Introduction

Empirical Legal Studies in EU Law

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Empirical legal research, better known as empirical legal studies (ELS), has arrived in the EU. It introduces a distinct way of thinking about the law, or epistemology, and distinct ways for transforming this thinking from beliefs and opinions to justified beliefs and opinions, or methodology. This volume is the first book-length publication dedicated to ELS in EU law. It features contributions penned by legal and political science scholars working in the field, alongside those interested in or concerned with their findings. It is part handbook, for which EU law and ELS scholars – experts and novices alike – can reach to get an overview of the state of the art. It is part manifesto, showcasing the need for and potential of this new field of academic inquiry. It is, finally, a critical reflection, assessing the challenges and limitations of ELS in the EU context, as well as its interaction with adjacent disciplinary and interdisciplinary endeavours. Our ambition is to display the contribution which empirical legal research has made to the study of EU law, while facilitating a frank exchange about the way forward.

This chapter is intended to serve as an introduction to ELS in EU law. We begin by defining its object and objectives, comparing them to existing legal and social science research concerned with legal aspects of European integration. Second, we briefly revisit the field's historical and geographical origins. Third, we examine the developing relationships between, on the one hand, ELS and, on the other, EU law and political science research, aspiring to set a constructive tone to the often-combative conversations marking these relationships. Fourth, we address open questions, uncharted territories, and existing obstacles faced by ELS. Finally, we provide an overview of the volume, outlining the individual chapters and the overarching themes which they address.

I.1 A MAP OF ELS IN EU LAW

I.1.1 *Object and Objectives*

What is ELS in EU law – and what does it want? The field's object of inquiry is the EU legal order, meaning the body of rules adopted by (or for) the EU institutions in

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accordance with the Treaties, interpreted by the Court of Justice of the European Union (CJEU), and implemented by the twenty-seven Member States. In a broader sense, its scope extends to the institutional practices, legal actors, and citizens whom EU rules and actions affect.

In simplest terms, ELS seeks to unpack and understand the operation of this legal order. EU law is widely conceptualised as an autonomous system with distinct characteristics.[1] It enjoys primacy over domestic law, including national constitutions.[2] It can have direct effect, meaning that citizens are able to invoke EU rights in judicial and administrative proceedings.[3] National courts must uphold these rights, even if national rules require otherwise. More broadly, Member States must ensure the functioning of EU law in their legal systems and abstain from acting in ways that jeopardise the Union's aims.[4] As part of this duty, they can no longer regulate areas which the EU has regulated,[5] a principle known as pre-emption.[6]

To study the EU's evolving legal order, ELS scholars – from both law and the social sciences – have been drawing on a diverse set of theories, or proceeded in a bottom-up manner, using exploratory or data-driven approaches to formulate research hypotheses. They have been making different methodological choices, selecting different types of data using various data collection techniques, and employing a range of methods to process and analyse that data.[7] This collective

[1] Opinion 2/13 ECLI:EU:C:2014:2454.

[2] Case 6-64 *Costa* v. *ENEL* ECLI:EU:C:1964:66.

[3] Case 26-62 *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* ECLI:EU:C:1963:1.

[4] Art. 4 TEU.

[5] Case 148/78 *Criminal proceedings against Tullio Ratti* ECLI:EU:C:1979:110.

[6] Amedeo Arena, 'The Twin Doctrines of Primacy and Pre-Emption' in Robert Schütze and Takis Tridimas (eds.), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018) 300; Robert Schütze, 'Supremacy without Pre-Emption? The Very Slowly Emergent Doctrine of Community Pre-Emption' (2006) 43 *Common Market Law Review* 1023.

[7] For examples on network approaches, see Mattias Derlén and Johan Lindholm, 'Goodbye *van Gend En Loos*, Hello *Bosman*: Using Network Analysis to Measure the Importance of Individual CJEU Judgments' (2014) 20 *European Law Journal* 667; Urška Šadl, Lucía López Zurita, and Sebastiano Piccolo, 'Route 66: Mutations of the Internal Market Explored through the Prism of Citation Networks' (2023) 21 *International Journal of Constitutional Law* 826; for an example on the use of natural language processing, see Michal Ovádek, Arthur Dyevre, and Kyra Wigard, 'Analysing EU Treaty-Making and Litigation with Network Analysis and Natural Language Processing' (2021) 9 *Frontiers in Physics* 657607; for an example on process-tracing, see Tommaso Pavone, 'From Marx to Market: Lawyers, European Law, and the Contentious Transformation of the Port of Genoa' (2019) 53 *Law & Society Review* 851; for an example on the use of regression analysis and descriptive statistics, see Olof Larsson and Daniel Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) 70 *International Organization* 377; for examples of media analyses, see Julian Dederke, 'CJEU Judgments in the News: Capturing the Public Salience of Decisions of the EU's Highest Court' (2022) 29 *Journal of European Public Policy* 609; Michael Blauberger and others, 'ECJ Judges Read the Morning Papers: Explaining the Turnaround of European Citizenship Jurisprudence' (2018) 25 *Journal of European Public Policy* 1422; for an example on expert interviews, see Emilia Korkea-aho, 'Legal Lobbying: The

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effort has enabled them to test the premises underlying the grand theories of European integration, but also to engage in micro- and macro-level theorising of the behaviour of institutions such as the CJEU, national courts, and Member State governments.[8] ELS studies have re-examined the key facets of the integration

Evolving (but Hidden) Role of Lawyers and Law Firms in the EU Public Affairs Market' (2021) 22 *German Law Journal* 65; for an example on deep legal coding, see Urška Šadl, *Good Judgment: The European Court of Justice as a Context-Conscious Lawmaker* 1st edn. (Hart 2024).

