

Systematic Content Analysis of EU Internal Market Law and Governance

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18.1 INTRODUCTION

Systematic Content Analysis (SCA) of legal text offers a methodological and replicable tool to analyse a large body of legal text. It typically consists of three steps: (1) selecting cases based on a clearly defined selection criteria; (2) coding cases according to a pre-determined coding protocol; and (3) analysing the coded cases, in particular by using statistics. While most legal (doctrinal)¹ and social science research² involves a careful reading of selected written materials, SCA stands out as a research methodology that provides an objective, systematic, and generalisable manner to analyse large bodies of legal text.³ The *objectivity* requirement necessitates that each research step adheres to explicitly formulated processes. These rules aim to minimise, if not entirely eliminate, subjective judgments and biases of the researcher. Similarly, the *systematic* requirement dictates that selection criteria and coding of the text follow consistently applied rules. The *generality* requirement indicates that findings should hold theoretical significance rather than merely offering descriptive information about the content. The research design must correspond to a theory and be interpreted in that context. Embodying fundamental principles of social science inquiry, these three requirements aim to apply scientific methods to analyse a body of judgments, administrative decision-making, legislation, and other forms of legal text.⁴

¹ Jesse Claassen, 'Doctrinal and Empirical Perspectives on Preliminary References to the European Court of Justice: Separate Worlds Unanswered Questions' (2023) 15(2) *European Journal of Legal Studies* 5.

² Ole R. Holsti, *Content Analysis for the Social Sciences and Humanities* (Addison-Wesley 1969) 3.

³ *Ibid.* 3–5. For similar definitions, see also Bernard Berelson, *Content Analysis in Communication Research* (Hafner 1952) 18; Dorwin P. Cartwright, 'Analysis of Qualitative Material' in Leon Festinger and Daniel Katz (eds.), *Research Methods in the Behavioral Sciences* (Dryden 1953) 424.

⁴ Holsti (n 2), 5. See also Francis Earle Barcus, 'Communications Content: Analysis of the Research, 1900–1958' (a content analysis of content analysis) (University of Illinois 1959), 8.

As explored in detail elsewhere,⁵ content analysis emerged as a modern research technique amidst the financial crisis of the 1930s in the US. Initially utilised by sociologists, it aimed to examine how media reflected and influenced public opinion,⁶ as well as to delineate trends in communication content.⁷ Its development accelerated during the Second World War, to secure gathering political and military intelligence by inspecting radio and press communications to predict Nazi propaganda strategies.⁸ Those techniques spread to other areas of social science and humanities after the war, and began to be conceptualised and to converge across disciplines.

In 1952, Berelson's *Content Analysis in Communication Research* marked a milestone as the first comprehensive textbook on content analysis.⁹ Early proponents positioned content analysis primarily as a quantitative method, emphasising the exploration of frequencies derived through counting.¹⁰ Moreover, these studies predominantly focused on manifest content – that which is readily observable on the surface.¹¹ Over time, content analysis evolved beyond its quantitative roots. It was also employed to guide more qualitative approaches, and to explore the latent content of the underlying meaning of the text.¹²

Since the 1980s, SCA has experienced rapid growth both in usage and range of disciplines, largely driven by technological advancements. As 'people cannot count, at least not very high',¹³ the rise of computer-aided statistical and text analysis software, the digitalisation and accessibility of online resources, and the emergence of automated content analysis have all contributed to the method's expansion.¹⁴ Technological development advanced the size and scope of digitalised data (potential databases) and enabled faster and more robust analysis of vast amounts of information.¹⁵

⁵ Or Brook, 'Politics of Coding: On Systematic Content Analysis of Legal Text' in Marija Bartl and Jessica C. Lawrence (eds.), *The Politics of European Legal Research* (Edward Elgar 2022) 112.

⁶ Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology* (Sage 2018) 13.

⁷ Holsti (n 2), 43–44.

⁸ *Ibid.* 69–70, 83; Krippendorff (n 6) 14–17.

⁹ Berelson (n 3).

¹⁰ Berelson (n 3). See also Roberto Franzosi, 'Content Analysis: Objective, Systematic, and Quantitative Description of Content' in Roberto Franzosi (ed.), *Content Analysis* (Sage 2008) xxi.

¹¹ Ithiel de Sola Pool (ed.), *Trends in Content Analysis* (University of Illinois Press 1959) 7.

¹² Wilfried Bos and Christian Tamai, 'Content Analysis in Empirical Social Research' (1999) 31(8) *International Journal of Educational Research* 659.

¹³ Frederick Mosteller and David Lee Wallace, *The Federalist* (Addison-Wesley 1964) 7.

¹⁴ Kimberly A. Neuendorf, *The Content Analysis Guidebook* (Sage 2017) 2; Krippendorff (n 6) 14–17; Chad M. Oldfather, Joseph P. Bockhorst, and Brian P. Dimmer, 'Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship' (2012) 64 *Florida Law Review* 1189; Justin Grimmer and Brandon M. Stewart, 'Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts' (2013) 21(3) *Political Analysis* 267.

¹⁵ Jena McGill and Amy Salyzyn, 'Judging by Numbers: How Will Judicial Analytics Impact the Justice System and Its Stakeholders' (2021) 44 *Dalhousie Law Journal* 249.

Despite its widespread adoption in the social sciences, content analysis was not readily applied to the study of law for many years. This reluctance may have stemmed from various factors. Some blame the prevailing belief among judges, policy-makers, and legal scholars that law is an objective and apolitical concept, a timeless and sacrosanct ideal unaffected by those responsible for its administration.¹⁶ According to this notion, the study of the law should focus on the black-letter law and leading cases and legal precedence, emphasising doctrinal analysis rather than the application of law in practice. Others proposed more practical obstacles hindering the systematic study of law, such as law students' legal education¹⁷ or that the access to judicial and other decision-making data, which is crucial for content analysis, was often (and still sometimes is) tightly controlled by courts and other institutions and is made available only to select entities and researchers.¹⁸ This limited access poses significant challenges to conducting comprehensive analyses of legal texts.

Empirical legal research in general, and the embrace of content analysis as a useful methodology to study law in particular, were deeply influenced by the American Legal Realism movement. Notable figures such as Judge Holmes and his successors advocated for law to embrace scientific methods to uncover the underlying political, economic, and societal conflicts that shape legal rules. They argued that hypotheses and assumptions that lay on the basis of law should be tested against empirical evidence, and case law should be subject to scientific scrutiny and analysis.¹⁹ While many of the Legal Realists advocated for the application of scientific methods in jurisprudence, empirical legal analysis did not become a focal point of their engagement. Unlike other interdisciplinary approaches stemming from Legal Realism, moreover, SCA did not evolve into an independent school of thought championing specific intellectual traditions or normative policy-relevant concerns.²⁰

SCA of legal text was first described as a unique legal methodology as late as 2008 in a seminal article by Hall and Wright.²¹ Their contribution not only

¹⁶ For this argument, see also Brook (n 5) 114–15.

