**Legalism Without Adversarialism:**
**Public and Private Enforcement in the European Union**

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*For thirty years, scholars have predicted that European integration would foster adversarial litigation in Europe. In this article, I empirically assess the Eurolegalism thesis by examining EU legislation and the pattern of public and private enforcement in the competition and securities fields, two policy areas where adversarial litigation is seen as most likely to develop. I find that EU legislation has not encouraged the private enforcement of public law. European legislators prefer administrative enforcement through vertically coordinated networks of independent regulatory agencies, a regulatory style closer to bureaucratic legalism. In practice, public enforcement through administrative action has grown much more rapidly than private enforcement, which remains low in most European jurisdictions. Several explanations for this outcome are explored, including the veto power of member states through the European Council, negative feedback effects from the U.S. experience with entrepreneurial litigation, and the impact of European legal and bureaucratic traditions.*

Keywords: European Union; adversarial legalism; bureaucratic legalism; competition; securities.

## 1.1 Introduction

Over the last thirty years, European regulation has become more *legalistic.* The combined effects of economic liberalization and the expanding corpus of European law has led regulatory implementation and enforcement, across a wide range of policy areas, to become more rule-based, formalized, transparent, and judicialized (Levi-Faur, 2005; Majone, 1997; Sweet & Brunell, 2004; Thatcher, 2002). But while most observers agree that European regulation is increasingly "controlled by formal legal rules and procedures" (Kagan, 2003, p. 74)*,* they disagree about whether liberalization and European re-regulation has also made regulatory processes more *adversarial*, understood as "policymaking, policy implementation and dispute resolution by means of lawyer-dominated litigation" (p. 3).

In a number of articles and a book, Daniel Kelemen (2006, 2008, 2011) argues that the combination of economic liberalization and the political fragmentation of authority in the EU, has led policy makers to "rely on adversarial legalism as a mode of governance" (2011, p. 240). He contends that EU lawmakers, time and again, across multiple policy sectors, have "enact[ed] detailed, transparent, judicially enforceable rules" that can be implemented through "a combination of public enforcement and enhanced opportunities for private enforcement litigation by individuals, groups, and firms" (p. 240). The result is "Eurolegalism" a formalized and participatory approach to regulatory implementation that relies heavily on the self-interest and entrepreneurship of private litigants to achieve policy implementation.

Others, however, challenge the Eurolegalism thesis, noting that the inertia of national political systems has prevented the spread of adversarial legalism in Europe even

as the fragmented structure of the European Union promoted it (Kagan, 1997, 2007; Levi-Faur, 2005; Van Waarden, 2009). While the growth of European secondary legislation might lead European regulators to "adopt American *norms"*, Robert Kagan (1997) argued more than two decades ago, the fact that most rules are implemented through national bureaucracies and judiciaries would lead jurisdictions to avoid "American enforcement methods" (183). Such predictions have been supported by empirical investigations of labor law (Rehder, 2009), corporate governance (Cioffi, 2009), consumer protection (Hodges, 2014) and data privacy (Bignami, 2011) which document the lack of adversarialism in European regulatory processes even as policy implementation has become more formalized.

In this article, I build on this research to offer a third perspective. In addition to being limited by the inertia of national and legal systems, I argue adversarial legalism is consistently constrained by European Union legislation. Contrary to the predictions of some legal scholars (Grace, 2005), and in great contrast to the United States (Farhang, 2010), European directives and regulations have generally *not* empowered private litigants to enforce regulatory rules (Hodges, 2014; Hodges & Voet, 2018; Nagy, 2019; Warren, 2011).[i] The primary focus of EU legislation has instead been to strengthen public enforcement capacities: to develop common rules across an increasing number of areas of regulation (Jabko, 2006; Moloney, 2014); to delegate implementation of these rules to public regulators at the national level (Majone, 1997; Thatcher, 2002); and to create European agencies and networks to monitor, coordinate, and increasingly stipulate the enforcement practices of national regulatory bureaucracies (Egeberg & Trondal, 2009; Levi-Faur, 2011; Moloney, 2011; Scholten, 2017). Where European legislation has

addressed the private enforcement of public law, it has eschewed the American model, endorsing narrowly circumscribed systems of private action, aimed at the goal of compensation rather than deterrence, and limited in practice by extensive safeguards (Hodges & Voet, 2018; Wils, 2017).

Theoretically, I explore two political incentives that help explain why the European Union has largely rejected adversarial legalism and developed a more bureaucracy-centered system of regulatory implementation. The first factor is the veto power of member state governments through the European Council (Tsebelis & Garrett, 2000). Committed to maintaining "procedural subsidiarity" (Lazer & Mayer-Schoenberger, 2001), which gives member states significant autonomy over the methods through which European rules are implemented, the Council has a strong incentive to block or weaken legislative proposals that would expand administrative procedural rights for private parties (McCubbins, Noll, & Weingast, 1987) or promote private enforcement as an alternative to bureaucratic implementation (Farhang, 2010). The Council's interests are more aligned with implementation through hierarchically coordinated regulatory bureaucracies, because such systems maintain a degree of national governmental control over policy implementation (Moe, 1989).

A second factor stems from the perceived economic costs of adversarial legalism. Since the late 1980's, as legal scholars and business interests have highlighted some of the problems stemming from private enforcement, class action litigation, and private attorneys general in the United States (Alexander, 1990; Coffee, 1987), many European policymakers and business organizations have campaigned to prevent the "American disease" of regulatory legalism from spreading in Europe (Cioffi, 2009; Nagy, 2019;

Stewart, 1993). The negative feedback effect produced by the U.S. experience with entrepreneurial litigation should propel European policymakers to avoid writing legislative provisions that would encourage adversarial litigation and develop alternative strategies to secure the implementation of EU rules.

These theoretical expectations are tested by empirically examining both the design of EU legislation and the enforcement of public law in two areas where adversarial legalism is seen as "most likely" to develop in Europe: the regulation of financial services and the regulation of market competition. As predicted by the theoretical framework, I find that the development of adversarial legalism has been limited by consistent opposition from the European Council as well as purposive efforts by European policymakers to develop systems of enforcement and redress that avoid the negative experience of the United States and which are more in line with European legal and bureaucratic traditions.