[8] For examples on European integration, see Larsson and Naurin (n 7); Michael Blauberger and Dorte Sindbjerg Martinsen, 'The Court of Justice in Times of Politicisation: "Law as a Mask and Shield" Revisited' (2020) 27 *Journal of European Public Policy* 382; Michal Ovádek, 'Supranationalism, Constrained? Locating the Court of Justice on the EU Integration Dimension' (2021) 22 *European Union Politics* 46; Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (1st ed. Cambridge University Press 2022); for examples on the CJEU, see Šadl, López Zurita, and Piccolo (7); Derlén and Lindholm (7); Mikael Madsen and Urška Šadl, 'A "Selfie" from Luxembourg: The Court of Justice and the Fabrication of the Pre-Accession Case-Law Dossiers' (2016) 22 *Columbia Journal of European Law*; Olof Larsson and others, 'Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union' (2017) 50 *Comparative Political Studies* 879; Blauberger and others (n 7); Urška Šadl and Anna Wallerman, '"The Referring Court Asks, in Essence": Is Reformulation of Preliminary Questions by the Court of Justice a Decision Writing Fixture or a Decision-making Approach?' (2019) 25 *European Law Journal* 416; Silje Synnøve Lyder Hermansen, 'Building Legitimacy: Strategic Case Allocations in the Court of Justice of the European Union' (2020) 27 *Journal of European Public Policy* 1215; Šadl (n 7); Urška Šadl and others, 'Law and Orders: The Orders of the European Court of Justice as a Window in the Judicial Process and Institutional Transformations' (2022) 1 *European Law Open* 549; Lucía López Zurita and Stein Arne Brekke, 'A Spoonful of Sugar: Deference at the Court of Justice' (2023) *Journal of Common Market Studies* 1; Philipp Schroeder, 'Seizing Opportunities: The Determinants of the CJEU's Deference to National Courts' (2023) *Journal of European Public Policy* 1; Stein Arne Brekke and others, 'That's an Order! How the Quest for Efficiency Is Transforming Judicial Cooperation in Europe' (2023) 61 *Journal of Common Market Studies* 58; Jan Zglinski, 'The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law' (2018) 55 *Common Market Law Review* 1341; Joshua C. Fjelstul, Matthew Gabel, and Clifford J. Carrubba, 'The Timely Administration of Justice: Using Computational Simulations to Evaluate Institutional Reforms at the CJEU' (2023) 30 *Journal of European Public Policy* 2643; Anna Wallerman Ghavanini, 'The CJEU's Give-and-Give Relationship with Executive Actors in Times of Crisis' (2023) 2 *European Law Open* 284; Dorte Sindbjerg Martinsen, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015); for examples on national courts, see Juan A. Mayoral, 'Judicial Empowerment Expanded: Political Determinants of National Courts' Cooperation with the CJEU' (2019) 25 *European Law Journal* 374; Juan A. Mayoral and Marlene Wind, 'Unleashed Dialogue or Captured by Politics? The Impact of Judicial Independence on National Higher Courts' Cooperation with the CJEU' (2022) 29 *Journal of European Public Policy* 1433; Anna Wallerman Ghavanini, 'Mostly Harmless: The Referring Court in the Preliminary Reference Procedure' (2022) 47 *European Law Review* 310; Monika Glavina, 'The Reality of National Judges as EU Law Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Slovenia and Croatia' (2021) 17 *Croatian Yearbook of European Law and Policy* 1; Nikita Divissenko, Sabrina D'Andrea, Maria Fanou, Anna Krisztián, Jaka Kukavica, Nastazja Potocka-Sionek and Mathias Siems, 'Asymmetric Cross-citations in Private Law: An Empirical Study of 28 Supreme Courts in the EU' (2021) 28 *Maastricht Journal of European and Comparative Law* 498.

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process, including domestic compliance with EU rules, the transformation of the internal market, the effect of supranational regulation on the welfare state, and the ins and outs of EU law making.[9] They have, likewise, asked universal questions about the mechanics of legal change and the constraints that political conditions, legal rules, and precedents impose on judges and legislators.[10]

This disciplinary, theoretical, and methodological eclecticism – one of the strengths of ELS – underscores the importance of defining clear objectives for the field, while also helping with articulating them. Empirical legal research seeks to improve our theoretical understanding of the EU legal order. It does so by 'bringing data to the table'[11] and uses this data, defined as facts about the world that we know, to learn about the facts about the world that we do not know. The goal of ELS, in other words, is to understand EU law and the European integration process by systematically analysing data, making descriptive and causal inferences, and contribute to theory development.[12]

By pursuing these aims, ELS addresses the same slice of reality as legal scholarship on EU law, but does so empirically. Like the social sciences, it approaches the study of EU law empirically without, however, uncritically accepting the premises of those disciplines as ground truth. Contrary to the notion of empiricism, which has been the subject of lively debates,[13] the limited 'need for loyalty to a particular social science discipline' has been largely accepted.[14] The result is that ELS promotes interdisciplinarity which, in turn, facilitates an investigation into the big(ger) picture. The dissociation from a single discipline also encourages academic exchange through the participation of all social science disciplines within ELS.[15] This is not without risk, and clearly defined objectives can prevent the movement from turning into an academic amoeba lacking methodological rigour; a loose affiliation of

[9] Larsson and Naurin (n 7); Alec Stone Sweet and Thomas L Brunell, 'The European Court of Justice, State Noncompliance, and the Politics of Override' (2012) 106 *American Political Science Review* 204; Martinsen (n 8); Šadl, López Zurita, and Piccolo (n 7); Dorte Sindbjerg Martinsen, 'The European Social Union and EU Legislative Politics' in Frank Vandenbroucke, Catherine Barnard, and Geert De Baere (eds.), *A European Social Union after the Crisis* (1st ed. Cambridge University Press 2017) 457; Tobias Nowak, 'Of Garbage Cans and Rulings: Judgments of the European Court of Justice in the EU Legislative Process' (2010) 33 *West European Politics* 753.

