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

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Abstract: *For twenty years, scholars have predicted that European integration would foster adversarial legalism in Europe. In this article, I empirically assess the Eurolegalism thesis by examining EU regulatory mandates and the pattern of public and private enforcement in the competition and securities fields, two policy areas where adversarial legalism is seen as most likely to develop. I find that EU policymakers have not encouraged private enforcement as an alternative to bureaucratic implementation. European legislators prefer administrative enforcement through public regulatory agencies, a regulatory style closer to bureaucratic legalism. In practice, public authorities on the EU and national levels retain authoritative control over the meaning and application of the law. Private enforcement plays a narrow, secondary role aimed at compensation. 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.

1.0 Introduction

European integration has fostered more *legalistic* processes of regulatory implementation. 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 EU re-regulation should be characterized as *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, 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 European legal culture and the political organization of European nation states will prevent the spread of adversarial legalism in Europe even as the fragmented structure of the

European Union promotes 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 block the adoption of "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. While not denying the importance of Europe's bureaucratic and legal traditions, I show that adversarial legalism is also 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 independently 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 private compensation following public enforcement actions, 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 in favor of 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," which gives member states significant autonomy over the methods through which European rules are implemented (Lazer & Mayer-Schoenberger, 2001), 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), a number of 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 designing legislation in ways 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 in these two policy areas 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 systems of enforcement, while rejecting proposals that would encourage the growth of adversarial litigation. Available data of the actual enforcement of EU securities and competition rules shows that public enforcement remains predominant. While private litigation rates have increased in many European jurisdictions, this mostly takes the form of "follow on actions" that rely on the government's findings of infringement and fact, and therefore reinforce rather than undermine the authoritative role of public regulators.

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 pattern of public and private

enforcement in two different sectors over the last two decades, 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.

The second contribution is theoretical. Previous research has rightly pointed to national legal and bureaucratic traditions as limiting the development of adversarial litigation in Europe (Bignami, 2011; Hodges, 2014; Kagan, 2007; Van Waarden, 2009). The emphasis here is different. Challenging the assumption that the fragmented design of the EU will lead legislators to promote private litigation as an alternative to bureaucratic implementation, I point to two incentives in the EU policymaking process that have consistently led legislators to limit adversarial legalism. 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 necessarily lead adversarial legalism to become the predominant mode of policy implementation 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 primarily implemented through hierarchically accountable networks of public regulators, and where private action is confined to follow-on litigation aimed at compensation, may prove a more representative model in many areas of EU policy (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 and considers the alternative theoretical frame of bureaucratic legalism. Section 3 lays out the empirical strategy and justifies the case selection. Sections 4 examines the structure of EU

regulatory mandates and the practices of regulators in the securities sector. Section 5 does the same for competition regulation. A final section concludes.

2.0 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 ways that empower private actors to independently enforce the law through adversarial litigation. 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.

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 by legislators facing institutional constraints to empower private litigants to enforce the law—and not simply the product of American culture or legal traditions. 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 become a predominant mode of policy implementation 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). 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). 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). Even if European Union legislation did 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, would limit the ability and incentives of private individuals and groups to initiate legal action (Hodges, 2014; Warren, 2011).

European legal and bureaucratic traditions, and political culture more broadly, have 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 avoid promoting adversarial litigation as a substitute for bureaucratic implementation. To be sure, in terms of institutional design, the European Union does have a number of features which some scholars have argued encourages 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 national bureaucracies 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 be motivated to promote decentralized private enforcement, 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 entrepreneurial 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 are 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]

To understand how these institutional factors might shape EU policymakers' implementation preferences, it is helpful 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 range from formal to 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 legislative process and the negative feedback effects of U.S. adversarial legalism, we should expect EU policymakers to intentionally avoid creating implementation systems 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). Private actors can and do play important roles within bureaucratic legalism, providing information about violations to regulators or seeking compensation for regulatory victims following public action. However, in contrast to adversarial legalism, such private actions do not significantly shape the authoritative rules and norms that structure the meaning and application of the law.