¹⁷ Mathias M. Siems and Daithí Mac Sithigh, 'Mapping Legal Research' (2012) 71(3) *Cambridge Law Journal* 651.

¹⁸ Jena McGill and Amy Salyzyn, 'The Supreme Court of Canada and Mainstreamed Judicial Analytics' in Wolfgang Alschner, Vanessa MacDonnell, and Carissima Mathen (eds.), *Decoding the Court: Legal Data Insights from the Supreme Court of Canada* (Taylor & Francis, 2024) 131.

¹⁹ Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457; Franz L. Leeuw and Hans Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar 2016) 2; Herman Oliphant, 'Facts, Opinions, and Value-Judgment' (1931) 1 *Texas Law Review* 127. See also Tommaso Pavone and Juan Mayoral, 'Statistics as If Legality Mattered: The Two-Front Politics of Empirical Legal Studies' in Marija Bartl and Jessica C. Lawrence (eds.), *The Politics of European Legal Research* (Edward Elgar 2022) 78; Brook (n 5) 114–15.

²⁰ Brook (n 5) 116–17.

²¹ Mark A. Hall and Ronald F. Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 *California Law Review* 63.

identified and conceptualised the method but also surveyed its application in analysing legal decisions by courts or administrative adjudicative bodies, outlining best practices. As of the cut-off-date of June 2006, Hall and Wright had reported 134 projects utilising SCA, indicating a notable increase in its usage over time. Prior to 1990, less than one project per year employed SCA, but this figure rose to an average of 5.7 projects per year in the 1990s, and eight projects in the early 2000s.²² Although not explicitly stated in their article, most of these contributions focused on US law and were published in American journals, highlighting the prominence of SCA within the context of US legal scholarship.²³ In the time that has passed since Hall and Wright conducted their study, the SCA of legal analysis has undergone significant advancements, largely due to the emergence of judicial analytics tools. These tools leverage advanced technological techniques, including machine learning, network analysis, and natural language processing, to code and analyse patterns in legal decision-making processes.²⁴

By contrast, the use of SCA for the study of EU law is still underdeveloped.²⁵ This chapter points to the limited popularity of this methodology in Europe, as well as to its vast potential. It focuses on the field of EU internal market law and governance. The remainder of this chapter is organised in three sections. Section 18.2 surveys the use of SCA in legal scholarship on the internal market (1957–2023). This section builds on and corresponds to the 2008 survey undertaken by Hall and Wright on the application of SCA in legal scholarship. It uses some of the same variables for comparative purposes, while incorporating additional variables relating specifically to the EU internal market. This section does not attempt to provide a comprehensive account of the use of SCA in this area. That would be an almost impossible exercise, as much of the scholarship employing some form of the method does not identify it by name.²⁶ The survey, therefore, seeks to shed light on the growing adoption of SCA, identify the areas of research, the type of research questions and data coded, and the academic actors and publishers involved.

Next, Section 18.3 submits that despite the scarcity of scholarship in Europe, SCA is a natural choice for studying EU internal market law and governance. More specifically, it highlights three distinctive features of EU law: (1) its inherent ambiguity, uncertainty, and vagueness, driven by the generality of the Treaties provisions and secondary laws, which often provide frameworks rather than precise norms and the multicultural nature of European legislators; (2) the intricate

²² *Ibid.* 72.

²³ Mark A. Hall and Ronald F. Wright, 'Appendix to Systematic Content Analysis of Judicial Opinions' Wake Forest University Legal Studies Paper No. 913336 (2008), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=913336.

²⁴ McGill and Salczyn (n 18) 2.

²⁵ Cf. Rob Van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20(3) *European Law Journal* 292.

²⁶ This is also consistent with the findings of Hall and Wright (n 21) 74.

multi-level governance system, where rule-making and application are shared across regional, national, and supranational levels; and (3) limited publications and weak open judicial data practices concerning significant body of EU legal text and its application, both at the EU and Member States level.

Finally, the chapter concludes by suggesting that the European legal community has a significant opportunity to advance the study of EU internal market law by using SCA to complement doctrinal studies of law. Openly acknowledging the use of SCA and adhering to its established best practices during the research design, writing, and review could foster an SCA culture tailored to the European context.

18.2 SURVEY OF SCA INTERNAL MARKET SCHOLARSHIP

18.2.1 *Aims and Research Design*

This section surveys the use of SCA in legal scholarship to explore research questions pertaining to EU internal market law and governance. The survey's design follows the framework established by Hall and Wright's 2008 study on the application of SCA in legal scholarship. Accordingly, the author conducted a search for all articles, book chapters, and monographs published between the conclusion of the Treaty of Rome in 1957 and 2023 that systematically coded all or a sample of EU legal text.²⁷ The term EU legal text was interpreted broadly, to include the application of SCA to study primary, secondary, as well as soft EU laws and policy documents; judgments of EU and national courts applying EU law and relevant Advocate General opinions; decisions of the EU Commission and EU and national administrative bodies applying EU law; debates and resolutions of the EU Parliament and its committees; judgments of EU and national courts or administrative body decisions applying EU law; and national laws implementing EU law. The dataset is available on SSRN.²⁸

The relevant scholarship was identified using Google Scholar and Google Book Search.²⁹ Limited to English-language search terms and documents, the author identified studies containing the terms 'systematic content analysis' or 'content analysis and 'EU law', 'EC Law', 'ECC law', 'free movement', 'internal market', or 'single market' in the title or the body of the research. Studies that did not engage with SCA were excluded, as well as those based on discourse analysis, interviews, bibliometric analysis, or other forms of empirical jurisprudence outside of SCA.³⁰ Out of the 2,647 pieces of scholarship that were originally identified by the Google

²⁷ Including articles that have been published online as early access but included in hard copy journals following the cut-off date.

²⁸ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5398589.

²⁹ The search and gathering of sources took place during February 2024.

³⁰ Arthur Deyve, Wessel Wijtvet, and Nicolas Lampach, 'The Future of European Legal Scholarship: Empirical Jurisprudence' (2019) 26(3) *Maastricht Journal of European and Comparative Law* 348.

