laws or the factual control exerted by data holders, can lock up data and thereby hinder the realisation of the full potential of big data for societal welfare.

Importantly, data is oftentimes generated by human action, with machines being merely used for its processing. (Noto La Diega & Derclaye, 2023) Therefore, the actual content created by a user is clearly owned by the user. Photographs taken with the camera of a connected device, for example, fall within the copyright of the user who is the author of that image. The situation is less clear with additional data that is collected through the camera, through sensors or user input in devices. (Storr & Storr, 2017) Generally, it can be observed that users tend to lack any influence as power asymmetries between data collectors and technology users leave the users with almost no individual control over the processing of their data. (Thouvenin & Tamò-Larrieux, 2021) This raises questions concerning the ownership of data with two particular issues that require balancing: (1) the rights of users, including the protection of their privacy in relation to personal data, and (2) the rights of data holders with respect to investment protection and intellectual property. In addition, the concept of data ownership itself can further be understood in two ways, either as directly introduced by law or indirect through a position of factual control that is protected by law. (Thouvenin & Tamò-Larrieux, 2021) Notably, an IP right or similar property right to data does not currently exist. (Storr & Storr, 2017; Podszun & Pfeifer, 2022) Therefore, considering the enormous interest in data by a variety of stakeholders, questions arise as to who should be the owner of the data, or whose interests take precedence. (Storr & Storr, 2017)

Nonetheless, despite there not being a general legal property right to data, other measures such as trade secret protection and database rights as well as technical and contractual measures can effectively establish a property-like protection by providing data holders with a technical-factual position of data ownership. (Noto la Diega, 2023; Podszun & Pfeifer 2022; Storr & Storr, 2017) While historically, property rights derived from the need to regulate scarce resources, data is not a scarce resource. (Storr & Storr, 2017; Hornung & Schomberg, 2022) In fact, data's non-scarcity is where its main potential lies if it is made sufficiently accessible. (Hornung & Schomberg, 2022) Thus, with various technical difficulties already hampering the adequate sharing of data, a property-like right in data can severely exacerbate problems concerning its adequate accessibility and utilisation. Property rights tend to be of an exclusive nature, meaning that non-right holders, including society and the very users who generate the data, can be excluded from sharing its benefits. (Storr & Storr, 2017)

While this recognition provides a strong argument against a property right to data, counter arguments highlight the importance of investment protection and the maintaining of incentives for the future generation of data. Similar to the debates on industrial IP rights, the incentive argument suggests that investors in data generating products and services need to be incentivised to make such investments. This incentive is then provided by measures preventing competitors who did not make similar investments from using

the generated data. (Kerber, 2022) Conversely, in consideration of the vast amounts of data that are continuously collected, it seems unsuitable to suggest that further legal incentives for the collection of data are required. (Noto La Diega & Derclaye, 2023) The value of the data itself, even if simultaneously used by others, provides sufficient incentive for its collection. In this regard, the Max Planck Institute for Innovation and Competition concluded in 2016 that there is neither a requirement nor a justification for introducing a legal exclusive right to data. (Drexel et al., 2016) It rather seems that new incentives are required to enhance accessibility to data. (Noto La Diega & Derclaye, 2023)

Although clear regulations on data ownership and access rights are missing, data collectors and developers of connected devices can implement technical designs for their products that provide them with the de-facto control over the data collected. Data holders can then effectively exclude competition and prevent others from using available data for innovative activities. (Kerber, 2022) This provides the foundation for a problem that is sometimes referred to as data enclosures. Companies lock up the data they collect making it neither available to the users who generate data, nor to other stakeholders who could use the data for societal objectives. Data holders establish a de facto technical control over the data and exclude others from accessing and utilising the data and from sharing the value. (Noto la Diega, 2023) Further, where a data holder alone is not able to create value from stored data, such data may remain locked away, unused. To make adequate use of the information contained in big datasets, and to achieve these societal objectives, it is thus crucial to unlock the potential of the collected data. For this to be effective at large, it is crucial to open up the currently locked-up data. (Alemanno, 2018)