[10] Larsson and others (n 8); Yannis Panagis and Urška Šadl, 'The Force of EU Case Law: A Multi-Dimensional Study of Case Citations' (2015) *Legal Knowledge and Information Systems* 71; Ovádek (n 8); Larsson and Naurin (n 7).

[11] In this sense, see Epstein, Chapter 5 in this volume and Lee Epstein and Andrew D. Martin, *An Introduction to Empirical Legal Research* (Oxford University Press 2014) 4.

[12] Epstein and Martin (n 11).

[13] Jakob v. H. Holtermann and Mikael Madsen, 'What Is Empirical in Empirical Studies of Law? A European New Legal Realist Conception' (2016) 39(4) *Retfærd* 3.

[14] T. Eisenberg, 'The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns' (2011) *University of Illinois Law Review* 1713.

[15] Ibid. 1732.

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academics rejecting the epistemology, authority, or methodological tyranny imposed by their mother disciplines.

The resulting research agenda of ELS is twofold: to study EU law from an internal perspective (as a legal phenomenon) and from an external perspective (as a social, political, and economic phenomenon). This establishes a shared terrain for lawyers and social scientists, facilitating collaboration – another hallmark of ELS in EU law as well as of this volume, which features contributions from scholars across the disciplinary spectrum, many of which are penned jointly. It does so at a time where EU lawyers increasingly draw on social science research methods and social scientists growingly investigate legal aspects of European integration, enriching each other's intellectual horizons through exposure to concepts, theories, and sensibilities that had hitherto flown under their respective disciplinary radars.

I.1.2 *Origins and Influences*

ELS has acted as a catalyst for innovation and insight, adding methodological tools and theoretical perspectives that were previously absent from or underdeveloped in research on EU law. Its impact on the field has been significant, a proposition that will be explored and substantiated throughout the volume. This, however, does not mean that ELS constitutes a radical break from previous research practices. As most academic movements, the empirical turn in EU law was shaped by a variety of endogenous and exogenous factors, which are crucial for understanding both its emergence and the form it has ended up taking. The following warrant particular attention.

The first are practical developments. Since the turn of the century, the amount of data on EU law has significantly grown and, with it, accessibility has improved. Publicly available databases like Curia (for the CJEU) and EUR-Lex (for all EU institutions) appeared and meant that EU judgments, regulations, and decisions were suddenly one click away – not all of them, not in every language, and not always in a useful format, but still. Scholars subsequently built on these resources to develop more coherent and comprehensive databases, and more user-friendly access points for empirical researchers.[16] National and European freedom of information acts created legal rights as well as, to a certain extent, cultural change in relation to sharing legally relevant documents with citizens and researchers.[17] This all coincided with unprecedented technological advances. Computing power rose sharply,

[16] Michal Ovádek, 'Facilitating Access to Data on European Union Laws' (2021) 3 *Political Research Exchange* 1870150; Stein Arne Brekke and others, 'The CJEU Database Platform: Decisions and Decision-Makers' (2023) 11 *Journal of Law and Courts* 389.

[17] At the EU level, see Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43. As to the remaining difficulties here, see Leino-Sandberg, Chapter 7 in this volume.

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travelling became easier, and breakthroughs in programming facilitated online communication. For empiricists of both the quantitative and qualitative variety, previously unknown research avenues opened up.

During the same period, a series of academic developments paved the way for the advent of ELS in the EU. The first is the debate on methods in EU legal research. Echoing similar discussions that were simultaneously taking place across the world,[18] European legal scholars started to reflect on how they conduct and should conduct research.[19] Criticisms of traditional doctrinal approaches grew and, with them, calls for methodological renewal. Scholarship on European law in general, and EU law in specific, was seen as unduly formalistic due to its adherence to 'black letter' approaches. It displayed high levels of fragmentation which resulted from differences in national legal cultures. Finally, and perhaps most worryingly, it lacked – in contrast to virtually any other academic discipline – a basic awareness of methodology. Some saw the solution in devising a 'European legal method', which would lay down coherent principles of legal reasoning and doctrinal analysis.[20] Others argued for a revitalised doctrinal research which, rooted in the 'law in context' tradition, would pay greater attention to non-doctrinal questions, disclose ideological preconceptions, and communicate the limitations of its findings more openly.[21] Yet others advocated that legal research should embrace methodological insights from the social sciences.[22]

In parallel, ELS began to spread in the US around the new millennium and, a little later, other parts of the world. Empirical legal scholarship, of course, did not

[18] For one notable exchange in the US context, see Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)' (2009) 97 *Georgetown Law Journal* 803; Richard A. Posner, 'The State of Legal Scholarship Today: A Comment on Schlag' (2009) 97 *Georgetown Law Journal* 845.

[19] Martijn Hesselink, 'A European Legal Method? On European Private Law and Scientific Method' (2009) 15 *European Law Journal* 20; Armin von Bogdandy, 'The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe' (2009) 7 *International Journal of Constitutional Law* 364; Mattias Kumm, 'On the Past and Future of European Constitutional Scholarship' (2009) 7 *International Journal of Constitutional Law* 401; Ulla B. Neergaard, Ruth Nielsen, and Lynn M. Roseberry (eds.), *European Legal Method: Paradoxes and Revitalisation* (*DJØF Publishing* 2011); Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 *European Law Journal* 292.

[20] Ulla Neergaard and Ruth Nielsen (eds.), *European Legal Method: Towards a New Legal Realism* (*DJØF Publishing* 2013).

[21] Rob van Gestel and Hans-Wolfgang Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What about Methodology?' (2011) EUI Working Paper LAW 2011/05.

[22] See Mattias Derlén and Johan Lindholm (eds.), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart 2018); Mikael Rask Madsen, Fernanda Nicola, and Antoine Vauchez (eds.), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022); Rossana Deplano and others (eds.), *Introduction to Interdisciplinary Research Methods in EU Law* (Edward Elgar 2024).