Scholar and Google Book Search, this exercise retained 38 research outputs. Two of those studies are theoretical contributions about the use of SCA to study EU law and policy, rather than studies applying this methodology.³¹

The variables of this database were coded manually. The definition of variables for each study were inspired by those put forward by Hall and Wright, including (1) the year of publication; (2) the name of the authors; (3) the number of cases coded by each study; (4) whether the scholarship referred to SCA or content analysis as a research methodology and/or cited scholarship on this methodology. In addition, this survey recorded the (5) publisher (for books and book chapters) or journal (for articles); (6) the field of the author's affiliation as identified at the first footnote of each publication; and (7) whether the coding was done in a manual, automated, or mixed fashion.³² Finally, the survey also defines variables related to the study of the EU internal market specifically, including the (8) area of EU law; and (9) the type of legal text coded by each study.

This survey does *not* attempt to provide a comprehensive account of the use of SCA to study decision-making in EU internal market law and governance. That would be a nearly impossible exercise because many studies that use content analysis techniques and methods do not refer to SCA or content analysis explicitly, or to this methodology's literature and research conventions.³³ This practice is not unique to the study of the EU internal market. Hall and Wright reported that researchers regularly employ SCA without citing any methodological literature or only cite examples of legal scholarship drawing on the method. The lack of reference to SCA in many studies could be related to academic conventions in law. Unlike many other areas of social science, legal publications often do not include a separate section or dedicated paragraphs laying out the methodology and approach of the study. The omission might also be related to the limited training of many (European) legal scholars in research methods,³⁴ resulting in a lack of attention to clearly defining the particularities of the study, or a hesitation to formally apply empirical research methodologies.

The survey, therefore, merely seeks to illustrate the growing trend of using SCA in EU internal market law and governance scholarship as an explicit and distinct research method, identify the areas of research, type of research questions and data coded, and the academics actors and institutions involved in this field.

18.2.2 Findings

Figure 18.1 summarises the development of the use of SCA scholarship for the study of EU internal market law and governance, recording the number of SCA

³¹ Brook (n 5); Claassen (n 1).

³² For the purpose of this study, manual coding includes the use of software used to organise and analyse data such as NVivo.

³³ Hall and Wright (n 21) 74.

³⁴ Mathias M. Siems and Síthigh (n 17) 666–74.

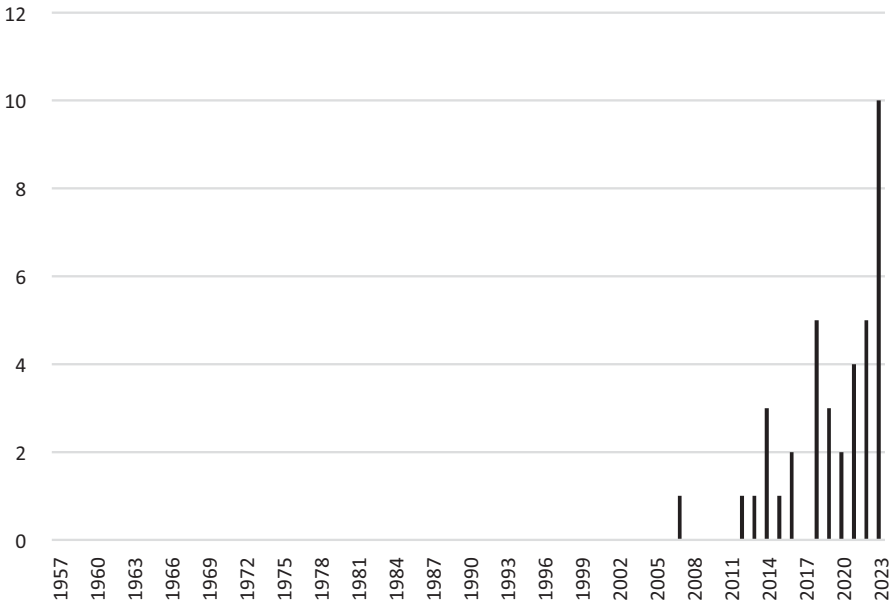


FIGURE 18.1 SCA scholarship per year.

publications per year included in the database. It demonstrates the delay in adopting SCA in this area, particularly in comparison with the US experience.³⁵ The SCA scholarship on the internal market has only emerged during the 2010s and gained some momentum in the past decade.

The limited adoption of SCA in Europe is particularly notable when keeping in mind that Hall and Wright's survey was limited to the study of legal decisions by courts or administrative adjudicative bodies. The studies included in this database and reported in Figure 18.1, by comparison, refer to applying the SCA technique to a broader variety of legal sources.³⁶ As demonstrated in Figure 18.2, in addition to judgments of EU (11), national courts (6), decisions of the EU Commission (7), other EU (2), or national (6) and administrative adjudicative bodies, the SCA studies included in this database explore the body of EU legislation (8), parliamentary debates and resolutions (5), and policy documents and consultations (9). Keeping this in mind, therefore, Figure 18.2 points to the limited study of judicial behaviour and politics in the EU using SCA, especially in comparison to the US.³⁷ As elaborated in Section 18.3 below, this might be tied to a host of technical barriers,

³⁵ See text to note 23.

³⁶ See Section 18.2.1 above.

³⁷ Cf. Jens Frankenreiter, 'Are Advocates General Political? An Empirical Analysis of the Voting Behavior of the Advocates General at the European Court of Justice' (2018) 14(1) *Review of Law & Economics* 1.

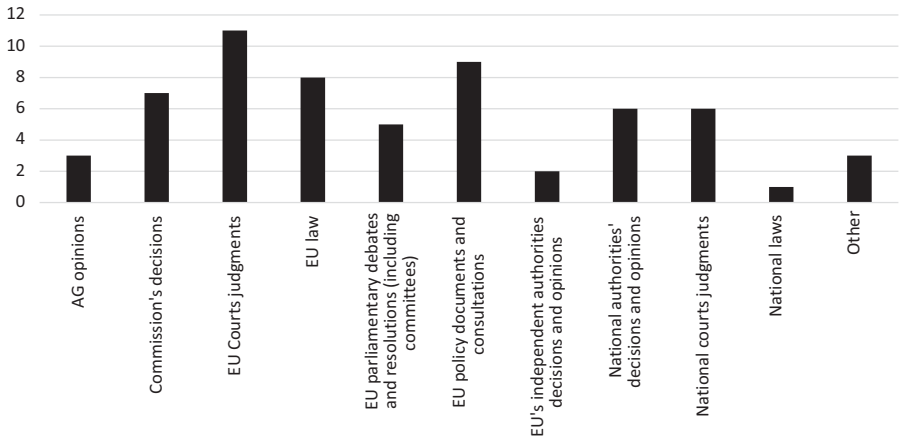


FIGURE 18.2 Type of coded legal text in the database.

as well as a more principled opposition to this line of research in various European legal systems and traditions.