3.0 Empirical Strategy

In the two sections that follow, I conduct cases studies of competition and securities regulation in two areas where regulatory policy is highly mediated by EU secondary legislation. In each case, I examine whether (1) the design of EU regulatory mandates and (2) the empirical pattern of public and private enforcement are more consistent with adversarial legal or bureaucratic legal styles of implementation. In assessing legislative mandates, I am concerned primarily with whether EU mandates encourage decentralized private enforcement as an 'alternative to bureaucratic power' or whether private enforcement is promoted as a narrower tool of private compensation that does not challenge the authoritative role of public actors. To assess the enforcement pattern, I consider whether implementation in practice is carried out primarily through public or private action and whether private litigation takes the form of stand-alone actions pursued independently of regulators or follow-on actions that rely on public findings of infringement and fact. Because it can take several years to implement legislation, I assess the pattern of enforcement several years after the adoption of EU mandates. Since the United States is viewed as the quintessential adversarial legal regime (Kagan, 2003), I compare EU regulatory mandates and practices to those in the United States. Insofar as adversarial legalism is present in Europe, my expectation is not to observe convergence with the US, where a variety of other factors shape regulatory design and enforcement. However, I would expect to find EU legislation explicitly encouraging the private enforcement of public law as well as patterns of private enforcement that undermines, rather than reinforces, public regulator's authoritative control of implementation.

The case selection is theory-driven, examining two "crucial cases" that can be used to assess the validity of the Eurolegalism thesis (Eckstein, 1975; Gerring, 2006,

2007). Both cases were used by Kelemen to develop his theory (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 available and incentivized by policy design.

As most likely cases for adversarial legalism, a positive finding that European legislation is encouraging private litigation as a substitute for bureaucratic implementation 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 adversarial litigation playing a more limited role 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.

4.0 **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 more 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 EU would rely on the self-interest of shareholders to implement European securities rules (Grace, 2005; Kelemen, 2011; Kelemen & Sibbitt, 2004). However, contrary to these expectations, European securities re-regulation has *not* expressly encouraged private enforcement. 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). This stands in stark contrast to the United States, where the foundational securities laws explicitly empower private actors to independently enforce the law: by suing companies that make material misstatements or omissions, suing traders that engage in market manipulation or deception, and to recover damages for false or misleading statements (Cox, Thomas, & Kiku, 2004).

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 create 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).

4.1 Assessing the Pattern of Public and Private Securities Enforcement

Although EU securities legislation does not explicitly encourage independent private enforcement, there is still the possibility that European re-regulation has inadvertently facilitated adversarial legalism, by opening up new opportunities for

entrepreneurial firms to jurisdiction shop or empowering courts to expand the rights of private actors under the law (Coffee 2016). To assess whether EU securities rules have indirectly encourage adversarial litigation, we can compare the pattern of public and private enforcement since the adoption of the FSAP in 1999, which has formed the blueprint for much of European financial re-regulation (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). Unfortunately, comprehensive litigation data is not available for the European Union as a whole. However, to get a sense of how regulation has been implemented in the two decades since FSAP, we can examine developments in Germany and the United Kingdom, two large countries with significant capital markets which were both subject to EU securities law during the time period examined. While these two cases are not necessarily representative of the EU as a whole, examining the enforcement pattern in two countries with contrasting financial and legal systems provides one test of whether EU mandates are leading in practice to more bureaucracy-centered or litigant-centered modes of implementation. If European integration had fostered adversarial legalism, then we would expect to observe it in a wide range of European countries, including the EU and UK.

3.1.1 The Pattern of Enforcement in Germany

Germany is a coordinated market economy where capital markets are comparatively small, minority shareholder rights weak, and finance largely bank-based and self-governed (Hall & Soskice, 2001; Zysman, 1983). It is also a civil law country where private, individual access to judicial review has historically been limited in favor of a bureaucracy-centered enforcement system (Damaska, 1986;

Pistor, 2005). 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 mandated financial liberalization and re-regulation (Deeg & Lütz, 2000; Kelemen, 2011, pp. 120-126). Although EU regulatory mandates did not require countries to facilitate shareholder litigation, the German government on its own initiative established 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).