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enter the American research scene only then. There had been almost a century worth of empirical work on law-related topics at that point, the initial impetus for which had come from the Legal Realists.[23] After a first-wave of empirical legal scholarship that was inspired by their theorising, various offshoots appeared in the second half of the twentieth century, including, most prominently, the Law and Society and New Legal Realism movements.[24] ELS in its modern form started to gain momentum in the 2000s, understanding its mission to lie in creating 'legally sophisticated empirical analysts' whose scholarship would help 'inform litigants, policymakers, and society as a whole about how the legal system works'.[25] Although not universally admired, it quickly became influential in North America which, in turn, established a global blueprint. Academic communities in Israel, Germany, and the Netherlands started to draw on empirical methods to study areas ranging from private, to constitutional, to international law,[26] thereby contributing to its gradual expansion across the world.[27]

Finally, political scientists came to show a growing interest in aspects of EU law that had previously been the sole realm of lawyers. While political science had long studied the driving forces behind the expansion of the EU legal order, the 1990s saw the publication of a number of seminal studies on legal aspects of European integration. The original focus was primarily on the CJEU and its interaction with national courts, with the empirical work originating, for the most part, in US faculties.[28] Early studies shed light on the relative strength of the two leading

[23] Herbert M. Kritzer, 'Empirical Legal Studies before 1940: A Bibliographic Essay' (2009) 6 *Journal of Empirical Legal Studies* 925.

[24] Mark C. Suchman and Elizabeth Mertz, 'Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism' (2010) 6 *Annual Review of Law and Social Science* 555.

[25] Theodore Eisenberg, 'Why Do Empirical Legal Scholarship' (2004) 41 *San Diego Law Review* 1741.

[26] Jack Goldsmith and Adrian Vermeule, 'Empirical Methodology and Legal Scholarship' (2002) 69 *University of Chicago Law Review* 153; Jack M. Balkin, 'Interdisciplinarity as Colonization' (1996) 53 *Washington and Lee Law Review* 949.

[27] Ariel L. Bendor and Yifat Holzman-Gazit, 'Empirical Legal Studies in Israel: Findings and Insights' (2011) 34 *Tel Aviv University Law Review* 351; Ino Augsberg, 'Von einem neuerdings erhobenen empiristischen Ton in der Rechtswissenschaft' (2012) 51 *Der Staat* 117; Emanuel V. Towfigh, 'Empirical Arguments in Public Law Doctrine: Should Empirical Legal Studies Make a "Doctrinal Turn"?' (2014) 12 *International Journal of Constitutional Law* 670; Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 *American Journal of International Law* 1; Niels Petersen and Konstantin Chatziathanasiou, 'Empirical Research in Comparative Constitutional Law: The Cool Kid on the Block or All Smoke and Mirrors?' (2021) 19 *International Journal of Constitutional Law* 1810. But see Epstein's Chapter 5 in this volume, which critically interrogates the story of globalisation.

[28] Anne-Marie Burley and Walter Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41; Jonathan Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the Eurpean Court of Justice' (1996) 19 *West European Politics* 360; Karen J. Alter, 'The European Court's Political Power' (1996) 19 *West European Politics* 458; Alec Stone Sweet and Thomas L Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95' (1998) 5 *Journal of European Public Policy* 66.

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theories of integration, neofunctionalism and intergovernmentalism. This work proved immensely influential, not just by articulating original theoretical frameworks about European integration itself but, more broadly, prompting a wave of enthusiasm for topics relating to EU law and judicial politics. It inspired subsequent clusters of scholarship on judicial behaviour,[29] legal mobilisation,[30] compliance,[31] and many more.[32] Perhaps most consequently, however, it prompted a more in-depth interaction with legal topics and scholarship, which laid the foundations for empirical legal research in the EU.

I.2 UNKNOWN TERRITORIES

Given the substantial body of scholarship that has emerged, it may be tempting to see ELS in EU law as having reached its destination. A variety of research questions have been answered, many methodological avenues have been explored, and meaningful theoretical contributions have been made. Contrary to this notion, we want to suggest that it might be more helpful to think of ELS as a process rather than a place. That process evolves along disciplinary, substantive, and institutional lines which create, in equal terms, opportunities and challenges.

I.2.1 *(Inter)disciplinary Conversations: Law and Social Science*

This volume taps into the ongoing disciplinary conversations between ELS and doctrinal research, which have often juxtaposed empiricism and doctrinalism, the modern and the classic, the scientific and the unscientific, the 'is' and 'ought', facts and norms.[33] It also investigates the relationship between legal research and the social sciences, as well as between the US and the European versions of ELS.

[29] Clifford J. Carrubba, Matthew Gabel, and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 *American Political Science Review* 435; Olof Larsson and Daniel Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) 70 *International Organization* 377.

[30] Pavone (n 8); Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007); see also Hermansen and Pavone, Chapter 15 in this volume.

[31] Tanja Börzel, 'Non-Compliance in the European Union: Pathology or Statistical Artefact?' (2001) 8 *Journal of European Public Policy* 803; Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002); Miriam Hartlapp, Gerda Falkner, Simone Leiber, and Oliver Treib, 'Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?' (2004) 27 *West European Politics* 452.

[32] See Naurin, Lindholm, and Schroeder, Chapter 2 in this volume.

[33] Urška Šadl and Henrik Palmer Olsen, 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts' (2017) 30 *Leiden Journal of International Law* 327; Gareth Davies, 'Taming Law: The Risks of Making Doctrinal Analysis the Servant of Empirical Legal

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Among these conversations, the debate between legal and empirical legal scholars has been the fiercest, longest, and most distracting.[34] On the one side, legal scholars fear the eclipse of normativity and potential weakening of the acquired institutional power over legal education, publication outlets, and chairs. On the other, empirical legal scholars object to the unfounded dominance of traditional perspectives in law-school curricula, publication outlets, and career opportunities.