The slower adoption of SCA in the field of EU internal market law and governance is also reflected by the number of cases coded in each study, reported in Figure 18.3.³⁸ According to Hall and Wright's database, between 2000 to June 2006, the median number of cases coded per project amounted to 399 cases (total of 52 projects), with one project coding as many as 22,000 judgments. The median number of coded cases concerning EU internal market law and governance, by comparison, is merely 61. As illustrated by Figure 18.3, 42 per cent of the European studies involved the coding of 100 or fewer cases (26 per cent of less than fifty cases), 10 per cent of between 100–200 cases, and only 18 per cent 500 cases or higher.

The limited number of coded cases might be partially explained by the very limited use of automated coding for SCA projects in Europe.³⁹ Out of the 38 papers in the database, only two involved a mix of automated and manual coding.⁴⁰ Hence, and despite the potential technological advancements since the conclusion of Hall and Wright's study in 2006, not only the number – but also the scale – of SCA studies concerning EU internal market law and

³⁸ Nine out of the 38 studied included in the database did not indicate the number of cases coded. In addition, as mentioned, two studied concerned the theory of SCA without applying it to a specific database.

³⁹ See also Ovádek, Chapter 10 in this volume.

⁴⁰ Heike Klüver, *Lobbying in the European Union: Interest Groups, Lobbying Coalitions, and Policy Change* (Oxford University Press 2013) 71; Bruno Van den Bosch and Friso Bostoen, 'Opening the Black Box: Uncovering the European Commission's Cartel Fining Formula through Computational Analysis' (2023) 3 *Stanford Computational Antitrust* 158. Two other projects did not indicate the coding method used.

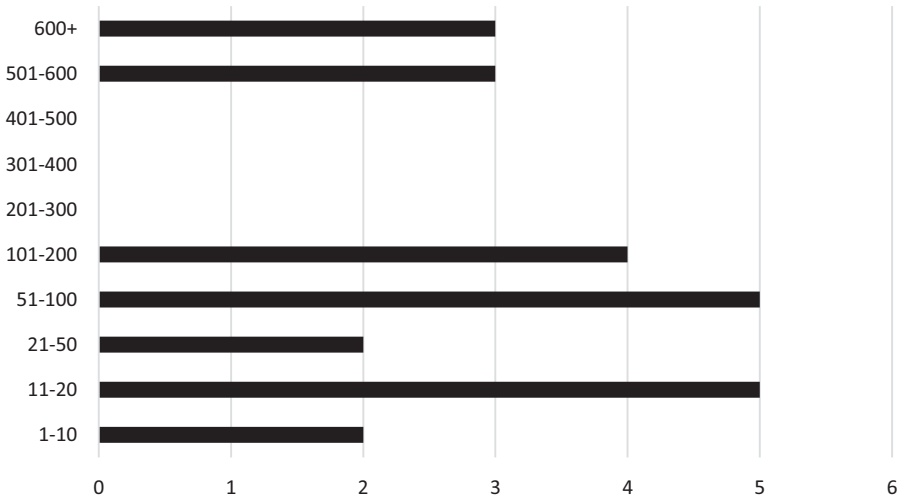


FIGURE 18.3 Number of coded cases per study.

governance has remained modest. Moreover, while Hall and Wright reported a consistently increasing median number of cases coded from the 1990s, there is no trend of an increase in the number of cases recorded in the European studies since the early 2010s.

One may question the added value which SCA can bring to traditional doctrinal legal research when the former is based on a relatively modest number of cases. Like SCA, (high-quality) doctrinal research also involves carefully reading and analysing a body of jurisprudence or other legal texts and making inferences about emerging trends and meanings. Hence, it could be argued that smaller-scale SCA studies do not offer great benefits beyond perhaps a more organised way to read cases. The potential advantages of SCA in such scenarios, nevertheless, may be context-specific. They are shaped, in particular, based on the research question, sampling criteria, and variables coded. For example, an SCA study of a small sample of cases from the total population, which is not grounded in probability or non-probability sampling criteria, is likely to have both limited validity and added value compared to doctrinal research. By contrast, a comprehensive account of all judgments rendered during a particular timeframe across a variety of variables might help expose trends and patterns that are not visible when relying on traditional legal methodologies, even if the number of coded cases is relatively modest.

Next, the survey of SCA-based EU internal market law and governance scholarship reveals that commercial aspects of EU law have received comparably greater attention. As summarised in Figure 18.4, SCA was most often used to explore matters related to EU competition law, Intellectual Property Rights (IPRs), taxation and fiscal policy, and sector regulation. Social aspects of EU law

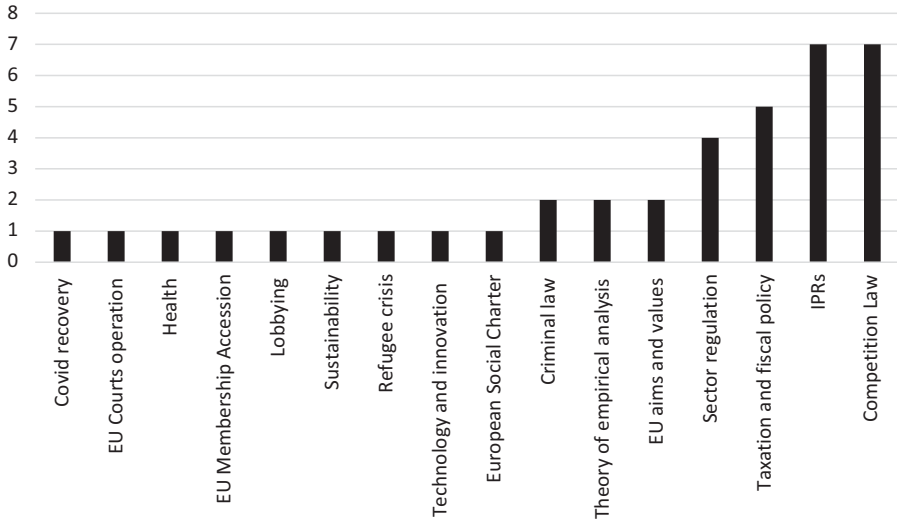


FIGURE 18.4 Areas of EU law.

and the general operation of the EU justice system have remained largely untouched by this methodology.⁴¹

These findings can partially be explained by some authors making multiple SCA contributions to their fields (e.g., in competition law⁴² and IPRs⁴³), rather than differences related to the background or inherent interdisciplinarity of scholars involved in certain areas of EU law. The uneven acceptance of SCA scholarship among certain areas of EU law also does not appear to be linked to publication venues. The studies included in the database were evenly spread among journals (for articles) and publishers (for books and book chapters), where all of the recorded journals published only a single SCA paper.