Rather than adversarial legalism, European Union mandates have encouraged implementation through a regulatory style Kagan (2003) describes as "bureaucratic legalism": formalized but centralized enforcement through regulatory bureaucracies (11). EU mandates in the securities and competition sectors have bolstered the development of public rather than private systems of enforcement. Available data of the actual enforcement of EU securities and competition rules shows a much faster growth rate for public enforcement through administrative actions than private enforcement through decentralized litigation. Private antitrust and shareholder litigation remain low in most European jurisdictions, especially when compared to the frequency and economic impact of adversarial litigation in the United States.

The analysis makes two main contributions to current debates in political economy, regulatory capitalism, and European Union studies. The first is empirical. By examining both the content of EU legislation and the rates of public and private enforcement across two different sectors, the analysis provides a more empirically grounded, comparative, and up to date assessment of the effect of EU mandates on regulatory styles than previous studies in law. In particular, I draw attention to the relatively low growth of adversarial litigation in Europe when compared to the more dramatic intensification of administrative actions by public regulators. I also show that even in jurisdictions where private litigation has increased, the number of case filings is small compared to the high frequency of private enforcement of public law in the United States.

The second contribution is theoretical. Previous research has rightly pointed to national legal and bureaucratic traditions as delimiting the development of adversarial litigation in Europe (Bignami, 2011; Hodges, 2014; Kagan, 2007; Van Waarden, 2009). The emphasis here is different. While acknowledging the importance of legal systems and political culture, I point to two incentives in the European policymaking process that should lead legislators to avoid using decentralized private litigation as an alternative to bureaucratic implementation. And I show why implementation through a hierarchically coordinated system of bureaucratic legalism may be more aligned with these incentives. This distinction is important because, if true, it means the progressive expansion of the *acquis communautaire* will not foster an increase in adversarial litigation in Europe. Although many factors will shape litigation rates and enforcement practices, as the European integration process advances, a system of bureaucratic legalism, where policy

is implemented through hierarchically accountable networks of public regulators, may prove a more representative model (Egeberg & Trondal, 2009; Levi-Faur, 2011; Scholten, 2017; Trondal, 2010).

The rest of this article is structured as follows. Section 2 reviews the conceptual framework underlying the Euro-legalism argument, considers the alternative theoretical frame of bureaucratic legalism, and justifies the case selection. Sections 3 examines the structure of EU regulatory mandates and the practices of regulators in the securities sector. Section 4 does the same for competition regulation. A final section concludes.

## 2.1 The Eurolegalism Thesis and its Alternatives

In a series of articles and a book, Kelemen (2006, 2008, 2011) has argued that adversarial legalism has become an increasingly important feature of the European regulatory state. In his view, the transformation has been driven by two interrelated causal processes: first, economic liberalization and European re-regulation have eroded the "informal, cooperative, and opaque" national systems of regulation that predominated for most of the 20th century, replacing them with centralized EU rules that are more complex, detailed, and rigid (2011, p. 7); second, the fragmentation built into the EU's political structure—divided horizontally between multiple branches of government and vertically between central and state governments—has led EU officials to write legislation in a way that promotes enforcement via decentralized private litigation. Like the US, where centralized implementation capacity is weak at the federal level, the EU "rel[ies] on adversarial legalism as a means of decentralized enforcement", writing legislative mandates as "judicially enforceable goals, deadlines, and transparent

procedural requirements", and then delegating enforcement powers to both state-level enforcement agencies and private actors (2006, p. 102). The result is "Eurolegalism", a formalized and participatory regulatory implementation process that lacks centralization and authoritative public control, and which relies heavily on the self-interest and entrepreneurship of private actors to achieve policy implementation.

A careful observer of European politics, Kelemen's empirical research has documented how the EU's single market program has contributed to the juridification of European regulatory processes, replacing informal and cooperative modes of national regulation with more detailed and rigid rules. His comparative, theoretically sophisticated approach to explaining these developments has pushed scholars in the too-often cloistered fields of American politics and EU studies to contemplate the broader global forces and inter-institutional dynamics that have contributed to the design and practices of regulatory institutions. Along with other law and politics scholars (Burke, 2002; Farhang, 2010; Kagan, 2003), Kelemen has made a convincing case that adversarial legalism is the result of intentional political choices to empower private litigants to enforce the law in the face of institutional constraints—and not simply the product of American culture or the forces of economic globalization. Notwithstanding these significant contributions, there are strong theoretical and empirical reasons to doubt certain aspects of his predictions, especially the contention that EU mandates are encouraging the privatization of regulatory enforcement and that adversarial litigation has proliferated in Europe.

One set of factors pushing against adversarialism, which has been explored in several empirical case studies, is the fact that enforcement through private litigation, and

particularly group litigation, cuts against the predominant legal and bureaucratic traditions in Europe (Bignami, 2011; Cioffi, 2009; Kagan, 1997, 2007; Van Waarden, 2009). Most European bureaucracies and judiciaries are more hierarchically organized than those in the United States and have clearer distinctions between public and private law (Damaska, 1986). Such systems make it more difficult to instrumentalize private litigation as a tool of deterrence or as a substitute for public enforcement (Bignami, 2011, p. 418). Trained predominantly in civil rather than common law, European legal elites are sceptical of legal devices such as class action or 'private attorneys general' which are alien to European legal traditions and appear to privatize fundamental functions of government (Nagy, 2019, pp. 39-40). Even where European Union legislation does create new judiciable rights for individuals, companies, and groups, the rules of civil procedure found in nearly all European countries, such as limited pre-trial discovery, narrow standing rules, loser pay requirements, and bans on contingency fees and punitive damages, limit the ability and incentives of private individuals and groups to initiate legal action (Hodges, 2014; Warren, 2011). Thus, short of creating a common system of civil procedure and private law for the EU as a whole, legislative mandates will likely not lead to a significant increase in private litigation.