To unlock the value of data, it is key to enhance its accessibility and to facilitate its re-use or even its initial utilisation. Currently, however, there is no general data access right, neither for businesses towards other businesses, nor for governments towards private corporations. While businesses generally see data as a valuable asset that should not be freely shared, exclusive rights to data would be liable to restrict competition with negative impacts on market growth and innovation, further hindering technological development. (Thouvenin & Tamò-Larrieux, 2021; Storr & Storr, 2017) Importantly, data access is a precondition for market entry, and participation in a supply chain and innovation. (SWD(2022) 34 final) Fairness, free competition, and the facilitation of innovativeness thus all require better conditions for data accessibility, with any restriction thereof likely having adverse impacts on the digital economy at large. (Thouvenin & Tamò-Larrieux, 2021; Podszun & Pfeifer, 2022)

A potential solution to the accessibility problem could be introduced by defining data as a public good, enabling the realisation of its full potential through its utilisation by a variety of stakeholders, with negligible detrimental impacts on any individual actor. (Thouvenin & Tamò-Larrieux, 2021) To establish data as a public good, it would be key to implement a balanced approach to data access that promotes trust in the digital economy by defining clear boundaries to the free flow of data, at least with respect to privacy concerns. In addition to the protection of personal data, certain legitimate busi-

ness interests, such as trade secrets and other IP rights, should be taken into consideration, too. (Thouvenin & Tamò-Larrieux, 2021; Noto La Diega & Derclaye, 2023) To be effective, this balancing of rights should re-consider traditional conceptualisations of IP, and particularly re-evaluate the extent to which IP is in fact conducive to innovation. Due regard should be paid to identifying when the over protection of private interests starts to hamper technological progress for the public benefit.

Lastly, the effective unlocking of big data requires tackling the technical factual control of data holders. This is both a legal and a technical concern, regarding for example the portability of data and its interoperability. Facilitating adequate data access thus requires both the introduction of legal measures that regulate the ownership of and access to data as well as the implementation of means that challenge protectionist technical measures that are liable to thwart the free flow of data. To maximise the societal benefit that can be generated from data, this free flow should only be restricted by legitimate data localization measures adopted in the public interest by States exercising sovereign rights over data generated/collected in their jurisdictions. (Zaka, 2020)

### III. The EU data strategy

In 2015, the EU adopted the Digital Single Market Strategy, with the aim of unlocking both the economic and social potential of the digital economy. Among a variety of factors, the Digital Single Market Strategy is inter alia built upon the recognition of the high value of data, and the challenges concerning its utilisation. One of its key goals is enhancing the free flow of data to improve its accessibility and utilisation and facilitate innovation in the EU. (Thouvenin & Tamò-Larrieux, 2021; Hennemann & Steinrötter, 2022) A key challenge of this approach, however, is to adequately facilitate data access for both individuals and businesses in accordance with fair competition standards, while simultaneously safeguarding the protection of privacy and consumer rights as well as of IP rights.

In light of this and in recognition of further challenges relating to big data, the EU supplemented the Digital Single Market Strategy in 2020 by adopting the European Data Strategy. The Data Strategy seeks to create the necessary preconditions for a genuine European data economy, aiming to establish Europe as a global leader in the digital economy. (COM(2022) 68 final; Specht-Riemenschneider, 2022a; Podszun & Pfeifer 2022) Among others, free flow of data (within the EU) is regarded as a key component of European competitiveness in the global digital economy. (Thouvenin & Tamò-Larrieux, 2021)

The Digital Single Market and the European Data Strategy rely on a number of legal policies and regulations, including the General Data Protection Regulation (GDPR), the Digital Markets Act, the Digital Services Act, the Artificial Intelligence Act, the Data Governance Act, the Data Act and sector specific regulations such as the proposed European Health Data Space (EHDS). The GDPR provides regulations for the protection of personal data and the fundamental right to privacy in the EU, by establishing limitations to the permissible processing of personal data (Regulation (EU) 2016/679). While the Digital Markets Act regulates the behaviour of the biggest di-

digital enterprises, aiming to prevent them from being gatekeepers of the internet, the Digital Services Act introduces responsibilities of private actors towards preventing the abuse of digital services for conducting illegal activities online (Regulation (EU) 2022/1925; Regulation (EU) 2022/2065). Similarly recognising the potentially detrimental impacts of artificial intelligence (AI) systems on society, the proposed EU Artificial Intelligence Act shall provide mandatory regulations for the utilisation of high-risk AI systems to safeguard that their output is appropriately used and interpreted (COM(2021) 206 final).