The survey points to an interesting observation about the type of scholars involved in the SCA studies of EU internal market law and governance. As Figure 18.5 suggests, half of the recorded SCA studies were conducted by non-legal scholars.⁴⁴ In other words, much of the insights about EU internal market law and governance using this technique are made by political scientists, economists, and business administration, as well as other social science researchers. This finding is in line with previously reported trends about empirical research in Europe in general,

⁴¹ This is a contrast to the findings of Hall and Wright (n 21) 73, who report that 5 per cent or more of the projects included in their database relate to administrative law, constitutional law, corporate and securities law, criminal law and procedure, contracts, employment discrimination, health law, and torts.

⁴² Five of the seven competition law papers were authored (four) or co-authored (one) by Brook.

⁴³ Two of the seven IPRs papers were authored by Ramalho.

⁴⁴ Based on the affiliation of the authors in each paper. The first paper in the database by a law-affiliated scholar was published in 2014.

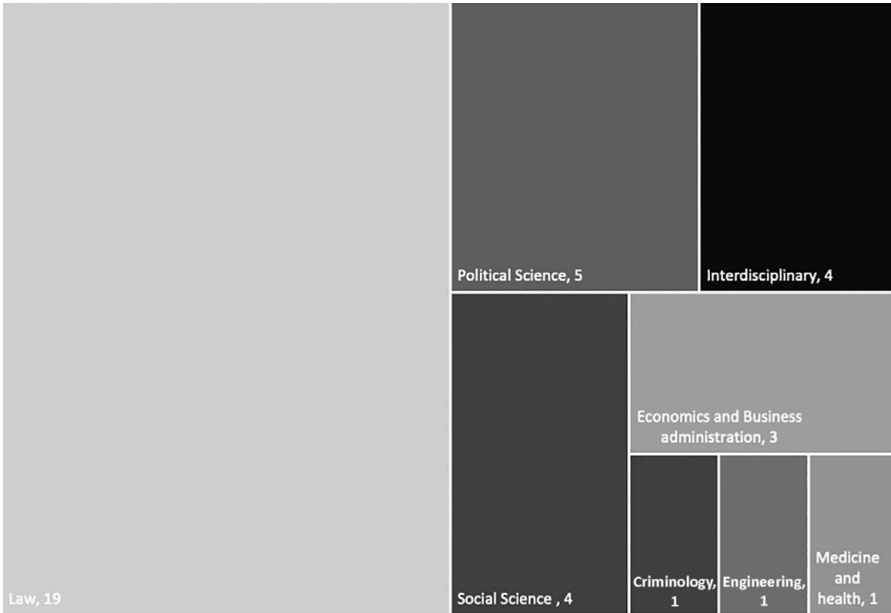


FIGURE 18.5: Authors' affiliation.*

*Note: The author's affiliation was coded according to the school, department, or faculty listed in the first comment of each publication. Hence, law, economics, and political science, for example, are distinguished from social science.

whereby a growing share of the cutting-edge research, which used to be the preserve of legal scholars, is now conducted by researchers outside the legal discipline.⁴⁵

This observation may indicate another missed opportunity within the realm of the SCA of EU internal market law and governance. Given their doctrinal training, background, and knowledge, legal scholars possess unique advantages in identifying legally significant research questions and empirically confirming or challenging some of the conventional wisdom and assumptions in their areas of expertise. Moreover, the integration of doctrinal legal insights can significantly enhance the quality and validity of SCA-based research. Achieving conclusions of substantial legal and practical significance often requires a nuanced legal understanding of the relevant legal rules and enforcement settings to effectively select cases, define variables, and analyse data. Thus, 'traditional' doctrinal legal analysis and SCA should not be seen as opposing methodologies but rather as complementary approaches. While social scientists and teams of interdisciplinary researchers undoubtedly offer important insights to the study of EU internal market law and governance, there remains considerable untapped potential for legal scholars to apply SCA effectively in their research.

⁴⁵ Dyeve et al. (n 30) 351.

Finally, a closer examination of the body of SCA research focusing on internal market law and governance reveals a relatively limited range of research questions being explored through this methodology. As commentators have previously noted, SCA of legal text can address various research questions, which can be roughly categorised into three groups: (1) descriptive research questions, which involve ‘gathering, organising, tabulating, and depicting data’ (research projects in this category typically aim to uncover trends in the case law, the success rates of certain arguments, and the language used in the decision-making process); (2) predictive research questions, which seek to forecast future courses of action based on past experiences and trends identified through SCA; and (3) perspective research questions, which aim to recommend evidence-based law and policy reforms.⁴⁶ Despite this potentially wide scope of application, EU scholarship has predominantly focused on the first category of descriptive research questions. Specifically, while many American SCA studies have explored judges’ personal characteristics (e.g., gender, age, education, and politics) as predictors or explanatory factors in decision-making, such scholarship has not gained traction in the EU context.⁴⁷

18.3 THE POTENTIAL FOR SCA-BASED RESEARCH OF EU INTERNAL MARKET LAW AND GOVERNANCE

SCA of EU internal market law and governance is still in its early days. As demonstrated in the previous section, there are few studies, typically coding a limited number of cases, concerning limited areas of EU law, and focusing on a narrow type of research questions. Nevertheless, this section suggests that the exploration of EU internal market law and governance may benefit from greater use of this methodology, particularly given (1) the nature of EU law, (2) its multi-governance character, and (3) by creating new databases and tools to explore the EU internal market in face of the limited publications and weak open judicial data practices concerning a significant body of EU legal text. This section discusses each of those features of EU law in turn, referring to examples of studies using SCA to explore those gaps based on the database presented in the previous section.

First, SCA has the potential to serve as a powerful tool for deciphering the ambiguous, uncertain, and vague provisions of EU law and governance in the internal market and beyond. Unlike many national legislations, EU laws often only offer general legal frameworks rather than defined norms.⁴⁸ The EU Treaties, secondary, and other forms of regulation typically provide no or very limited explanations of the underlying values of the EU legal order and the aims of the specific

⁴⁶ McGill and Salyzyn (n 15) 252.

