Legalism Without Adversarialism:
The Politics of Regulatory Implementation in the European Union

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Abstract: *Many scholars predict that European integration will foster adversarial legalism in Europe. In this article, I empirically assess the Eurolegalism thesis by examining EU regulatory mandates in the competition and securities fields, two policy areas where adversarial legalism is seen as most likely to develop. I show that in both of these policy areas, member states and business organizations have successfully opposed the creation of strong private enforcement regimes. EU policymakers have relied more on administrative enforcement through public regulatory agencies, a regulatory style closer to bureaucratic legalism. In practice, public authorities play the primary enforcement role and private litigation serves the narrower function of compensation following public enforcement actions. Several political explanations for the organization of regulatory implementation are explored, including the veto power of member states through the European Council, the 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 arms-length, rule-based, formalized, transparent, and judicialized (Levi-Faur, 2005; Majone, 1997; Sweet & Brunell, 2004; Thatcher, 2002). But while most observers agree that regulation in Europe is increasingly "controlled by formal legal rules and procedures" (Kagan, 2019, p. 74), they disagree about whether European Union regulation has encouraged *adversarial* modes of policymaking and enforcement, 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 deter lawbreaking and 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 political 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 25 years 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 by developing a novel argument to help explain what Bignami (2011) calls the "non-Americanization of European law." I argue that in addition to facing resistance on the national level, Eurolegalism is also consistently opposed by some institutional actors on the European Union level. While supranational actors such as the European Commission are interested in empowering private litigants to independently implement EU rules as way to bolster implementation, member states prefer bureaucracy-centered modes of implementation that give them some control over implementation and protect the procedural autonomy of national legal systems. Since member states, collectively through the Council of the European Union (Council), have the ability to amend and veto legislation, they can block or limit proposals that would establish strong private enforcement rights or intervene in national legal procedures. This veto power is reinforced by the negative feedback effects generated by the U.S. experience with litigation, which leads a variety of EU stakeholders to oppose American enforcement methods. As a result of these political dynamics, I argue that EU regulatory mandates are more likely to utilize systems of hierarchically-organized bureaucratic legalism that give regulatory bureaucracies an authoritative role in enforcement than horizontally-structured systems of adversarial legalism where public and private litigants enforce the law through the courts.

I test my argument through close case studies of the regulation of financial services and market competition, two areas of policy that are seen as 'most likely' cases for adversarial

legalism to develop. I find that 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] 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 primarily at facilitating private compensation following public enforcement actions, and limited in practice by extensive safeguards (Hodges & Voet, 2018; Wils, 2017). I find little evidence that EU secondary legislation is establishing strong private enforcement rights or systematically encouraging the development of adversarial modes of governance.

EU mandates in these two sectors are more in line with what Kagan (2019) describes as "bureaucratic legalism": formalized but centralized enforcement through regulatory bureaucracies (11). The primary focus of EU legislation in these areas has 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). Available data of the actual enforcement of EU competition rules shows that, even in an area of law where there have been longstanding efforts to encourage private enforcement through national courts, public enforcement remains predominant. While private litigation rates have moderately increased in some European jurisdictions, these mostly take 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.

Through close examinations of the legislative process leading up to key legislation in financial services and competition policy, I find evidence of member state and business resistance to Eurolegalism. Business opposition is rooted in the perceived costs of entrepreneurial litigation, while member states see private enforcement as potentially undermining the effectiveness of public enforcement and the autonomy of established systems of national private law. In both the competition and securities sectors, the U.S. experience with entrepreneurial litigation is invoked as a cautionary tale. Although member state and business opposition has not always prevented the creation of private rights of action or expanded civil liability, it has successfully curtailed the scope and effectiveness of such measures. Proposals that would significantly expand the independent enforcement role of private litigants have either been rejected or substituted for narrowly circumscribed systems of private damages actions that follow successful public enforcement decisions.

The analysis makes several contributions to current debates in political economy, regulatory capitalism, and European Union studies. The first is empirical. Through an analysis that combines close process tracing of legislative developments with an empirical examination of the design of legislation and the pattern of public enforcement and private litigation in two crucial cases, I point to a distinctive trajectory of juridification in Europe that has not been fully elaborated in earlier studies. The Europeanization of regulation in these fields is leading implementation to become more legalistic, understood as controlled by formal rules, while maintaining, and in some cases even reinforcing, hierarchically structured and bureaucracy-centered systems of administrative enforcement.