ELS in the EU is aware of these discussions, which tend to revolve around the incompatible outlook, methods, and merit of normative and descriptive research.[35] It stays committed to a constructive exchange with doctrinal scholarship on EU law, to which it owes its existence and edge. Just like formalism and legalism enabled legal realism and critical legal studies, and the attitudinal and the strategic model of judicial behaviour were built against the legal model, empirical legal research found much of its initial inspiration in the rich doctrinal research on EU law. Doctrinal scholarship is, thus, not the antithesis but a starting point, reference point, and sometimes counterpoint of ELS in EU law, depending on the type of data, chosen methodology, and specific research question. Empirical legal work seeks to understand how the law is produced, changed, and with what effects. This stance is grounded in the realisation that doctrinal analysis remains indispensable for the internal criticism of the legal system and proposals for legislative reform.

ELS in the EU is also entering into conversation with ELS more broadly. Historically, empirical legal research on EU law owes its existence and appeal to ELS which, as already noted, took hold in the US before expanding globally. It is noteworthy that, overall, EU-centred ELS appears more inclusive in terms of theoretical and methodological approaches than, for instance, its North American counterpart. But its aims resemble those of the original ELS movement: to encourage and develop empirical scholarship on legal issues; and stimulate ongoing conversations among scholars of law, economics, political science, criminology, finance, psychology, sociology, healthcare, and other disciplines. Just as the *Journal of Empirical Legal Studies* (JELS) stressed the need to fill 'a gap in the legal and social science literature that often leaves scholars, lawyers, and policymakers with false or distorted impressions about the legal system',[36] ELS in EU law strives to provide accurate and relevant insights into the EU legal order. Just like JELS, it seeks to encourage, promote, and provide an impetus for the careful

Research' in Marija Bartl and Jessica C. Lawrence (eds.), *The Politics of European Legal Research* (Edward Elgar 2022) 124. See also Zglinski, Chapter 1 in this volume.

[34] See Davies, Chapter 4 in this volume.

[35] Urška Šadl, 'Who Needs the European Society for Empirical Legal Studies?' (2022) 29 *Maastricht Journal of European and Comparative Law* 643; Johan Lindholm and others, 'Introducing the *European Journal of Empirical Legal Studies*: A Beacon of Empirical Inquiry in Law' (2024) 1 *European Journal of Empirical Legal Studies* 1.

[36] Theodore Eisenberg and others, 'Editor's Introduction' (2004) 1 *Journal of Empirical Legal Studies* v.

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collection of empirical data and the dispassionate testing of empirical hypotheses. And finally, just like JELS, it hopes to bring together legal researchers and social scientists who are interested in the empirical analysis of law and legal institutions.

Finally, ELS in EU law encourages the ongoing interdisciplinary conversations between legal researchers and social scientists. Among the latter, political science has been the primary co-founder of ELS, methodologically and theoretically. These two key constituents of ELS, legal researchers and political scientists, are (or should be) fundamentally interested in the same empirical research questions: how is EU law created and changed? What is the impact of EU law in society? Most, if not all, of the specific questions that ELS in EU law asks can be derived back to these broader queries regarding the operation of the evolving EU legal order. The fact that the basic questions are the same, while the skill sets and approaches to research are different, means that ELS in EU law is a goldmine for interdisciplinary synergies. By working together, legal researchers and political scientists can answer their questions in more ambitious and better-founded ways.

Some of this potential remains unfulfilled precisely because of the different skills and research approaches that the two disciplines bring. The strict format of much political science work, focusing on testing or developing theoretically derived hypotheses, often by means of highly technical research methods, is too tight a straitjacket for many legal researchers. The tools and jargon of EU law and legal analysis is too obscure for social scientists who lack training in law.

However, the fact that both disciplines – when they meet in ELS in EU law – are fundamentally interested in the same empirical questions means that they are also (or should be) interested in the same types of research designs and methods, namely those that can provide the most credible and innovative answers to those questions. Empirical research that addresses important problems but is unable to back up its answers with solid research designs, is not, or ought not be, of interest to anyone. At the same time, credible and innovative answers are most likely to come from research designs where the scholars have deep knowledge of the data they are analysing, that is, EU law and practice. All of this speaks to the huge potential of further interdisciplinary collaboration.

I.2.2 *Open Questions: Theory and Data*

ELS in EU law has accomplished much in little time. The chapters in this volume testify to the diversity and wealth of theories, research questions, data, and methods that scholars have used to produce new knowledge about the functioning of the EU legal order. Some topics have received a great deal of empirical scrutiny. Examples include variations in the use of the preliminary reference procedure, the levels of compliance with EU law by the Member States, and the political constraints on judicial behaviour. These have become 'flagship' streams of empirical legal research on EU law, yet they capture only a fraction of the existing scholarly work. ELS has

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and continues to expand into ever more substantive (sub-)fields of EU law. The range of topics to which empirical methods have been applied reaches from gender equality,[37] environmental protection,[38] and data rights[39] to aspects of soft law,[40] disability rights,[41] procedural rules,[42] and multilingualism[43] – to name but a few.

And still, the work is incomplete. The coverage of substantive EU law is uneven and riddled with gaps. The data on the application of EU rules by national judges is limited.[44] A robust understanding of how attitudinal factors affect the choices of the CJEU's judges is missing.[45] The ways in which non-institutional actors contribute to the making of and compliance with EU law are spotty.[46] Entire policy areas of EU law, such as external relations, financial services, and racial equality,[47] have barely received any scholarly attention. Similarly, research questions which pertain to the classic repertoire of ELS and to which the field can, arguably, make some of its most important contributions, have been left unexamined. Among the most obvious examples here is the study of how effectively EU legislation can change the behaviour of legal actors and stakeholders.