⁴⁷ This will be further elaborated below, see text to notes 82–83.

⁴⁸ Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012) 162.

legal provisions.⁴⁹ The ambiguity surrounding EU law is ascribed to a combination of factors, including the need to reach a political compromise between representatives of the Member States, negotiations and amendments over legal text conducted mostly by non-native speakers and later translated into the various Member States' languages, and the interpretation and application of those rules by judges and lawyers coming from vastly different legal traditions.⁵⁰ The scope, meaning, and boundaries of EU law and governance, therefore, are affected by the multicultural nature of European legislators and multilingualism.⁵¹ Further uncertainties pertain to the interaction between EU and national law and how far the EU competencies reach.⁵² The division of competencies between the Member States and the EU is politically charged and contested, and EU law offers only incomplete, open-textured, and imprecise rules.⁵³ For example, while the EU Treaties introduce the principles of conferral, subsidiarity, proportionality, and sincere cooperation to guide this division, they do not contain a clear resolution tool in case the application of those principles results in conflicts.⁵⁴

Against this background, SCA has already assisted in identifying how EU internal market law and governance is being interpreted and applied in practice, whether it follows a coherent and consistent interpretation,⁵⁵ how the interpretation of national actors differs across subject areas or borders,⁵⁶ what laws are being enforced and which are not, and how the governance mechanism operates.⁵⁷ The method was used to investigate how the division of competencies between the EU and the Member States operates across different fields of law,⁵⁸ and how the bodies involved

⁴⁹ Ibid. 165–66. See also Marcella Favale, Martin Kretschmer, and Paul C. Torremans, 'Is There An EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' (2016) 79(1) *The Modern Law Review* 31.

⁵⁰ Eleanor Sharpston 'Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System' (2010) 12 *Cambridge Yearbook of European Legal Studies* 411.

⁵¹ Beck (n 48) 174–75.

⁵² Hans-Wolfgang Micklitz, 'Why Is the Regulation of Enforcement through the EU So Difficult?' in Christine Godt and Matthias Lamping (eds.), *A Critical Mind: Hanns Ullrich's Footprint in Internal Market Law, Antitrust and Intellectual Property* (Springer 2023) 69.

⁵³ Beck (n 48) 168–86.

⁵⁴ Ibid. 169.

⁵⁵ Jane Cornwell, 'Playing By Its Own Rules? A Quantitative Empirical Analysis of Justificatory Legal Reasoning in the Registered Trade Mark Case Law of the European Court of Justice' (2021) 46(5) *European Law Review* 647; Frederic Blockx, 'Reading Tea Leaves Differently?: A Comparison of the Interpretive Fingerprint of the CJEU and the US Supreme Court in Copyright Law' in Eleonora Rosati (ed.), *The Routledge Handbook of EU Copyright Law* (Routledge 2021) 441; Or Brook and Magali Eben, 'Article 3 of Regulation 1/2003: A Historical and Empirical Account of an Unworkable Compromise' (2024) 12(2) *Journal of Antitrust Enforcement* 45.

⁵⁶ Or Brook, 'Struggling with Article 101 (3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' (2019) 56(1) *Common Market Law Review* 121.

⁵⁷ Ibid.

⁵⁸ Ana Ramalho, 'Copyright Law-Making in the EU: What Lies under the "Internal Market" Mask?' (2014) 9(3) *Journal of Intellectual Property Law & Practice* 208; Brook and Eben (n 51).

in applying EU internal market and governance make use of their discretion. For example, SCA research exposed if and how the decision-making process was biased against certain national citizens and companies.⁵⁹ From a policy perspective, SCA may also be used to limit the scope of discretion in the administration of EU law. As Bugarič notes, '[t]he most effective means of limiting the scope of discretion in public administration lies not in more detailed legislation but in . . . bringing public administration operations into the public domain'.⁶⁰

SCA has the potential to complement doctrinal studies in the quest to clarify the meaning of various provisions of EU law and governance precisely because it shifts the focus away from leading cases, which are often the subject of doctrinal research, to the day-to-day interpretation and application of EU norms by various EU and national actors. This shift allows for a more comprehensive understanding of how EU laws are practically implemented and interpreted across different contexts, offering valuable insights that doctrinal analysis alone might miss.

Second, SCA is particularly well-suited to explore matters related to multi-level governance within the EU. European integration is an ongoing policy-creation process. Its authority and policy-making are influenced and shared across regional, national, and super-national levels.⁶¹ Various national political institutions and actors play roles in both rule-making and rule-implementation, and these institutions and actors often exhibit considerable procedural and institutional diversity.⁶² European and transnational integration necessitates cooperation among distinct governmental levels (local, subnational/regional, national, European, and transnational) and between them and non-public actors.⁶³ As a result, EU law gains effect not only by the implementation of the 27 national legal systems (which can diverge in particular when EU law sets only minimum harmonisation⁶⁴), but also by its application by national courts, national administrative agencies, national traders, consumer, and environmental organisations, service providers, employers and employees, interest groups,⁶⁵ and European citizens. Despite the critical importance of the enforcement of EU law, however, there is a limited understanding of the extent to which EU law is applied and by whom.⁶⁶

⁵⁹ Van den Bosch and Bostoen (n 40) 189–96.

⁶⁰ Bojan Bugarič, 'Openness and Transparency in Public Administration: Challenges for Public Law' (2004) 22 *Wisconsin International Law Journal* 483.

⁶¹ Liesbet Hooghe and Gary Marks, *Multi-level Governance and European Integration* (Rowman & Littlefield 2001) 2.

⁶² *Ibid.* 119–21.

⁶³ Yannis Papadopoulos 'Accountability and Multi-level Governance' in Mark Bovens, Robert E. Goodin, and Thomas Schillemans (eds.), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014) 273; Ian Bache and Rachael Chapman, 'Democracy through Multilevel Governance? The Implementation of the Structural Funds in South Yorkshire' (2008) 21(3) *Governance* 397.

⁶⁴ Claassen (n 1) 13.

⁶⁵ E.g., Klüver (n 40) 3–4.

⁶⁶ Micklitz (n 52) 69–95.