European legal and bureaucratic traditions, and political culture more broadly, has undoubtedly contributed to the "non-Americanization" of European law (Bignami, 2011). However, there is another important but overlooked reason why adversarial legalism will likely not come to Europe: EU policymakers have rational incentives to design regulatory mandates in ways that prevent or limit the development of adversarial litigation. To be sure, in terms of institutional design, the European Union does have a number of features

which are seen as encouraging adversarial legalism and private litigation more generally (Van Waarden, 2009, pp. 209-210). These include a system of policymaking and implementation that is fragmented vertically and horizontally (Kelemen, 2008), strong courts with a history of establishing new rights (Kelemen, 2003; Sweet & Brunell, 2004), a pluralistic system of interest representation (Streeck & Schmttter, 1991), and a policymaking orientation toward marketization (Jabko, 2006; Thatcher, 2013). To lock-in European policies and prevent bureaucratic and political drift in a fragmented political system, EU legislators can write detailed, justiciable provisions into policy mandates that can be activated by private parties (Kelemen, 2011, p. 25; McCubbins et al., 1987; McNollgast, 1999). Lacking direct implementation power in most policy areas, the European Commission may wish to leverage the self-interest of private actors as an "alternative to bureaucratic power," and mandate procedural changes that incentivize the private enforcement of public law (Farhang, 2010, p. 22). However, two countervailing factors should limit any strategic incentives European policymakers sometimes have to promote the private enforcement of European rules.

The first is the institutionalized role of member states in the European legislative process. Unlike the U.S., where state-level governments have no institutionalized say over the legislation adopted by Congress or the rules written by federal regulatory agencies, in the European Union, member states, collectively through the Council, have veto power over most European secondary legislation (Tsebelis & Garrett, 2000). As representatives of the executive branch of government, the European Council should prefer implementation through public agencies that resemble the Weberian ideal-type, and which provide opportunities for political actors to exercise a degree of control over

implementation (Moe, 1989, pp. 279-281). For the same reasons, we can expect them to oppose legislative provisions that empower private groups to use courts to challenge administrative procedures and contest enforcement actions (Grisinger, 2012; McCubbins et al., 1987), or encourage private actors to enforce regulatory rules in the courts (Burke, 2002; Farhang, 2010). Devices such as class action lawsuits or private attorneys general are not only alien to European civil law but undermine executive control over implementation (Burbank, Farhang, & Kritzer, 2013). While other EU-level legislators, such as the Commission or Parliament, may have incentives to promote decentralized private enforcement as an alternative to bureaucratic implementation, their ability to do so will be limited by the Council's strong opposition to such structures.

A second factor relates to the perceived economic costs of decentralized private enforcement and, in particular, group litigation. Even if members of the Commission or Parliament, facing intransigent member states, have a rational incentive to empower decentralized private litigants to bolster compliance, this interest is moderated by the wide perception within Europe that private enforcement represents an ineffective and economically costly method of enforcing regulatory rules. Actively cultivated by U.S. law professors and business organizations since the 1980's (Alexander, 1990; Coffee, 1987; Stephenson, 2005), the perception that adversarial legalism encourages out-of-control litigation at great cost to the economy is now widespread in Europe (Issacharoff & Miller, 2012; Kagan, 1997; Stewart, 1993). European business associations, when seeking to block or dilute efforts to reform national civil procedures or establish group litigation rights, often reference the economic costs of litigiousness in the United States (Hodges & Voet, 2018; Nagy, 2019). Since the European Commission has frequently

relied on European business interests to both help develop and legitimize the single market project (Jabko, 2006), European policymakers should be highly attuned to these concerns, and respond to them when designing legislation. "The negative side of American legalism is not hidden from European observers," Kagan noted in the late 1990's. "Every adversarially-tinged proposed legal reform must deal with the warning, 'Be careful or we will end up like the United States," (1997, p. 182).

[Table 1 about here]

It is helpful here to recall Kagan's conceptual framework, still the point of departure for most comparative work on regulatory styles. Building on the typology of legal systems developed by Damaska (1986), Kagan (2003) identifies four ideal types of policy implementation in advanced industrial democracies which fall along two dimensions. As detailed in Table 1, the first dimension is the decision-making style. This can be more or less formal or informal, with formality understood as "the extent to which contending parties or interests, as well as government officials, invoke and insist on conformity to written legal procedures and pre-existing legal rights and duties" (9). The second dimension is the organization of decision-making authority, defined by Kagan as "the extent to which the implementation or decision-making process is hierarchically dominated by an official decision maker, applying authoritative norms or standards" (11).

Given the institutional organization of the European Union's decision-making process, the negative feedback effects of U.S. adversarial legalism, and the bureaucratic and legal cultures found within most member states, we should expect EU policymakers to intentionally avoid developing systems of enforcement that move toward the bottom

right box. European legalistic mandates should instead push regulatory processes toward "bureaucratic legalism," the formal and hierarchical regulatory style found in the top right box of Table 1. Like adversarial legalism, bureaucratic legalism is governed through legal procedures that are transparent and rigid, which can be reviewed by judges. But unlike adversarial legalism, the enforcement process is more centralized in public bureaucracies that, like Weber's bureaucratic ideal type, emphasize "uniform implementation of centrally devised rules, vertical accountability, and official responsibility for fact-finding" (Kagan, 2003, p. 11). While adversarial legalism "decentralizes enforcement, putting government officials to the side," bureaucratic legalism reinforces the authority of state officials to implement policy directly through administrative processes (Burke & Barnes, 2017, p. 14).

The expectation here is *not* to observe a fully developed system of bureaucratic legalism in Europe. Member states maintain significant autonomy over how EU legislation is transposed and enforced, and therefore the implementation of even highly judicialized policy areas remains heterogeneous (Höpner & Schäfer, 2012). In some areas of regulation, EU coordination is characterized by looser legal mandates and less hierarchical and regimented processes of benchmarking and peer learning (Bignami, 2011; Sabel & Zeitlin, 2010). Moreover, a variety of developments in the political economy other than EU mandates, such as the growth of private regulation (Büthe & Mattli, 2013), the judicialization of policy (Shapiro & Sweet, 2002; Slaughter, 1999), and the global diffusion of American legal technologies and practices (Coffee, 2018; Levi-Faur, 2005) may lead some countries to adopt aspects of adversarial legalism, even if European legislation does not require or encourage it.