[37] Monika Leszczyńska, 'Mandatory Quotas for Women on Boards of Directors in the European Union: Harmful to or Good for Company Performance?' (2018) 19 *European Business Organization Law Review* 35; Konstantinos Alexandris Polomarkakis, 'Gendered Capital and Litigants in EU Equality Case-Law' (2022) 85 *Modern Law Review* 1387.

[38] Jale Tosun, 'Environmental Monitoring and Enforcement in Europe: A Review of Empirical Research' (2012) 22 *Environmental Policy and Governance* 437; Fiona J. Sanderson and others, 'Assessing the Performance of EU Nature Legislation in Protecting Target Bird Species in an Era of Climate Change' (2016) 9 *Conservation Letters* 172; Yves Steinebach, 'Water Quality and the Effectiveness of European Union Policies' (2019) 11 *Water* 2244.

[39] Maurizio Borghi, Federico Ferretti, and Stavroula Karapapa, 'Online Data Processing Consent under EU Law: A Theoretical Framework and Empirical Evidence from the UK' (2013) 21 *International Journal of Law and Information Technology* 109.

[40] Mariolina Eliantonio, Emilia Korkea-aho, and Oana Stefan (eds.), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (Hart 2021).

[41] Delia Ferri, 'The Role of Soft Law in Advancing the Rights of Persons with Disabilities in the EU: A "Hybridity" Approach to EU Disability Law' (2022) 28 *European Law Journal* 134; Jeffrey Miller, 'Explaining Paradigm Shifts in Danish Anti-discrimination Law' (2019) 26 *Maastricht Journal of European and Comparative Law* 540.

[42] Anna Wallerman Ghavanini, 'Can Two Walk Together, except They Be Agreed? Preliminary References and (the Erosion of) National Procedural Autonomy' (2019) 44 *European Law Review* 159; Stein Arne Brekke and others, 'That's an Order! How the Quest for Efficiency Is Transforming Judicial Cooperation in Europe' (2022) 61 *Journal of Common Market Studies* 58; for more examples, see Cheruvu, Chapter 13 in this volume.

[43] Karen McAuliffe, 'Hybrid Texts and Uniform Law? The Multilingual Case Law of the Court of Justice of the European Union' (2011) 24 *International Journal for the Semiotics of Law* 97.

[44] See Dyevre, Chapter 14 in this volume.

[45] See Cheruvu, Chapter 13 in this volume.

[46] See Hermansen and Pavone, Chapter 15 in this volume.

[47] Iyiola Solanke, 'Conclusion: Embedding Decoloniality in Empirical EU Studies' in Mikael Rask Madsen, Fernanda G. Nicola, and Antoine Vauchez (eds.), *Researching the European Court of Justice* (Cambridge University Press 2022) 343.

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Furthermore, data without theory equals noise. In order to say something substantively about the above themes, ELS needs to connect its empirical work to theory. Studies that collect data or use existing data on a given legal problem should focus on exploring questions or testing hypotheses that are connected to general theories about law and legal change, as well as to broader legal developments or political debates. The volume includes plenty of positive examples of empirical insights from EU law which contribute to wider European and international discourses.[48] However, ELS in the EU has still to fulfil the theoretical potential of its aspirations. It also needs to take its societal responsibility seriously. As any research field, ELS can only succeed by producing both theoretical insights and socially relevant research findings.

Lastly, the methodological toolbox available to ELS in EU law has yet to be fully explored. A large part of European ELS continues to rely on basic descriptive statistics. Studies count the number of times a certain rule has been applied, or the average share of a certain outcome in a group of cases, walking in the footsteps of the earliest empirical legal scholarship in the realist tradition. For many research questions, descriptive analysis of this kind is sufficient to provide reliable answers. Other questions benefit from different research designs, both qualitative and quantitative. Teasing out significant correlations and causal relationships has been part of ELS scholarship for some time. Constructive interdisciplinary conversations under the umbrella of ELS can kickstart fruitful collaborations and accelerate progress here. The EU context poses specific challenges to ELS because of the strong doctrinal tradition which dominates legal education. The empirical legal community in EU law, like most of the social sciences, is still digesting developments like the credibility revolution, which affects research design, or the rise of novel technologies such as machine learning. It may seem ironic to expect that a field, which is still to some extent pre-occupied with familiarising itself with the fundamentals of social science research, rapidly comes to terms with some of the cutting-edge methods that are emerging elsewhere. It is, however, also entirely logical as ELS is placed between legal doctrine, with its notoriously stable methodology, and social science, with its notorious lust for methodological innovation and constant search for robust research designs. ELS must level up to keep up.

I.2.3 *Uncharted Waters: Education and Impact*

It is often observed and lamented that European law schools do not train legal scholars in empirical methodology and tend to have little academic ambition. Legal training is practice-oriented and legal practice in Europe is closely tied with academia. Historically, entire legal systems across the continent were crafted at

[48] See, e.g., Gammeltoft-Hansen and Byrne, Chapter 19 in this volume.

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universities,[49] and the academic influence has been persistent in EU law. Users and producers of theory and doctrine are nearly indistinguishable.[50]

However, legal practice has increasingly digitalised, and law schools will soon be growing digitally savvy generations of graduates. Doctrinal scholarship, it has been argued, has been losing its secure footing.[51] ELS has capitalised on that development, just like it has piggybacked on the data revolution mentioned above. Research centres like iCourts, PluriCourts, and IUROPA undertook PhD training in empirical research, instilling a distinctly non-normative epistemology in a new generation of scholars. An array of other initiatives in the form of summer schools and workshops have emerged throughout Europe in cities like Amsterdam, Rotterdam, Oslo, Leuven, and Florence. The new generations of scholars are intellectually open and methodologically capable – ELS can bring them together as they mature. As Rome wasn't built in a day, ELS in EU law will not be built in a generation but require successive generations of scholars. Institutional support is instrumental, intellectual community is key.