The second contribution is theoretical. Previous research has rightly pointed to national legal and bureaucratic traditions as constraining the globalization of American law (Bignami, 2011; Hodges, 2014; Kagan, 2007; Van Waarden, 2009). In this article, I show that Eurolegalism is also being resisted by important actors in the European Union's policymaking process. This distinction is important because it suggests European integration may not

necessarily foster adversarial legalism in the long-run. A range of factors will shape litigation rates and enforcement practices, and private litigation may come to serve an important enforcement function in some jurisdictions and some policy areas. However, given the prominent role of member states in the European policymaking, and the negative feedback effects of the U.S. experience with entrepreneurial litigation, private enforcement systems will continue to be politically resisted and therefore limited in practice. Globalization and economic integration may require regulatory systems to adapt, but how a jurisdiction changes remains a political choice that is shaped by existing domestic traditions and practices.

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 bureaucratic control, and which relies heavily on the self-interest and entrepreneurship of private actors to deter lawbreaking.

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 that are heavily mediated by courts. 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, 2019), 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. Moreover, he has pointed our attention to the institutional features of the European Union that lead some actors to view decentralized private litigation as helpful for securing compliance with EU rules. 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 systematically empowering private litigants to independently enforce market rules as well as the prediction that adversarial legalism has become a predominant mode of policy implementation in Europe.

One set of factors pushing against adversarialism, which has been explored in several empirical studies, is the fact that the enforcement of public law 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 such as law enforcement (Buxbaum, 2005; Joerges, 2004; Nagy, 2019, pp. 39-40). Such systems make it

more difficult to instrumentalize private litigation as an enforcement tool (Bignami, 2011, p. 418). Even where European Union legislation does create new judiciable rights for individuals, companies, and groups (Cichowski, 2007; Sweet & Brunell, 2004)), 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 absent public enforcement (Hodges, 2014; Warren, 2011).

Most existing studies focus on how the forces of adversarial legalism are constrained by divergent bureaucratic traditions and legal cultures on the national level. Yet, for many of the same reasons highlighted in these studies, we should also expect to find political resistance to adversarial legalism within the EU policymaking process. To be sure, in terms of institutional design, the European Union does have a number of features that could be seen as encouraging adversarial legalism and private litigation more generally (Van Waarden, 2009, pp. 209-210). These include supranational executive bodies with limited direct implementation capacity (Kelemen, 2011), a system of policymaking and implementation that is fragmented vertically and horizontally (Kelemen, 2008), and strong courts with a history of establishing new rights (Conant, 2006; Kelemen, 2003; Sweet & Brunell, 2004). To lock-in European policies and prevent bureaucratic and political drift in a fragmented political system, EU legislators may wish to write detailed, justiciable provisions into policy mandates that can be activated by private parties (Kelemen, 2011, p. 25; McCubbins, Noll, & Weingast, 1987; McNollgast, 1999). Lacking direct implementation power in most policy areas, and facing member states that are sometimes resistant to EU mandates, the European Commission in particular has an interest in leveraging the self-interest of private actors as an "alternative to bureaucratic power," and mandating procedural changes that incentivize the private enforcement of public law (Farhang, 2010, p. 22). But while such forces are no doubt formidable, they are counterbalanced by other institutional actors and stakeholders that prefer

bureaucratic modes of governance and oppose the instrumentalization of private litigation as a tool of policy enforcement.

The first and most important countervailing factor 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 of the European Union, have the power to amend and veto most European secondary legislation (Tsebelis & Garrett, 2000). As a representative body of national governments, the European Council prefers bureaucratic modes of implementation that are more in line with national traditions (Buxbaum, 2005) and which preserve subsidiarity in national court procedure (Joerges, 2004; Lazer & Mayer-Schoenberger, 2001). Compared to the European Commission and Parliament, the Council should therefore be more opposed to 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 independently 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 law, but have the potential to unbalance carefully calibrated systems of national private law and undermine executive control over implementation (Burbank, Farhang, & Kritzer, 2013; Joerges, 2004; Kagan, 2007).