However, my expectation is that European legislative mandates themselves will *not* foster adversarial legalism by either significantly changing national rules of civil procedure or encouraging decentralized private enforcement as an alternative to bureaucratic implementation. The preferred implementation strategy of European policymakers will be delegation to independent agencies, which are held accountable to European mandates through regulatory networks. Insofar as the EU does encourage private enforcement, the aim will be compensation rather than deterrence, and will be much more limited in scope than the statutory provisions encouraging private enforcement in the United States.

In the two sections that follow, I conduct cases studies of competition and securities regulation, evaluating (1) whether EU regulatory mandates encourage private or public enforcement, and (2) the empirical pattern of public and private enforcement before and after the Europeanization of policy. The case selection is theory-driven, examining two "crucial cases" that can be used to assess the validity of the Eurolegalism theory (Eckstein, 1975; Gerring, 2006, 2007). Both cases were used by Kelemen to develop the Eurolegalism thesis (Kelemen, 2006, 2011), and both sectors are widely seen as 'most likely' areas for adversarial legalism to develop in Europe (Bignami & Kelemen, 2018; Grace, 2005; Kagan, 1997). This is both because many aspects of competition and securities rules are now determined by EU law, and because both sectors are characterized by a high number of well-resourced, private companies that would be likely to take advantage of private enforcement provisions insofar as they are avaliable.

As "most likely" cases for adversarial legalism, a positive finding that European legislation is encouraging private litigation would lead to only a modest shift in our

confidence in Kelemen's theory (Levy, 2008, p. 12). However, a negative finding would indicate a "disconfirmatory crucial case," and therefore be more generalizable (Gerring, 2007, p. 237). From a Bayesian perspective, if we see limited adversarial legalism in competition and securities regulation, where the theory suggests it is most likely to emerge, this finding would lower confidence in the Eurolegalism thesis (Levy, 2008, p. 12). In particular, it would lower the probability that adversarial legalism would develop in other 'less likely' sectors—such as privacy, consumer, or environmental regulation—where EU harmonization is less extensive and affected interests have fewer resources to finance litigation. This, in turn, would mean that adversarial legalism may be an inappropriate theoretical frame for conceptualizing the juridification of European regulation. Alternative frameworks, such as "bureaucratic legalism" (Burke & Barnes, 2017), or "cooperative legalism" (Bignami, 2011), may be more representative models for a regulatory approach that combines legalistic, detailed policy mandates with vertically coordinated bureaucratic implementation.

## 3. **The Europeanization of Securities Regulation**

Since the 1990's, the European Union has significantly expanded the corpus of rules governing financial markets. Across nearly every aspect of securities regulation, from the publication of prospectuses to penalties for insider trading, rules now stem, in large part, from European Union mandates (Moloney, 2014; Mügge, 2014; Quaglia, 2010). Comparatively detailed, transparent, and inflexible than the national rules they replaced, the Europeanization of securities rules has contributed to the development of more formalized and deterrence-oriented systems of financial regulation across the EU

(Cioffi, 2009; Kelemen, 2011, pp. 93-142).

A number of scholars have predicted that the marketization of finance, and the development of detailed, formalized securities rules, would also lead to an uptick in adversarial securities litigation (Grace, 2005; Kelemen, 2011; Kelemen & Sibbitt, 2004). However, contrary to these expectation, European securities re-regulation has *not* expressly encouraged private litigation. While EU mandates have strengthened the power of shareholders and investors, increasing financial disclosure requirements and providing greater legal protection and certainty to investors (Cioffi, 2009; Cioffi & Höpner, 2006), they have not directly expanded private liability, or the rights of private investors to enforce public rules against traders or corporate directors (Marjosola, 2014; Moloney, 2012; Warren, 2011). EU mandates, from the Investment Services Directive of 1988 to the Markets in Financial Instruments Directive of 2014, have instead worked within an "administrative paradigm" (Marjosola, 2014) that seeks to protect investors by strengthening *public* regulatory capacities. This includes developing common securities rules that apply across the single market; expanding the resources and competences of independent public regulators to monitor compliance and enforce these rules; and establishing and strengthening regulatory agencies and networks at the EU-level to coordinate their uniform implementation and enforcement through designed public regulatory agencies (Moloney, 2011; Posner & Véron, 2010; Quaglia, 2010). For instance, one of the stated goals of the Financial Services Action Plan (FSAP) was to develop "state-of-the-art" public supervision at the national level and created a "legally binding underpinning for cross-border cooperation between banking supervisors" (Commission, 1999).

The European Commission, in a draft proposal from 2010, did survey support for European legislation that would make it easier for individual or groups of investors to initiate legal action under the EU securities statutes (Cherednychenko, 2019, p. 17). However, the Commission withdrew the initiative after finding that most member states and organized business associations opposed it (Moloney, 2012, p. 421). Chief among the objections was that a European initiative to expand private access to justice would clash with established systems of domestic liability, and likely lead to higher costs for businesses and consumers (Ibid).

*3.1 Assessing the Pattern of Public and Private Securities Enforcement*

That EU legislation does not explicitly establish new justiciable rights does not, of course, mean that private shareholder litigation has not increased. One of Kelemen's predictions, after all, is that adversarial litigation would rise, in part, as an unintended effect of re-regulation by a political authority that is both fragmented and administratively weak. To assess whether this prediction has come to pass, we can examine whether shareholder litigation under public securities rules has increased since the adoption of the FSAP, which formed the blueprint for much of European financial re-regulation since 1999 (Quaglia, 2010). Many of the enacted measures, including provisions on disclosure requirements and insider trading, were seen as "substantially expand[ing] the legal bases for shareholder litigation" (Kelemen, 2011, p. 135). Although comprehensive litigation data is not available for the European Union as a whole, legal scholars have collected shareholder litigation data for Germany and the United Kingdom, two large countries with significant capital markets. While not fully representative,

examining the pattern of change in litigation in two countries with divergent financial and legal systems, before and after the adoption of FSAP measures from 2002-2004, provides an approximation of the range of outcomes that might be expected for Europe as a whole.