ELS in EU law has still to make its societal impact visible. Journalists and judges might not subscribe to JELS or its European counterpart, EJELS, nor habitually make trips to the relevant annual conferences. But ELS scholars could invest greater effort into writing digestible versions of their studies for media outlets and the legal profession, minimising technical terminology and maximising societal relevance. The findings of empirical legal work could effectively feature in widely read blogs, currently used mostly for quick case commentary by doctrinal scholars, or commissioned reports. This type of work can contribute to the legal profession in important ways. Take the CJEU, which has long been reluctant to grant access to its archives and hand out its dossiers for research purposes. Its judges, bar a few prominent figures with close ties to academia and Brussels, have been content to remain anonymous. However, even the Court has realised that openness and good communication are key to the acceptance of its jurisprudence and institutional legitimacy. This has resulted in the creation of the CJEU's YouTube channel, the publication of press releases, and the availability of live streams of the hearings,[52] as well as a jurisprudence on access to internal documents.[53]

[49] Stefan Vogenauer, 'An Empire of Light?: II: Learning and Lawmaking in Germany Today' (2006) 26 *Oxford Journal of Legal Studies* 627.

[50] Harm Schepel and Rein Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3 *European Law Journal* 165; Rob van Gestel and Hans-Wolfgang Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What about Methodology?' (2013) EUI Working Papers; Antoine Vauchez, 'The Transnational Politics of Judicialization: Van Gend En Loos and the Making of EU Polity' (2010) 16 *European Law Journal* 1; Antoine Vauchez, 'When Scholarship Matters: Theory-Building and Theory Effects in the EU Polity Context' (2020) iCourts Working Paper Series, No. 200, IMAGINE Paper no. 7, 2020 1.

[51] Rob van Gestel, Hans-Wolfgang Micklitz, and Edward Rubin, 'Introduction' in Rob van Gestel, Hans-Wolfgang Micklitz, and Edward L. Rubin (eds.), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) 1.

[52] https://www.youtube.com/c/CourtofJusticeoftheEuropeanUnion.

[53] See Leino-Sandberg, Chapter 7 in this volume.

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ELS scholars in the US regularly write reports for major newspaper outlets. One of the most prominent examples is Epstein and Liptak's work which integrates data and narrative at the end of each US Supreme Court term and, occasionally, makes the front pages of the *New York Times*.[54] In the EU, many court cases and legal developments which make the front pages are practically screaming for empirical data and scholarly involvement. (Re-imagine, for instance, the Brexit debate with such contributions in lieu of tabloid sensationalism, unfounded accusations, and 'post facts'.) Even if outreach takes time and effort, it can promote ELS work in Europe and transnationally. Clarifying the real-world implications of ELS studies, assessing speculation in the law reviews and court decisions, and developing collaborations with journalists will make ELS research relevant in and beyond the academic circles.

1.3 THE VOLUME

This book is organised in three parts, which cover the key dimensions of ELS in EU law.

Part I explores the *foundations* of the field, assessing its rise, rationales, and relationship with other disciplines. The growing popularity of ELS in the EU has gone hand in hand with increasing pushback, which has been articulated most forcefully by legal scholars. In light of this pushback, *Zglinski* asks if empirical legal research adds something to the study of EU law and, if so, what. His chapter argues that ELS does not only give legal scholars methodological tools to effectively research questions in which they were always interested, but also allows them to ask new questions, expanding their theoretical horizons and conceptual vision of EU law.

Naurin, *Lindholm*, and *Schroeder* offer a view from political science. More than two decades after Mattli and Slaughter's famous claim that 'political science has discovered the European Court of Justice', they assess whether the discipline has also discovered EU law. They trace the evolution of law in political science work on the CJEU, from a concept understood in rudimentary terms as an external constraint on judicial behaviour to the more nuanced accounts of legal concepts, doctrine, and judicial practices in recent work, arguing that there is still untapped potential in exploring the multidimensionality of legal cases.

The following two chapters discuss what the emergence of ELS means for doctrinal scholarship on EU law. *Gentile* argues that empirical research is likely to enrich, and could even revitalise, doctrinal work due to the epistemological benefits which it brings. There is the promise of complementarity. However, there is also, so she warns, the peril of losing something essential about the nature of EU law, especially if viewing it through an exceedingly quantitative lens.

[54] See Epstein, Chapter 5 in this volume.

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Davies presents the rise of empirical research as driven by the disillusionment with existing scholarship on EU law which, in turn, is connected to the disillusionment with the EU more broadly. Built on a strong tradition of contextual and theoretical analysis, EU legal scholarship has largely been 'evidence-free', lacking empirical evidence beyond legal texts. The increasing popularity of ELS can, against this backdrop, create synergies but also conflicts. The chapter outlines the different alliances that may materialise between forces old and new, arguing that the future will, either way, be different from the past.

Epstein reflects on the emergence of European ELS as part of the globalisation of ELS. According to the standard narrative, empirical research on law began in the US with the legal realists and, subsequently, spread across the world. Epstein critically interrogates this narrative, analysing the extent to which ELS research has permeated leading European and US law journals. Her data provide mixed support for the globalisation story, showing that the number of empirical studies that are published remains remarkably low in Europe. The chapter outlies strategies for effecting change.

Part II looks at *data* and *methods*. Data are the lifeblood of empirical research. *Glavina* takes stock of the data that is used in EU empirical legal research, as well as the methods employed to analyse them. This includes classical sources of law, such as CJEU rulings and EU legislation, but increasingly also less traditional sources, such as information from interviews, surveys, and social media. The chapter enquires into the possibilities and limitations of these different types of data, while considering whether their existence challenges established understandings of what counts as law.

Leino-Sandberg zooms in on non-judicial data, which have grown in importance as an object of study in European ELS, and the difficulties researchers face when trying to access them. Taking legal debates in the Council and the Commission as a case study, she highlights the active role which the legal services of both institutions play in the framing and shaping of EU law, as well as the significant hurdles which a scholar seeking to obtain information about their respective positions faces.