SCA offers a tool to explore how different regional, national, super-national, and EU actors comprehend and implement the provisions of EU law and governance.⁶⁷ It was used to investigate how national systems implemented EU law and to uncover divergences and inconsistencies in interpretation that may not be readily apparent using doctrinal or case-study-specific methodologies,⁶⁸ and how the operation of the EU- and national-level legislative and enforcement systems co-exist.⁶⁹ Moreover, SCA was used to trace the integration agenda of EU legislation,⁷⁰ as well as resistance to EU integration by national actors.⁷¹

SCA studies aiming to explore the features of EU multi-level governance and decentralised enforcement face unique challenges regarding research design and the research teams' composition. Language barriers, diverse European legal traditions, and the varying contexts in which EU law and governance are being applied at the national level affect the selection of cases and bodies subject to exploration, as well as the definition of variables. Consistent with the EU principle of procedural and institutional autonomy, this national diversity often necessitates an EU-wide team of project leaders and large teams of coders, each an expert in their respective legal systems. Consequently, coordinating such extensive and specialised teams is often essential for effectively addressing the complexities inherent in SCA studies within the EU context.⁷²

Finally, SCA projects can play a critical role in addressing the scarcity of empirical data on the operation and application of EU law and governance by generating new databases and tools. As elaborated below, the systematic gathering and analysis of EU legal texts face various challenges, resulting from limited publications and weak open judicial data practices. Overcoming these obstacles through SCA can significantly enhance the empirical foundation of EU legal studies, providing deeper insights into how EU law is implemented and enforced across different jurisdictions.

A significant body of EU legal text is not published or publicly available. This may come as a surprise, considering the EU's apparent commitment to a relatively high degree of openness and transparency. Article 1 TEU, for example, emphasises that in the process of creating an ever closer union among the people of Europe, 'decisions

⁶⁷ This type of research questions was explored using SCA, for example, by Brook (n 56).

⁶⁸ Tiziano Zgaga, Eva Thomann, and Mathieu Goubier, 'European Union Versus Core State Powers: The Customisation of EU Fiscal Policy' (2023) *Journal of European Public Policy* 1, online.

⁶⁹ Tiziano Zgaga, 'The Coexistence of Fiscal Sovereignties: The Post-pandemic European Union in Comparative Perspective' (2023) 11(4) *Politics and Governance* 102.

⁷⁰ Ana Ramalho, 'Copyright Law-Making in the EU: What Lies under the "Internal Market" Mask?' (2014) 9(3) *Journal of Intellectual Property Law & Practice* 208.

⁷¹ Tiziano Zgaga et al. (n 68).

⁷² For a discussion, see Or Brook and Barry Rodger, 'National Judicial Review of EU Law Enforcement: Challenges in Creating the EU Competition Law Judicial Review Database' (2025) 2(2) *European Journal of Empirical Legal Studies* 1.

are taken as openly as possible to the citizen', and Article 15(1) TFEU adds that 'to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible'. Regulation 1049/2001 further expands on those general principles, establishing the right to access EU documents, subject to some restrictions.⁷³ Similarly, the judgments of the EU courts are mostly published and reasoned,⁷⁴ and the EU courts acknowledged that publishing the Commission's decision contributes to ensuring the observance of EU law, serves the public interest of knowing as fully as possible the reason behind the Commission's action, increases compliance, and invites those who have suffered damages to launch private claims or seek judicial review.⁷⁵

Nevertheless, access to a significant body of EU legal text and the decision-making process remains limited.⁷⁶ For instance, the EU Courts held that the obligation of Article 15 TFEU applies only to the exercise of the 'administrative tasks' of their operation, and not to their judicial powers.⁷⁷ Similarly, the right to access the court file and publicity of trial is garnered by the EU Courts to the parties to the judicial proceedings. The general public enjoys only a lower and undefined standard of openness.⁷⁸

Moreover, the EU's obligations regarding openness and transparency do not uniformly extend to the national actors responsible for applying EU law.⁷⁹ Rather, based on the EU principle of procedural and institutional autonomy, each Member State adopts its own national rules and practices on publications, even with respect to national legal text and decisions applying or implementing EU law. Significant divergences persist among the Member States in this regard. While some national rules require the publication of all or some judgments (often those of higher-instance bodies), others have no publication obligations or leave the decision to

⁷³ Regulation (EC) No. 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, L 145/43.

⁷⁴ Subject to confidentiality with respect to business secrets, see Rules of Procedure of the General Court of 4 March 2015 [2015] OJ L 105/1. See also Charlotte Emin, 'Luxembourg Confidential: Keeping (Business) Secrets Before the General Court of the European Union' (2023) 14(1) *Journal of European Competition Law and Practice* 4.

⁷⁵ In the field of EU competition law, see for example, C-189/02P *Dansk Rørindustri and Others v. Commission* ECLI:EU:C:2005:408, para 170; T-193/03 *Giuseppe Piro v. European Commission* ECLI:EU:T:2005:164, para 57, 69, 78; 41–69, 104; T-345/12 *Akzo Nobel NV and Others v. European Commission* ECLI:EU:T:2015:50, 60.

⁷⁶ Alberto Alemanno and Oana Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo' (2014) 51(1) *Common Market Law Review* 97. See also Bugarcic (n 55), 487–90; Sharpston (n 48) 409. See also Leino-Sandberg, Chapter 7 in this volume.

⁷⁷ Joined Cases C-514/07, 528/07 & 532/07 *Kingdom of Sweden v. API* ECLI:EU:C:2010:541 para 81. For an analysis, see Alemanno and Stefan (n 71).

⁷⁸ Alemanno and Stefan (n 71) 2.

⁷⁹ Marc Van Opijnen, Ginevra Peruginelli, Eleni Kefali, and Monica Palmiran, 'On-Line Publication of Court Decisions in the EU: Report of the Policy Group of the Project "Building on the European Case Law Identifier"', available at SSRN 3088495 (2017) 7.

the relevant court or presiding judge.⁸⁰ In some cases, formal national publication rules are not respected in practice, and some national courts place logistical hurdles that significantly limit access to judgments, even for research purposes.⁸¹ Furthermore, even when national judgments are published, in some Member States they are heavily redacted or anonymised, making it difficult to follow the trail of process and understanding its outcomes.⁸²

Another distinctive challenge in systematically studying EU legal texts arises from the manner in which judicial and administrative decisions are made. Unlike the US, where court judgments often include dissenting opinions, decisions by EU Courts and administrative bodies are typically rendered collegially, without the expression of divergent views.⁸³ The absence of dissenting opinions is often attributed to the EU's policy objective of garnering broader support for its legal framework. It is argued that presenting minority views could potentially undermine acceptance of EU Court rulings within the legal-political systems and among the general public of the Member States, particularly on contentious or sensitive issues.⁸⁴ This lack of diverging opinions also characterises many EU Member States, particularly those with civil law traditions.⁸⁵ This decision-making format complicates the profiling of judges in relevant chambers and hinders the observation of trends in their rulings. Consequently, as previously noted, this type of research, which is widespread across the Atlantic, is constrained in Europe.