Concerning the use of non-personal data more directly, the Data Governance Act provides regulations for facilitating further utilisation and re-use of data held by public sector bodies, for facilitating the mutual utilisation of data between private and public actors, and for furthering data altruism (Regulation (EU) 2022/868). In particular, the Data Governance Act aims to create the necessary preconditions for individuals and corporations to voluntarily share data without jeopardising their existing rights over this data (COM(2022) 68 final). Additionally, the Data Governance Act permits the reuse of certain types of public sector data, even where it may be commercially confidential or protected by IP rights. This permission is balanced through mechanisms by which data is strictly shared on the basis of confidentiality (Noto la Diega, 2023). A further aspect of protection is provided by a restriction of data exports to non-EU countries, which are regarded as countries that do not provide sufficient IP protection standards (Regulation (EU) 2022/868, Art. 5 paras 10 & 12).

On 14 March 2023, the EU Parliament adopted the “Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data” also referred to as the Data Act. As a horizontal regulation, the Data Act outlines the cross-sectoral rules for handling privately held, user-generated non-personal data (COM(2022) 68 final). In essence, the EU objective with the Data Act is to improve the facilitation of digital transformation and establish more equitable value allocation and access to non-personal data. By unlocking data enclosures, the Data Act aims to strengthen Europe’s sustainable data economy and create beneficial opportunities for everyone (COM(2022) 68 final). Notably, one of the Data Act’s key aims is that the accessibility and utilisation of data shall be conducive to innovation (COM(2022) 68 final). The regulation thus seeks to foster a more inclusive and innovative digital landscape that benefits society as a whole.

Recognising the significant opportunities of open innovation, as indicated by the rapid development of vaccines in response to the COVID-19 pandemic, adequate access to data has become particularly crucial for health research (Radziwon et al., 2022). In this respect, the EU seeks to supplement the general regulations of the Data Act with the sector specific European Health Data Space (EHDS), aiming at unleashing the full potential of health data by facilitating better research, innovation and policy-making in the health sector. The EHDS aims to empower individuals by providing better digital access to their personal health data, while also fostering a genuine single market for digital health products and services, and facilitate the use of health data by health professionals and practitioners for better healthcare delivery (COM(2022) 197

final; European Commission, 2022a). In addition, the EHDS seeks to introduce clear rules for the use of non-identifiable health data for research and innovation purposes. If sufficient, facilitating access to non-identifiable health data for researchers can increase opportunities for innovativeness in the health sector (European Commission, 2022b). Ultimately, the European Health Data Space shall thus provide benefits for a variety of stakeholders, including faster access to patient’s health records, easier access to health records from different systems, and access to large amounts of health data for research purposes (European Commission, 2022a).

#### IV. Shortcomings of these regulations and their implications on the South

While the Data Act ostensibly aims to facilitate better data access for innovation, initial studies have revealed that its regulations in fact grant data holders quasi-exclusive control, thereby establishing a de-facto data ownership, formerly not envisioned by the law (Kerber 2022). It further fails in establishing a general access right for academia and public research institutions, limiting any public sector access to situations of exceptional need, such as public emergencies (COM(2022) 68 final, Arts. 14 & 21). Therefore, the Data Act seems to trip over the same pitfalls as IP regulations that traditionally strive to promote accessibility and innovation by extending exclusive protection. Overly strong protection, however, tends to lead to the opposite effect by impeding the realisation of data’s full potential for societal benefits. A relevant example for this is the global introduction of pharmaceutical patent rights, which created new obstacles for pharmaceutical researchers, hampering their use of patented products and processes in their research endeavours (Smith, Correa & Oh, 2009; Henry & Searles, 2012; Abbott, 2015). Initial research on the Data Act thus indicates that the regulation is unlikely to achieve its aims. As a sector specific regulation, the European Health Data Space requires alignment with the horizontal regulations provided by the Data Act. It is thus similarly questionable whether the EHDS has the capacity to achieve its own aims of fostering innovation in the health sector.