### *3.1.1 The Pattern of Enforcement in Germany*

Germany is a coordinated market economy where, historically, capital markets were small, minority shareholder rights weak, and finance largely bank-based and self-governed (Zysman, 1983). Beginning in the early 1990's, Germany began a three decade process of financial regulatory reform that strengthened disclosure requirements, expanded investor rights, and established detailed rules to govern every aspect of financial trading (BaFin, 2012; Cioffi, 2009; Ziegler, 2000). Since 1994, most German securities laws have been in response to EU mandates, which served as a major prod in propelling liberalization and re-regulation in Germany (Deeg & Lütz, 2000; Kelemen, 2011, pp. 120-126). Although EU regulatory mandates did not require countries to facilitate shareholder litigation, on its own initiative, the German government established, in 2005, a new legal vehicle, the *KapMuG*, which made possible for the first time the aggregation of individual securities lawsuits with similar claims into a single legal proceeding (Kelemen, 2011, p. 124)

To assess whether these reforms increased the rate of adversarial litigation, we can use data compiled by Heil and Lee (2016), which identifies a comprehensive list of private shareholder lawsuits from 2001-2013. Their data show that, following the enactment of reforms in the mid-2000's, private securities enforcement moderately increased in Germany, moving from an average of six lawsuits per year between 2001-

2004 to an average of ten from 2005-2013. However, this 60% increase roughly parallels the growth rate of the German stock market, which expanded by more than 50% over the same period. Notably, only a small number of these— a total of 14 lawsuits in the 13 years examined—were taken under the *KapMuG* law.

To assess whether this slight uptick should be seen as evidence of adversarial legalism in Germany, it is helpful to compare private litigation numbers with those in the United States, which is widely seen as the ideal-typical adversarial legal system. Private litigation is far lower in Germany than in the United States, where an average of 1,188 private securities lawsuits were initiated each year from 2001-2013. Adjusting for the 15-fold difference in capital market size, the German average comes to around 13% of US totals (Heil & Lee, 2016, p. 10). There is an even bigger difference between the number of aggregate shareholder lawsuits in Germany and the United States. The 14 *KapMuG* lawsuits initiated in Germany from 2001-2013 compare to 1,607 securities class actions pursued in the United States over the same time period (Heil & Lee, 2016, p. 10).

Moreover, there is little sign that German private shareholder litigation has increased since 2013. More recent analyses of German aggregate litigation find that cases are still infrequent and slow-going in Germany (Hodges & Voet, 2018, pp. 2514-2537). When *KapMuG* suits are pursued, they are frequent dismissed. Even successful cases, such as the mass legal action by 17,000 former shareholders of Deutsche Telekom, have taken more than a decade to work their way through the courts.

The more dramatic and durable change in German enforcement in the aftermath of EU re-regulation has been the steady intensification of public enforcement, carried out through administrative processes. In a relatively short period of time, Germany

established several independent regulators, which were then centralized in *BaFin*, an independent regulator with thousands of personnel (BaFin, 2012). The frequency and intensity of administration sanctions has also increased. For instance, the percentage of administrative sanctions involving fines moved from 12.4% of all proceedings commenced in 1996-1998 to 37% for proceedings from 2013-2015 (von Buttlar, 2016). While insider trading investigations and prosecutions were infrequent in the 1990's, they have become regularized since the 2000's, with an average of seven successful prosecutions each year from 2005-2013. Over the same period *BaFin* concluded 5,497 supervisory investigations, 2,510 special audits, 1,151 market manipulation investigations, and 364 insider trading investigations.[ii] This enforcement output greatly surpassed the 113 private shareholder lawsuits, many unsuccessful, that were initiated over the same period.

*3.1.2 The Pattern of Enforcement in the UK*

The United Kingdom, a liberal market economy that is the home to Europe's largest capital market, would seem a more likely place to observe adversarial shareholder litigation. Historically, financial regulation was governed by a mostly informal and cooperative system of state regulation that provided industry organizations with ample discretion to self-regulate the financial industry in loose coordination with the Bank of England (Moran, 1986). However, beginning with Margaret Thatcher's "Big Bang," which liberalized key financial rules in the 1980's, British securities regulation has shifted from a largely informal and self-regulatory system of management to a more rigid and legalistic regulatory regime, enforced primarily through independent public

regulators (Moran, 1991; Vogel, 1996). As in Germany, the EU was instrumental in pushing the UK government to adopt more detailed, stringent, and comprehensive rules in financial regulation, as well as to establish a centralized financial regulator (Kelemen, 2011, pp. 131-137).

The legalization of UK securities rules is associated with a steady increase in the frequency and intensity of public administrative sanctions. Until the mid-2000's, regulators pursued only a handful of enforcement actions for insider trading and brought none of these cases to successful criminal prosecution (Coffee, 2007). In 2009, the Financial Services Authority (FSA) secured its first insider trading conviction and, over the next year, convicted a total of six defendants for market abuse, imposing aggregate prison sentences of 83 months (ESMA, 2012, pp. 105-111). Administrative penalties have also increased significantly. From 2004-2006, the three-year average for the FSA's total penalties was £9.06 million per $1 trillion of GDP. During the 2013-2015 period, the Financial Conduct Authority (FCA) (which replaced the FSA in 2013) assessed £358.1 million in fines per $1 trillion of GDP —nearly a forty-fold increase (Foster, 2018, p. 7). In its most recent annual report, covering the 2018-2019 fiscal year, the FCA completed 484 market abuse reviews and 91 enforcement investigations (FCA, 2019, p. 37).

However, even as public enforcement has intensified, private litigation remains infrequent. In an empirical study of private shareholder litigation actions in the UK, Armour, Black, Cheffins, and Nolan (2009) surveyed all 27,099 case filings in the Companies Court from 2004-2006. They found just three private case filings against publicly traded corporate directors, only one of which involved damages (698-699). They

then examined electronic records of all judicial opinions that had been reached from 1990-2006. They found only one successful private case involving a claim under public securities rules and just two case filings, one of which was dismissed, brought under common law principles (714). The authors conclude that "the chances of a director of a publicly traded UK company being sued under corporate law are virtually nil" (690).