But while legally significant, there is little evidence that such developments have challenged the dominance of German financial regulators. First, while private securities litigation can and does occur, public enforcement continues to predominate several years after the enactment of EU securities mandates. One study of private securities litigation found that, from 2005-2013, 113 private securities lawsuits, many unsuccessful, were initiated in Germany (Heil & Lee, 2016). 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] It also reviewed 7,390 private complaints related to securities transactions—suggesting that shareholders continue to prefer petitioning public regulators over initiating their own litigation.

From analyses of the German *KapMuG* device, we also know that aggregate litigation mostly takes the form of follow-on lawsuits that rely on facts and liability established by public authorities. For instance, the high-profile lawsuits against

Deutsche Telekom, Volkswagen, Porsche, and Wirecard using the German KapMuG device are all based on public regulatory findings or criminal prosecutions. This contrasts with the United States, where around 70% of private securities settlements are independently launched and therefore do not rely on facts or liability established from SEC enforcement actions.[iii]

Finally, studies suggest that aggregate litigation remains slow-going and frequently dismissed, making it less likely that it could become an effective substitute for public enforcement (Hodges & Voet, 2018, pp. 2514-2537). Even relatively straightforward cases can take decades to work their way through the courts. In the most famous German case, initiated by 16,000 shareholders of Deutsche Telekom alleging securities disclosure violations, claims initially filed in 2001 had still not been resolved in 2021 (Deutsche_Telekom, 2021). By contrast, in the United States, where shareholders pursued similar claims against Deutsche Telekom under U.S. securities laws, a class action lawsuit was resolved comparatively quickly, with the company agreeing to a $120M settlement in 2005 (Halberstam, 2015).

3.1.2 The Pattern of Enforcement in the UK

The United Kingdom, with a common law system that provides broad individual access to judicial review and a liberal market economy that is home to Europe's largest capital market, would seem a more likely place to observe adversarial shareholder litigation (La Porta, Lopez-de-Silanes, & Shleifer, 2006; Pistor, 2005). However, as in Germany, the implementation of UK securities rules is more reflective of bureaucratic than adversarial legalism.

Historically, British 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). Beginning with Margaret Thatcher's "Big Bang," which liberalized key financial rules in the 1980's, British securities regulation 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 UK's Financial Conduct Authority is now among the most active in the world, investigating hundreds of violations each year and issuing hundreds of millions in penalties annually (Foster, 2018, p. 7). In one 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 securities 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 reached between 1990-2006, finding only one successful private case involving a claim under public securities rules and just two case filings, one of which was dismissed (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).[iv] Of the 109 GLOs issued between 1998-2020, only three appear to involve public securities rules.[v]

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.[vi] 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.[vii]

All in all, the design of EU securities legislation and the pattern of private and public enforcement in two contrasting political economies indicates that European securities enforcement remains far apart from American adversarial legalism even after more than twenty years of intensive re-regulation at the European level. EU securities mandates have not empowered private litigants. Private aggregate litigation mostly takes the form of follow-on lawsuits, and therefore does not directly undermine the state's authoritative role determining when and how securities law is applied. The combination of more formalized securities rules with hierarchical control by a public regulator suggests implementation in this sector is characterized more by bureaucratic legalism than adversarial legalism.

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 new enforcement framework (Regulation 1/2003), which removed the Commission's monopoly on enforcement and mandated that national competition regulators implement European competition law in cases involving inter-state trade, establishing a dual enforcement system (Gerber, 2007; Wigger & Nölke, 2007; Wilks, 2005). Because the reform made it possible for the first time for national courts to hear competition cases initiated by private litigants, a number of scholars have characterized it 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 because 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).