In addition to access rights, unlocking the full potential of big data further requires the free flow of data across borders. (Ferracane, 2021) This was emphasised by a Japanese government initiative on “Data Free Flow with Trust” at the 2019 G20 summit with the G20 Osaka Leaders’ Declaration summarising: “Innovation is an important driver for economic growth, which can also contribute to advancing towards the SDGs and enhancing inclusiveness. [...] Cross-border flow of data, information, ideas and knowledge generates higher productivity, greater innovation, and improved sustainable development, while raising challenges related to privacy, data protection, intellectual property rights, and security” (G20, 2019). Similar to the lockup of data by private corporations, in a global context the problem is that governments oftentimes seek to restrict data flows to other countries, as data is regarded as a valuable asset for domestic industries. Such restrictions, however, are liable to hamper innovativeness on a global scale and thus impede innovation for the public benefit (Burri, 2021; Ferracane, 2021). In 2019, the UN High-Level Panel on Digital Cooperation emphasised that in a global economy that is increasingly reliant on digital interdependence, “new forms of digital cooperation” are required “to

ensure that digital technologies are built on a foundation of respect for human rights and provide meaningful opportunity for all people and nations” (United Nations, 2019). Consequently, the free-flow of data across borders is regarded as a key factor for fairly distributing value and for facilitating location-independent innovation that serves the public interest globally. (Noto La Diega & Derclaye, 2023)

In this respect, while economically sound, it is socially regrettable that EU data regulations impose considerable restrictions on data transfers to non-EU countries. As briefly noted above, the Data Governance Act both provides regulations for the sharing and re-use of publicly held data and further strives to establish a system that enables data holders to share their data without jeopardising other rights. Both of these systems rely on safeguards for the protection of IP and trade secrets, which include that data can only be transferred to EU countries and non-EU countries that provide adequate levels of IP protection. With the adoption of the TRIPS Agreement in 1995, the international community introduced minimum IP protection standards applicable to almost all WTO member states. (TRIPS, Art. 1) This protection was introduced to ensure that IP is adequately protected globally. As these minimum standards are then seemingly no longer regarded as sufficient by the EU, there is a risk that the EU data policy sharing requirements, together with the urgent need for data access for many developing economies, may lead to a further proliferation of global IP standards by pushing stronger IP protection through the back door. In other words, States may be inclined to adopt higher levels of IP protection in order to qualify as legitimate data importing countries for EU data, even where heightened levels of IP protection may otherwise not be in that country’s best interest.

When taking a closer look at the practices of Western corporations, further injustices can be observed when considering that these corporations sell their digital products globally and collect user-generated data everywhere. When this data is then locked up in industrialised nations and utilised there, while the Global South is prevented from accessing and sharing the value of this data, this can be likened to the exploitation of natural resource rich countries by Western states and Western industry. A phenomenon that may potentially be regarded as data colonialism.

To a certain extent, this problem runs parallel to the problem that currently a relatively small number of companies dominate the global digital economy and thereby exercise a quasi-control of the digital markets, both in developed markets as well as in the developing world (Gervais, 2021). This control of the digital economy was facilitated by a modern phenomenon termed “digital dispossession” by which data collectors amass vast amounts of personal and non-personal data through appropriation. Digital dispossession thereby provides data holders with a new type of “data power” which facilitates further data lockups with detrimental impacts on society (Noto La Diega & Derclaye, 2023).

## V. Open questions and future directions

Open questions that arise in this context (as raised at the South Centre, 2023) not only revolve around facilitating adequate access to data globally, but also around effectively regulating and restric-

ting the power of gatekeeping corporations. Considering the definition of data interoperability standards further questions can be raised on who holds the authority to establish these standards. That the EU currently assumes a leading role in this domain, being among the first to introduce related data regulations, increases the likelihood of the EU, or another industrialised nation, defining these future global standards. Thus, it is a critical time for all nations, particularly those in the Global South, to actively engage in these issues, to actively identify solutions aligned with their own interests, and to avoid that global standards are imposed upon them. While it may be beneficial for developing countries to replicate certain aspects of EU policies, such as GDPR regulations for safeguarding citizens’ privacy, not all EU policies are suitable for replication. As elaborated in this contribution, some of the policies are not able to fulfil their aims even within the EU, hence, they may be even less adequate for developing economies. Countries of the Global South should thus thoroughly analyse Western developments in order to formulate and adopt regulations that cater to their own specific needs. Furthermore, questions arise concerning the necessity of introducing a global data regulation that clearly delineates ownership and access rights. While an international treaty establishing such regulations can contribute to legal certainty and enhance the global digital economy, it is crucial to ensure adequate representation of the developing world’s requirements. It is essential to prevent the treaty from being West-centric, akin to the TRIPS Agreement, which hindered rather than facilitated development processes in the South.

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