Since this study was completed, there is little evidence that private securities litigation has increased significantly in the UK. This lack of growth can be seen by analyzing the incidence of group litigation orders (GLO), a legal device that allows aggregate litigation in the securities and other fields (Hodges & Voet, 2018, p. 1732).[iii] Of the 109 GLOs issued between 1998-2020, only three appear to involve public securities rules.[iv]

Such totals are insignificant when compared to the level of shareholder litigation in the United States. In just the year 2019, 428 new class action securities lawsuits were filed in federal and state courts in the U.S., affecting an estimated 5.5% of U.S. exchange-listed companies.[v] That same year, 74 settlements from class action securities lawsuits were finalized, with a median settlement value of $11.5M and a total value of $2B.[vi]

All in all, the design of EU securities legislation and the pattern of private and public enforcement in two large countries suggests that European securities enforcement remains far apart from American adversarial legalism even after more than thirty years of intensive re-regulation at the European level. EU securities mandates have not empowered private litigants. In practice, there is little indication that private shareholder litigation has significantly increased in either the UK or Germany, two systems with

contrasting political economies. The most profound change in enforcement has been the intensification of administrative sanctions by independent regulatory agencies.

## 4.0 The Europeanization of Competition Law

As in the securities sector, the implementation of European competition law has gradually become more legalistic since the 1980's. Flexible and discretionary systems that predominated at the European and national levels in the 1960's and 1970's (Buch-Hansen & Wigger, 2010; Gerber, 1998) have been gradually replaced with systems that are more "coercive, punitive, and juridical" (Kelemen, 2011, p. 174). Most notably, in 2003, the European Union adopted a regulation that removed the Commission's power to "negatively clear", or confer legal immunity to, firms engaged in restrictive agreements that it deemed to be economically beneficial (Gerber, 2007b; Wigger & Nölke, 2007; Wilks, 2005). The reform also mandated that national competition regulators implement European competition law in cases involving inter-state trade, establishing a dual enforcement system.

A number of scholars have interpreted this reform as promoting adversarial legalism. Wigger (2007), for instance, describes the 2003 reforms as "a stepping-stone in a much broader process of enhanced convergence towards the US model of private enforcement (104)." Kelemen (2011) argues that, as a result of competition modernization, administrative enforcement systems would be replaced by decentralized adversarial litigation where "[f]irms and consumer groups would enforce competition law by suing each other—much as they do in the United States" (167).

However, a closer analysis of Regulation 1/2003, which contained the reforms,

shows that none of the mandates included in the legislation required member states to expand opportunities for private enforcement. Nor has the legislation undermined the longstanding bureaucratic legal model of administrative enforcement. The legislation preserves the Commission's extensive administrative power to launch preliminary investigations, launch case proceedings, issue statements of objections to companies, conduct oral hearings, issue decisions, and assess fines, all without recourse to courts (Riley, 2003; Wilks, 2005). In certain respects, Regulation 1/2003 enhances the Commission's administrative authority, extending its remedial and investigative power and establishing new authority to impose structural remedies, to provide leniency to cooperative companies, and to enter settlements with parties under investigation (Parliament, 2016; Wilks, 2005, p. 434). While not mandating it, the legislation also encourages member states to adopt administrative systems of control at the national level, with most member states voluntarily adopting systems based on the Commission's practices (Cseres, 2010). In 2016, all but five of 28 member states had a unitary administrative enforcement model, and all but two could impose administrative sanctions (Parliament, 2016).

As important, Regulation 1/2003, by establishing a vertically coordinated competition network, hierarchizes the enforcement of competition rules (Riley, 2003; Wilks, 2005). In cases involving interstate trade, national regulators are now obligated to enforce European rather than national competition rules and to coordinate their investigations and enforcement decisions with the Commission through the European Competition Network (ECN) (Wilks, 2005, p. 439). Within this system, the European Commission has an authoritative role. Under Regulation 1/2003, national regulators must

report all investigations and envisaged decisions to the Commission, which has the power to take over a case and substitute its own proceedings (Article 11(6)). The Court of Justice of the European Union, in the development of its case law, has generally reinforced the hierarchical structure of European competition law, including the binding nature of Commission decisions on national regulators and courts (Lang, 2007). Rather than adversarial legalism, the legislation establishes an enforcement approach that is closer to Weber's bureaucratic ideal type, emphasizing "uniform implementation of centrally devised rules, vertical accountability, and official responsibility for fact-finding" (Kagan, 2003, p. 11).

*4.2 The Public and Private Enforcement of European Competition Law*

Although Regulation 1/2003 has promoted a hierarchically organized system of public enforcement, it is possible that the reforms have inadvertently increased private competition litigation (Gerber, 2007a). To assess whether private competition enforcement has increased in the aftermath of competition law modernization, we can analyse private competition litigation data compiled by Rodger (2014), which covers the years 1999-2012. The study finds that, in the countries where data is available, there has been a modest increase in overall litigation since the 2004 European modernization law, rising from 66 private case filings per year from 1999-2003 to an average of 108 during the years 2004-2012.[vii] This suggests that private litigation rates have marginally increased in the wake of reform.

Should this be interpreted as a sign of Eurolegalism? It is helpful here to compare private competition enforcement in Europe with private antitrust enforcement in the

United States. To do this, we can combine Rodger's private litigation data with enforcement data provided by the European Competition Network and American courts and regulatory authorities.[viii] As can be seen in Table 2, which details the total number of public enforcement actions and private antitrust cases initiated in the European Union and United States from 2004-2010, private litigation plays a much smaller relative role in Europe. In the US, private antitrust litigation constitutes more than 90% of all enforcement—and, in some years as much as 97%. Many of the most economically significant cases are pursued through private antitrust litigation, including many that influence the development of antitrust jurisprudence (Crane, 2019).

[Table 2 about here]

In Europe, by contrast, public enforcement plays the predominant role. In terms of enforcement output, public authorities initiate around half of all cases. However, because of the greater likelihood that public cases will result in a judgment, the ratio of *successful* public to private actions is actually closer to 2:1.[ix] Moreover, many of the successful private cases are not economically significant. Most are business-to-business lawsuits involving contractual disputes, often either to nullify a contract or as a defensive measure against another lawsuit. Only 17% of private cases involved damages and an even smaller percentage could be considered actions akin to private attorneys general in the United States. Lawsuits initiated by consumers represented only 3% of cases, and groups of consumers (i.e. class actions), just 0.4% cases—a total of just five cases in 27 countries over the 12-year period (Rodger, 2014, p. 162).