Šadl, *Lindholm*, *Naurin*, and *Wallerman Ghavanini* discuss the need for creating multi-user databases as a resource for empirical legal scholarship in the EU and the conditions under which these can be successful. Reflecting on the success of existing tools like the US Supreme Court Database, and drawing on their own experiences from the IUROPA Project, the authors embrace and apply four principles that should guide the process: openness and accessibility; reliability and reproducibility; sustainability and foundational nature; connection with real-world problems.

Method is the other indispensable ingredient to every empirical research project. *Kim* and *Schroeder* tackle the – often overlooked, but vital – issue of conceptualisation and measurement. While ELS typically engages with legal texts, distilling information from those texts need not be straightforward. The chapter offers detailed

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guidance for researchers of both law and political science interested in employing a text-as-data approach to study EU law. The authors explain how to conceptualise legal phenomena in a way that renders them conducive to measurement, providing practical advice on hand-coding and the use of deep-learning classifiers.

What follows is a discussion of three methodological developments that have gained in prominence in EU law scholarship as well as outside of it. *Ovádek* focuses on large language models (LLMs), which have attracted considerable attention as a result of the creation of technologies such as OpenAI's Generative Pre-Trained Transformers (GPT) series. He argues that LLMs present a potentially transformative tool for scholars working on EU law, enabling them to digest and analyse large corpora of legal texts and, thus, opening up new avenues for hypothesis testing and data-driven insights.

Korkea-aho analyses the use of interviews as a research technique. Interviews conducted as part of EU law scholarship typically differ from those conducted in other social sciences in one important aspect: they target legal experts such as civil servants, practising lawyers, and other professionals. The chapter discusses the implications of this peculiarity, proposing three principles – authenticity, transparency, and integrity – that should influence how we employ data from elite interviews.

Mayoral delves into experiments. Despite the growing interest in experimental research designs in ELS across the world, their application in the EU continues to be limited. Through a systematic examination of contemporary experimental studies, the chapter identifies emerging trends and research questions. It explores the various types of methods available in this field – ranging from surveys to lab and field experiments – and assesses their capacity to deepen our understanding of EU legal and policy-making processes.

Part III turns towards substantive *themes*. It explores the most important streams of scholarship which ELS has produced in the EU, and the research questions which this scholarship has tried to answer. The chapters do not just summarise what has been achieved, but critically assess the scholarly acumen and outline future research agendas. Even more than in the previous sections of the book, we can only offer a small glimpse here into the increasingly rich world of empirical legal research, which is extending its reach into a growing number of areas of EU law. Against this backdrop, selecting some research strands which stood out as particularly significant and representative, while omitting others, was inevitable. In a decade from now, a different list with different items may appear justified.

Cheruvu examines the vast and rapidly growing literature on judicial behaviour in the EU, that is, the study of the choices which judges make and their consequences for society. Existing work explores the influence of three types of factors on courts: judge-level, internal institutional, and external institutional. While there has been in-depth engagement with some theoretical frameworks, such as rational choice accounts of judicial behaviour, there is significant room for applying attitudinal,

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identity, and 'Thinking Fast' approaches, as well as further probing into the international character of the CJEU.

Dyevre looks at another classical object of European ELS scholarship: national courts. Empirical legal research has generated important insights into the role of Member State courts and their interaction with the CJEU. However, it has remained theoretically limited, overlooking advances in the scholarship on judicial behaviour, and methodologically limited, notably when it comes to issues surrounding causal inference. Data remains a challenge given the difficulties with accessing the high number of domestic court rulings, but natural language processing, machine learning, and web-crawling techniques may facilitate research.

Hermansen and *Pavone* map the empirical research on litigation and legal mobilisation in the EU. Surveying the relevant political science and legal literature, they situate EU law litigation in a broader comparative context. The chapter uses an original large-N dataset of cases referred by national courts to the CJEU to address three questions central to the field: who litigates EU law, who influences the decisions of the CJEU, and with what downstream effects?

Hofmann analyses the evolution of enforcement or, more precisely, centralised enforcement through the European Commission's use of the infringement procedure. Since the second Barroso Commission, the number of disputes that the Commission has decided to refer to the CJEU has drastically declined. The chapter explores the origins of this development and focuses on the consequences. It shows that the Commission has primarily reduced its enforcement action vis-à-vis the 'old' fifteen Member States, while also re-directing its focus away from most of its early priorities such as the internal market, taxation, and transport.

López Zurita and *Sindbjerg Martinsen* investigate the policy impact of CJEU rulings. The ability for courts to effect policy change has been a topic of high constitutional salience, in the EU and elsewhere. The chapter analyses the Court of Justice's impact on two levels, horizontal (EU) and vertical (Member States), the latter of which is sub-divided into its legislative, administrative, and judicial dimension. The picture which emerges is that of an influential, if constrained, Court, but also of a field that remains patchy and would benefit from more interdisciplinary research as well as empirical insights.

Brook enquires into empirical legal research on the EU internal market, focusing on the use of systematic content analysis (SCA). While the internal market has always been at the heart of the European integration project, SCA has entered ELS on EU law only more recently. Brook conducts a survey of existing studies that draw on SCA as a means for researching questions of market integration. Her findings reveal that, despite a number of important publications that have appeared over the past decade, its use remains limited. The chapter identifies some untapped potential as well as existing challenges.

Gammeltoft-Hansen and *Hamilton Byrne* look at the promise of applying computational methods for research on EU migration law. In spite of the considerable

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harmonisation efforts that have gone into it, migration law is also, more than other domains, fragmented due to its connections with national and international legal regimes. The chapter illustrates the advantages of a data-driven approach to European migration law through an analysis of the Danish Refugee Appeal Board's Asylum case law and outlines methods for comparison with datasets from other jurisdictions. It addresses questions of data politics and the possibility of overcoming these by drawing lessons from critical data studies and reflexive research practices.

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