In principle, Regulation 1/2003 does open the door to private competition enforcement. Yet notably, the reform does not require member states to expand opportunities for private enforcement. It neither creates express rights to pursue private litigation, nor does it require member states to remove any of the legal rules that discourage private enforcement. The main focus of the Regulation is the development of a more extensive, hierarchically organized system of public implementation. 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). This is in stark contrast to the United States, where antitrust legislation requires most public enforcement to go through the courts, and where private actors are not only expressly empowered to independently enforce the law but are also incentivized to do so through devices such as "treble damages," which triple the payout from successful private cases.

As important, Regulation 1/2003 hierarchizes the enforcement of competition rules across Europe (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 authoritative control over the meaning of the law. 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 Private Damages Actions

After a protracted political debate lasting more than a decade, in 2014 the European Union did approve a directive ostensibly designed to encourage competition damages lawsuits. The legislation harmonizes certain aspects of procedure and makes it moderately 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 remains too restrictive to meaningfully shift the relative roles of public and private actors in the implementation process (Nagy, 2019; Peyer, 2016). The directive 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). The legislation also does very little to reduce procedural barriers to independent private enforcement. Member states are not required to remove civil procedural barriers such as loser pay rules or bans on contingency fees that disincentivize private enforcement. They do not have to overhaul restrictive discovery rules. And there is 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 contradict 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 a proposal 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 clarified 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 narrowly circumscribed system of private damages that was intended to reinforce the hierarchically structured, publicly dominated European competition system.

4.3 The Public and Private Enforcement of European Competition Law

Although Regulation 1/2003 has promoted a hierarchically organized system of public enforcement, and the competition damages legislation remains limited in scope, it is still possible that the reforms have inadvertently fostered a more adversarial legal system. To assess whether this has occurred, we can analyze the pattern of public and private competition enforcement, paying particular attention to whether public regulators remain the primary enforcers, and whether private enforcement mostly takes the form of stand-alone or follow-on actions.

Table 2 reports the total number of public enforcement actions and private antitrust cases initiated in the European Union and United States from 2004-2010. In the US, private litigation is the predominant mode through which the law is enforced. Private antitrust litigation constitutes more than 90% of all enforcement—and, in some years as much as 97%. Moreover, many of these cases are independently pursued – that is, they do not follow government actions – and thus can be seen as undermining regulator's authoritative control over the law's rules and standards. Indeed, many of the most important developments in the meaning and application of antitrust law stems from case law generated by private antitrust litigation (Crane, 2019).

[Table 2 about here]

In Europe, by contrast, public enforcement plays the predominant role. In terms of total 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 closer to 2:1.[viii] Moreover, most of

the European cases are business-to-business lawsuits involving contractual disputes, often either to nullify a contract or as a defensive measure against another lawsuit, which do not have bearing on the authoritative meaning of the law. Only a fraction could be considered actions akin to 'private attorneys general' in the United States. Only 17% of private cases involved damages, 3% were initiated by consumers, and just 0.4% cases—a total of just five cases in 27 countries over the 12-year period--involved groups of consumers (i.e. class actions), (Rodger, 2014, p. 162).

Has the authoritative role of public regulators shifted since 2014, when the EU adopted the Private Damages Actions Directive? To answer this question, we can examine data recently compiled by Laborde (2019) on private cartel damages actions across 30 European competition systems, and compare it to the number of public cases pursued over the same period. Table 3 reports the number of successful private cases compared to the number of cartel decisions taken by national and European officials. The data suggests that public enforcement continues to predominate. Not only are most enforcement actions initiated by public regulators, but virtually all private cases derive from public investigations. 98% of private cartel damages cases finalized from 1998-2019 followed public enforcement actions—either from the European Commission (40%) or national regulators (57%) (Laborde, 2019). Just 2% of cases– a total of five over more than two decades – were standalone actions pursued independently by entrepreneurial lawyers. This pattern suggests that private enforcement is not yet shaping the rules and standards that guide the enforcement of the law.