Since the enactment of competition law modernization, public enforcement output has grown more quickly than private litigation. Following the enactment of Regulation 1/2003, private competition litigation under European competition law increased by 60%. However, total administrative enforcement, initiated by either the Commission or national regulators, increased by more than 800% (Wils, 2013, p. 296). Public competition enforcement remains strong in Europe, with members of the ECN employing more than 4,781 regulators in 2016 (Parliament, 2016, pp. 20-24), and completing 1,094 investigations and 549 administrative decisions from 2013-2019 (ECN, 2020).

In sum, the pattern of public and private competition enforcement suggests that competition modernization has *not* led to a significant increase in adversarial legalism. Compared to the 1990's, enforcement is now more formalized and punitive; legal appeals more frequent, and the private antitrust bar much larger (Gerber, 2010; Kelemen, 2011, p. 160). However, the 2003 reforms preserved, and in some ways reinforced, enforcement through public, administrative processes. The most important consequence of Regulation 1/2003 has been to bolster public enforcement capacities and to strengthen the hierarchical accountability of national regulators. In practice, private litigation rates have not significantly increased since 2004—and not nearly as quickly as public enforcement.

*4.3 Private Damages Actions*

After a protracted political debate lasting more than a decade, in 2014 the European Union approved a directive ostensibly designed to encourage the private enforcement of competition law. The legislation harmonizes certain aspects of procedure and makes it easier for private plaintiffs to demand evidence from companies and, in

some cases, regulators (Parcu, Monti, & Botta, 2018, pp. 1-5). However, many observers contend the legislation does little to facilitate or encourage the private enforcement of competition law (Nagy, 2019; Peyer, 2016). The legislation specifically rejects the American idea of treble or punitive damages, requiring companies to provide damages only equal to the amount of economic harm caused (Parcu et al., 2018, p. 3). Member states are not required to remove civil procedural barriers such as loser pay rules or bans on contingency fees that disincentivize private enforcement. And the directive makes no provision for private attorneys general or class action even while encouraging member states to facilitate consensual dispute resolution (Wils, 2017, p. 38). In some ways, the directive even constrains private litigants' rights, establishing mandatory limits on access to information uncovered in public decisions and requiring countries to ensure that court judgments stemming from private litigation never contradicts administrative determinations (Peyer, 2016). As Wils (2017) explains, the legislation reinforces the centrality of public enforcement as the key deterrent in the EU system, relegating private enforcement to a "supplementary, purely compensatory role" (39).

In earlier proposals the Commission had considered legislation that would have done more to facilitate private enforcement. For instance, in a 2005 Green Paper, the Commission surveyed support for provisions that would establish U.S.-style discovery rights, punitive damages, contingency fees, and class action devices (Parcu et al., 2018, pp. 2-4). The proposal, to a significant extent, was infused with the "American conception of private action for damages as an instrument of deterrence and a potential replacement for public enforcement" (Wils, 2017, p. 21). However, such proposals were not well received by either member states or the business community. Member states, led

by France and Germany, opposed provisions that would undermine procedural subsidiarity (Hodges, 2014, p. 72). Business interests saw several of the provisions as costly devices that would encourage the development of adversarial legalism in Europe in ways that were out of step with European legal traditions (Hodges, 2014, p. 73). In later versions of the legislation, the Commission stripped adversarial legal provisions from the legislation and made clear that the purpose of the proposal should "complement" but "not replace or jeopardize public enforcement" and that any proposal "must be rooted in European legal culture and traditions" (Commission, 2008). The 2014 directive that was eventually adopted into law largely reflected this goal, encouraging a private enforcement system that would complement the hierarchically structured, publicly dominated European competition system.

### *5. Discussion and Conclusion*

For the last thirty years, scholars have predicted that European integration would lead regulatory processes to become more adversarial. The combination of globalization and the fragmentation of political authority in the EU, it was argued, would encourage the private enforcement of public law and spur the proliferation of adversarial litigation. National legal traditions might limit the pace of change and its institutionalization within some sectors, but adversarial legalism would inevitably, if gradually, take hold. "Eurolegalism is an incoming tide," notes Kelemen in a recent volume. "It flows into the estuaries and up the rivers. It cannot be held back, and it is transforming governance across a wide range of policy areas" (2018, p. 86).

In this article, I have provided empirical evidence and theoretical reasons that

confirm certain aspects of Kelemen's predictions while casting doubt on others. I have concurred with his conclusion that European regulatory policy has become more detailed, formalized, and rigidly applied while departing from his prediction that EU legislation would encourage adversarial litigation. Through a close analysis of both the law and its enforcement in the securities and competition sectors, two regulatory areas identified by scholars as most "most likely" for adversarial legalism to develop, I have shown that EU legislation has *not* promoted private enforcement as an alternative to public enforcement, and that most EU rules enacted in these two sectors appear to encourage administrative systems of enforcement. Proposals that would seriously expand private litigation have usually been rejected. The only successful initiatives to expand private liability explicitly reject the U.S. system as a model. In careful analyses of available data on private litigation rates, I have shown that, even as regulatory rules have become more juridified, private enforcement has not significantly increased. The more profound change has been a dramatic increase in the frequency and intensity of public administrative sanctions.

Rather than American-style adversarial legalism, the hierarchically accountable and bureaucratically dominated mode of enforcement that the European Union is encouraging bears more similarity to what Kagan terms bureaucratic legalism. Compared to the United States, where a mix of unordered federal and state agencies can enforce the law, the European Union's system of regulatory federalism in the competition and securities sphere is more hierarchical, organized through vertically accountable networks of public regulators orchestrated by the European Commission. Whereas American antitrust and securities enforcement occurs through decentralized public and private litigation and is characterized by substantial numbers of private shareholder lawsuits,

European regulatory enforcement occurs primarily through administrative actions, initiated by centralized bureaucracies, and accompanied by much less private litigation.

Previous studies have emphasized the role of bureaucratic and legal inertia in limiting the growth of adversarial litigation (e.g. Bignami, 2011; Cioffi 2009; Van Waarden, 2009; Kagan, 1997). The explanatory emphasis here has been different. While acknowledging the importance of legal traditions, I have argued that European policymakers themselves face their own incentives to avoid adversarial legalism and to utilize primarily bureaucratic strategies to ensure compliance. Chief among these is the European Council's stalwart opposition to EU mandates that would undermine procedural subsidiarity. Member states, speaking through the Council, have consistently blocked, delayed, or diluted initiatives that would encourage the private enforcement of public law or change civil procedural rules to encourage adversarial litigation. A second incentive is the negative feedback stemming from the US experience with adversarial litigation. European business organizations have used the fear of American-style litigation to weaken private enforcement initiatives and push European lawmakers to develop limited approaches aimed at compensation rather than deterrence, which are limited by extensive safeguards.