A second factor relates to the perceived economic costs of entrepreneurial litigation stemming from the U.S. experience. Even if members of the Commission or Parliament, facing intransigent member states, have a rational incentive to empower decentralized private litigants to bolster implementation, this interest is moderated by the wide perception within Europe that private enforcement represents an ineffective and economically costly method of enforcing public regulatory rules. Actively cultivated by U.S. law professors and business organizations since the 1980's (J. C. 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 supranational efforts to remove barriers to private litigation or establish group litigation rights, often reference the economic costs of litigiousness in the United States (Hodges & Voet, 2018; Nagy, 2019). These concerns are then echoed by some member state governments. 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 political dynamics 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 (2019) 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 prominent role played by member state governments in the European Union's legislative process and the negative feedback effects of U.S. adversarial legalism, we should expect EU secondary legislation to not push regulatory implementation systems too far toward the bottom right box. European mandates are more likely to rely on "bureaucratic legalism," the formal and hierarchical regulatory style found in the top right box of Table 1 since this system is more aligned with the preferences of member state governments and the broader business community. 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, 2019, 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 (fire alarms) or seeking compensation for regulatory victims following public action (restitution). However, in contrast to adversarial legalism, such private actions do not play a central enforcement or deterrence role and therefore 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 test these theoretical expectations through cases studies of competition and securities regulation, two areas where regulatory policy is subject to extensive EU secondary legislation. In each case, I analyze the regulatory implementation structure established in EU law, focusing on such factors as the role of national bureaucracies and courts, the type of sanctions employed, and whether the legislation establishes new rights of private actions. For each case, I also analyze the political process leading up to the enactment of key legislation, identifying the expressed preferences of different institutional actors and stakeholders as well as the evolution of legislation from proposal formulation to enactment. In the case of competition, I additionally examine the empirical pattern of public enforcement and private litigation. My main concern is not whether private litigation is increasing, since we would expect to such developments in both adversarial and bureaucratic legal systems in response to economic liberalization and globalization. Rather, following Kagan (2019), my interest is whether EU mandates reinforce implementation through centralized bureaucracies or fosters alternative litigant-based systems of enforcement. Insofar as I observe a significant number of private cases that are launched completely independently from regulators, this would be consistent with the development of adversarial legalism since it would suggest private litigation is playing an independent deterrence function. However, if private litigation mostly serves the role of providing compensation following public determinations this would be more in line with bureaucratic legalism since it does not challenge the central role of bureaucrats in enforcement.

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 more horizontal, litigation-based implementation systems 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 hierarchically organized systems of bureaucratic implementation.

4.0 **Legalism without Adversarialism in European Securities Regulation**

Since the 1990's, the European Union has significantly expanded the corpus of supranational rules governing financial markets. Across nearly every aspect of financial services 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, inflexible and coercive 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).

Some scholars have viewed the Europeanization of financial services regulation as an impetus for adversarial litigation and private enforcement regimes. Given the limited implementation capacity of supranational actors in this policy arena, it was predicted that EU legislators would empower private litigants to independently enforce EU securities rules (Grace, 2005; Hertig & Lee, 2003; Kelemen, 2011; Kelemen & Sibbitt, 2004). However, contrary to these expectations, European securities re-regulation has generally *not* established new rights of private action or encouraged the private enforcement of EU mandates. While EU legislation has advanced the interests of shareholders and investors, increasing financial disclosure requirements and providing greater legal protection and certainty to investors (Cioffi, 2009; Cioffi & Höpner, 2006), with limited exceptions, it has not directly expanded private liability, or the rights of private investors to enforce public rules against traders or corporate directors (Cherednychenko, 2020; Marjosola, 2014; Moloney, 2012; Warren, 2011). This stands in stark contrast to the United States, where the foundational federal 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 recovering 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 (MiFID II), have instead primarily worked within an "administrative paradigm" (Marjosola, 2014) that seeks to protect investors by strengthening *public* regulatory capacities. Although the specific details differ across policy areas, most EU securities legislation establishes common rules aimed at goals such as investor protection,

market integration and financial stability (Moloney, 2014). To implement these common rules, member states are required to establish administrative agencies armed with extensive monitoring and enforcement authority (Scholten & Ottow, 2014). Since the 2008 financial crisis, the architecture of these public supervisory systems has become more hierarchically organized, with member states now required to follow detailed implementation and enforcement guides, which are developed through European supranational agencies such as ESMA (Moloney, 2011, 2014; Posner & Véron, 2010; Quaglia, 2010). While in principle, it remains possible for courts to interpret EU mandates in ways that confer private rights and remedies, given the "'public law' grammar" used in the most important EU financial services regulations, the ECJ as well as national courts have not derived extensive private enforcement rights from EU legislation (Cherednychenko, 2021, p. 1370).