Even when published and accessible, a significant portion of the body of EU law is not structured or integrated into databases that facilitate automatic downloading and processing, essential for conducting large-scale SCA projects.⁸⁶ Despite the

⁸⁰ Ibid. Or Brook and Barry Rodger, 'Comparative Analysis' in Barry Rodger, Or Brook, Maciej Bernatt, Francisco Marcos, and Annalies Outhuijse (eds.), *Judicial Review of Competition Law Enforcement in the EU Member States and the UK* (Kluwer 2024) 947.

⁸¹ Brook and Rodger (n 72).

⁸² Ibid.

⁸³ The European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment, adopted at the 31st plenary meeting of the CEPEJ, Strasbourg, 3–4 December 2018, 16, available at <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>, Annex II, 66.

⁸⁴ Sharpston (n 50) 416–17.

⁸⁵ The European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment (n 82) Annex II, 66.

⁸⁶ See also Xavier Ronsin and Vasileios Lampos, 'In-Depth Study on the Use of AI in Judicial Systems, Notably AI Applications Processing Judicial Decisions and Data' Annexed to the European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment, adopted at the 31st plenary meeting of the CEPEJ, Strasbourg, 3–4 December 2018, 16, available at <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>, 18–25; European Commission for the efficiency of justice (CEPEJ), '2022–2025 CEPEJ Action Plan: Digitisation for a Better Justice' (2021), 1, available at <https://rm.coe.int/cepej-2021-12-en-cepej-action-plan-2022-2025-digitalisation-justice/h680a4cf2c>; Council of Europe European Commission for the Efficiency of Justice (CEPEJ), *Comparative Study on the Use of Judicial e-auctions in the Council of Europe Member States* (2023), available at <https://rm.coe.int/cepej-gt-cyberjust-2023-1-en-judicial-e-auctions-comparative-study-h680abb7b4>.

growing momentum of Open Data initiatives over recent decades, the advancement in opening up judicial decision-making and creating accessible datasets has been notably slow in many jurisdictions across Europe.⁸⁷

The scarcity of accessible and readily processable data concerning the implementation of EU internal market law and governance is exacerbated by the limited adoption of SCA within both academic circles and policy evaluations. In addition to the sparse SCA academic literature highlighted in the previous section, impact assessments and policy evaluations of EU law and governance often concentrate on substantive EU rules. The European Commission, in particular, allocates little resources for gaining an understanding of the diverse institutional settings of the actors applying EU law and the interplay between national authorities and courts.⁸⁸ This situation perpetuates a vicious cycle: As European scholarship and policy-making predominantly rely on doctrinal legal research focused on black-letter legal rules rather than their practical application and enforcement, fewer information and datasets conducive to advancing SCA and empirical legal research are generated.

Some of the challenges associated with the limited access to legal text and their analysis, particularly those necessary for understanding judicial and administrative decision-making processes, are not unique to EU law.⁸⁹ Yet, while studies in the US and Canada, for instance, have made strides in overcoming those hurdles, '[t]he huge black box called enforcement has never really been opened during the long history of EU law'.⁹⁰ Generating a robust body of SCA studies holds the promise of unravelling the 'black box' of EU enforcement. These studies are indispensable not only for addressing fundamental legal research questions by using new empirical–systematic methodologies, but also for creating new databases and tools⁹¹ that bolster further SCA research and skills among legal researchers of the EU internal market law and governance.

18.4 FINAL REMARKS

SCA has begun to gain footing in Europe over the past decade. While this methodology is regularly used for studying law in the US, especially for exploring various facets of judicial decision-making, the survey of EU scholarship presented in this contribution illustrates that SCA studies of EU internal market law and

⁸⁷ Marko Marković and Stevan Gostojić, 'Open Judicial Data: A Comparative Analysis' (2020) 38(3) *Social Science Computer Review* 295. See also Brook and Rodger (n 72).

⁸⁸ Micklitz (n 52) 72.

⁸⁹ See, e.g., Sarah Sutherland, *Legal Data and Information in Practice: How Data and the Law Interact* (Routledge 2022) 13; Benjamin Alarie, Anthony Niblett, and Albert H. Yoon, 'How Artificial Intelligence Will Affect the Practice of Law' (2018) 68(1) *University of Toronto Law Journal* 106, 117.

⁹⁰ Micklitz (n 52) 72.

⁹¹ Cf. Siems and Sithigh (n 17); Michal Ovádek, 'Facilitating Access to Data on European Union Laws' (2021) 3(1) *Political Research Exchange* 1.

governance remain limited. They are not only scarce in number but also constrained in terms of the areas of EU law investigated, the types of research questions pursued, the number of cases coded in each study, the use of automated coding, and the involvement of legal scholars. This contribution aimed to underscore the untapped potential of SCA in examining EU internal market law and governance, addressing both the challenges and common hurdles encountered in such studies.

Following the initial experience with SCA, the European legal community stands at a crucial juncture to advance this methodology. The development of a robust body of SCA research on EU internal market law and governance could benefit from increased attention to methodological rigour and the development of common best practices tailored to the European legal traditions and the EU's structural characteristics throughout the research process – from initial design to study write-up and review by editors and peers. This is particularly true not only for the studies that explicitly recognise the use of SCA (which were the focus of the survey presented in this contribution), but also to many other projects that implicitly employ similar analytical techniques. Similarly to what was highlighted by Hall and Wright in their critique of earlier American-based SCA studies, although many studies have been published in leading law journals and sparked much academic debate, '[i]n project after project, legal researchers reinvent this methodological wheel on their own', and have to learn 'how to do content analysis on the fly, feeling at first as if we each discovered something new until we learned that we had each done the same thing independently'.⁹²

The European legal community stands to gain significantly from openly embracing SCA to engage in a more methodologically sound study of EU law. Recognising the use of SCA and adhering to the best practices developed by legal researchers and social scientists over the past 70 years has the potential of leading to more robust sample selection, variable definition, coding interpretation, and validity checks, as well as to identifying and discussing the limitations of studies. This, in turn, will not only improve methodological quality, but could cultivate a SCA culture within the European legal community. It could foster the development of skills, formation of peer groups, shared conventions tailored to the distinctive aspects of EU law and governance, and generate new databases supporting future empirical research and policy evaluations. By standardising and refining the application of SCA, legal scholars can effectively contribute to more insightful analyses and interpretations of EU legal frameworks.

⁹² Hall and Wright (n 21) 74–75.