The emphasis on incentives rather than legal traditions as the most important barrier to adversarial legalism is important because it suggests that the continuing expansion of the *acquis communautaire* will not necessarily lead to a significant expansion of adversarial litigation in Europe. Even if Europeanization erodes national legal and bureaucratic traditions, and a fully codified European area of justice develops (Hartnell, 2002), adversarial legalism may not develop; if it does, it will be a version that

is much more restrained than that seen in the United States. Indeed, the fact that private litigation has not significantly expanded within the competition or securities sectors, two policy areas subject to extensive EU mandates and characterized by well sourced interests, suggests that there may be few, if any, areas of European policy where adversarial legalism is likely to take hold as a result of more harmonized European policy.

At the same time, the finding that competition and securities enforcement is characterized by a regulatory style that is both vertically coordinated and bureaucracy centered is not necessarily generalizable to other sectors. While scholars have noted a growing centralization of enforcement within certain sectors (Moloney, 2014; Scholten, 2017) as well as an emerging European executive order that has no shortage of Weberian characteristics (Trondal, 2010), competition and securities are among the most centralized and harmonized areas of European policy. Other regulatory areas are characterized by more horizontally structured supranational regulatory networks and less overall harmonization (Bignami, 2011; Sabel & Zeitlin, 2010). And in a few countries, such as the Netherlands, observers have noted an increase in adversarial litigation. Consequently, it is likely that the organization of European legalism will continue to vary across policy areas and countries.

Future scholars should investigate how the European policymaking process and the negative feedback effects from U.S. entrepreneurial litigation have interacted with the EU's recent efforts to establish a European system of collective redress. The legislation, which was finalized in 2020, rejects the American model of 'private attorneys general,' mandating instead that member states establish a system of "representative actions"

through certified non-profit organizations that forbids participation from financially interested actors or lawyers (Hodges & Voet, 2018; Nagy, 2019; Parliament, 2020). Empirically explaining how and why this approach was developed—and why American-style class actions were rejected—would provide an additional test for the Eurolegalism thesis and shed new light on the political and institutional factors that shape the structure of regulatory implementation in the European Union.

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Appendix I: Tables

Table 1: Modes of policy implementation

| Organization of decision-making authority | Decision-making style | |
|---|---|---|
| | INFORMAL | FORMAL |
| HIERARCHICAL | *Expert or political judgment* | *Bureaucratic legalism* |
| PARTICIPATORY | *Negotiation/ mediation* | *Adversarial legalism* |

*Source:* Kagan (2003, p. 10).

Table 2: Public and Private Antitrust Enforcement, US and Europe, 2004-2010

| | United States | | | European Union | | |
|---|---|---|---|---|---|---|
| | *Public, Cases Filed* | *Private, Cases Filed* | *Percent Public* | *Public Cases, Envisaged decisions* | *Private Cases, Filed* | *Percent Public* |
| 2004 | 66 | 693 | 8% | 302 | 179 | 63% |
| 2005 | 64 | 774 | 8% | 203 | 212 | 49% |
| 2006 | 75 | 865 | 8% | 165 | 224 | 51% |
| 2007 | 63 | 1150 | 5% | 150 | 209 | 42% |
| 2008 | 65 | 1029 | 6% | 159 | 198 | 45% |
| 2009 | 79 | 1062 | 7% | 150 | 168 | 47% |
| 2010 | 58 | 646 | 8% | 169 | 110 | 61% |
| Average | 67 | 888 | 7% | 171 | 186 | 51% |

*Source:* Rodger 2014, European Competition Network, US Federal Courts, NAAG Litigation Database. Calculations by the author.

[i] The European Treaties, to aid the transposition of European law, allows private actors to initiate litigation against member states in national courts, through the preliminary reference procedure. See Börzel (2006). This article does not address preliminary reference requests, which number in the hundreds per year. The exclusive focus is on the

private enforcement of public law against market actors, which generates the overwhelming share of federal litigation in the United States. See Farhang (2010)

[ii] Calculations by author using *BaFin* annual reports, which are available here: https://www.bafin.de/EN/PublikationenDaten/Jahresbericht/jahresbericht_node_en.html.

[iii] The UK government has published all group legal orders that have been filed since 1998. See < https://www.gov.uk/guidance/group-litigation-orders#lloyds-HBOS-litigation>.

[iv] These include a 2014 order related to the fiduciary duties of Lloyds during its proposed acquisition of HBOs, a 2013 order involving misleading statements purportedly made by the Royal Bank of Scotland, and a 2013 order regarding an investment portfolio fund's alleged omission in reporting. See < https://www.gov.uk/guidance/group-litigation-orders#lloyds-HBOS-litigation>.

[v] See "Securities Class Action Filings: 2019 Year in Review," Cornerstone Research. Accessible at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review.

[vi] See "Securities Class Action Settlement Median Value Remains Historically High in 2019" Cornerstone Research. Accessible at https://www.cornerstone.com/Publications/Press-Releases/Securities-Class-Action-Settlement-Median-Value-Remains-Historically-High-2019.

[vii] His study identifies 1,268 private cases from 1999-2012 in the EU-27 minus Germany, and an additional 599 cases in Germany from 2003-2010.

[viii] Calculations by the author using publicly available data. Statistics for European regulators were compiled from the European Competition Network at <

https://ec.europa.eu/competition/ecn/statistics.html>. Information on the number of public and private US antitrust filings can be found in "Statistical Tables of the Federal Judiciary," available at < https://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2014>. Information on state-level enforcement of federal antitrust law was provided by the National Association of Attorneys General, available at < http://app3.naag.org/antitrust/search/>.

[ix] In Rodger's study private litigants had a success rate of 21%. A higher proportion of public investigations – 43% – led to envisaged decisions. See (ECN, 2020).