[Table 3 about here]

In sum, there is little evidence that EU competition legislation has fostered 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, while private damages actions did not undermine the authoritative role of public regulators in enforcement. In practice, private enforcement plays a secondary role that is limited to follow-on actions. The most important consequence of the Europeanization of competition law appears to be the strengthening of public enforcement capacities through bureaucratic legal processes.

5. Discussion and Conclusion

Since the 1990's, scholars have predicted that European integration would lead regulatory processes to become more adversarial. The combination of globalization with the fragmentation of political authority in the EU would lead legislators to enact private enforcement as an 'alternative to bureaucratic power,' spurring the proliferation of aggregate litigation and 'private attorneys general' in Europe. National legal traditions might limit the pace of change, 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 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 encourage the strengthening of public enforcement capacities. The only successful initiatives to expand private liability explicitly reject the U.S. system as a model. Moreover, the actual pattern of enforcement suggest that public authorities on the European and national levels have retained their central, authoritative roles over the meaning and application of the law.

This article represents one piece of evidence on the implementation of European regulation. The cases that I examine and the measures that I use to assess developments are, by their nature, limited. The findings have been based on an examination of patterns in the past, which may not hold if other European actors, such as the Court of Justice of the European Union, significantly expand opportunities for private enforcement (Shapiro & Sweet, 2002; Slaughter, 1999) or if entrepreneurial litigators find creative ways around restrictive national rules of procedure (Coffee, 2018). 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, as I have argued throughout this article, the EU itself is not encouraging the development of adversarial legalism as a substitute for bureaucratic

implementation. Rather than American-style adversarial legalism, the hierarchically accountable and bureaucratically dominated mode of regulatory enforcement that the European Union is encouraging in key areas of policy bears more similarity to what Kagan terms bureaucratic legalism. Whereas American antitrust and securities enforcement occurs through decentralized public and private litigation and is characterized by substantial numbers of stand-alone private lawsuits that shape the authoritative meaning of the law, European regulatory enforcement occurs primarily through administrative actions, initiated by centralized bureaucracies, and accompanied by private litigation that reinforces, rather than undermines, the authoritative role of public actors.

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 EU policymakers themselves face their own incentives to avoid adversarial legalism and to utilize primarily public institutions 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 an important barrier to adversarial legalism is important because it suggests that the continuing expansion of the *acquis communautaire* will not necessarily undermine the centrality of public systems of enforcement. Even if Europeanization erodes national legal and bureaucratic traditions, and a fully codified European area of justice develops (Hartnell, 2002), adversarial legalism may not follow; 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 plays a comparatively minor role in the implementation of competition and securities rules, two policy areas subject to extensive EU mandates and characterized by well sourced interests, provides reason to doubt that adversarial legalism is likely to become a dominant mode of policy implementation in Europe.

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. At the national level, bureaucratic legalism is largely predominant. However, relations between EU and national regulators are characterized by more diverse forms. 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). Consequently, it is likely that the organization of European legalism will continue to vary across levels of government, policy areas, and countries, with bureaucratic legalism being one of several styles.

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.

Table 3: Cartel Enforcement, Public and Private, 2014-2019

		European Union		
	Commission Cartel Cases	*National Cartel cases (cases envisaged)*	*Successful Private Damages Action*	*Percent Public*
2014	10	115	9	94.8%
2015	15	98	17	85%
2016	6	106	15	86.6%
2017	7	67	18	75.7%
2018	4	92	40	58.3%
Average	8.4	95.6	19.8	81%

Source: Laborde 2019, European Competition Network. 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] Correia and Klausner (2012) find that 72% of class actions securities settlements from 2000-2011 did not parallel SEC action. Choi and Pritchard (2016) identify 69% of private securities settlements from 2004-2007 as "private only."

[iv] 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>.

[v] 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>.

[vi] 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.

[vii] 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.

[viii] 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).