Consider, for instance, the body of EU legislation that regulates markets in financial instruments (MiFID I, MiFID II and MiFIR). The legislation relies entirely on systems of public administrative enforcement to implement a wide range of detailed regulatory mandates covering everything from investor protection to OTC derivatives and commodities (Cherednychenko, 2020, 2021; Moloney, 2014). To enforce these rules, member states must establish public regulatory bodies with the power to assess administrative sanctions, including pecuniary penalties. Moreover, when developing enforcement guidelines, national agencies must follow detailed and continually evolving supervisory and enforcement rules and best practices developed by the European Securities and Markets Authority. Yet, even as EU legislation significantly expands public regulatory capacities, and creates more hierarchically-coordinated systems of regulation, the legislation does not creation private rights of action or explicitly expand civil liability.

The European Commission, in developing the MiFID II Directive, did initially consider measures that would make it easier for individual or groups of investors to initiate legal action against both investors and agencies under the EU securities statutes. In its review

of MiFID in 2010, the Commission suggested creating a "principle of civil liability" as a way to help "ensur[e] an equal level of investor protection in the EU." (Commission Green Paper 2011). Internal Market Commissioner Michel Barnier suggested that the EU should go even further, arguing that investors should be able to "take agencies to court when there has been negligence or violation of applicable rules" (ESMA, 2011). However, the Commission dropped the idea after finding that most member states and organized business associations opposed it (Cherednychenko, 2019, p. 17; 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. As one prominent law firm noted during the review, there was widespread concern that such a principle could "produce serious adverse consequences for investment firms," and "destabilise EU markets by encouraging vexatious claims" (Overy, 2011)

During legislative negotiations, the European Parliament also sought to introduce a more modest civil liability provision that would hold firm management boards liable for violations of MiFID II or MiFIR requirements (Moloney, 2014, p. 414). Yet this proposal was also rejected due to strong industry and member state opposition (Ibid). Notably, while litigation-based compensation mechanisms were rejected, the Parliament did succeed in adding a requirement for member states to establish administratively managed restitution mechanisms, administered through public bureaucracies (Parliament, 2012; Wallinga, 2019, pp. 526-527). In this way, an area such as restitution, which is traditionally covered by private law, has been incorporated into a public regulatory function as a result of EU legislation.

A similar rejection of judicial enforcement devices in favor of hierarchically organized systems of public administrative enforcement can be observed across most other areas of EU financial services regulation. For instance, the Transparency Directive, the Market Abuse Regulation, the Securitisation Regulation, Unfair Commercial Practices Directive, and the General Product Safety Directive (GPSD), each focus entirely on strengthening public

regulatory bodies, leaving it to courts to determine whether there are any implications for private law (Cherednychenko, 2020). Although there is robust debate about the long-term effect of EU re-regulation on private law regimes, in no area of financial services regulation, has the EU required member states to incentivize private damages actions or to remove procedural barriers to civil litigation (Cherednychenko, 2021; Della Negra, 2020; Wallinga, 2019). Close analysts of these legislative developments consistently conclude that the public law focus of EU harmonization efforts—and the general silence on private enforcement—stems from the combination of member state resistance to the EU harmonization of private law and strong industry opposition to any measure seen as encouraging litigation (Andenas & Chiu, 2013, p. 223; Moloney, 2012; Wallinga, 2019, pp. 518-519).

When EU law does reference civil liability, the aim is often to limit adversarial legalism. For instance, in a number of different areas, EU mandates require member states to create administratively managed alternative dispute resolution devices for certain categories of consumer disputes in financial services as a way to reduce private litigation and judicial enforcement (Cherednychenko, 2020, p. 9; Hans-Wolfgang Micklitz, 2015, p. 508) In other areas, EU legislation explicitly limits civil liability. For instance, the EU Market Infrastructure Regulation, which aims at increasing the stability and transparency of OTC derivatives markets through strengthened public supervision, explicitly states that the rule should not be construed to establish any private enforcement or compensation right (Della Negra, 2020). In the occasional instance where EU legislation does explicitly confer private rights of action, it is left to member states to decide how such rights are realized. For instance, in the 2013 Credit Ratings Agency Directive (CRA III), an investor or issuer may claim damages from credit rating agencies where they infringe certain requirements; however, the way such liability is structured and the procedural rules regulating litigation are left entirely up to member states and their existing systems of private law (Moloney, 2014, p. 677).[ii]

5.0 **Legalism without Adversarialism in European Competition Regulation**

Competition policy represents another case where Europeanization has contributed to the legalization of policy at the national level. Since the 1980's, flexible and discretionary systems that predominated in the 1960's and 1970's have been gradually replaced with systems that are more "coercive, punitive, and juridical" (Kelemen, 2011, p. 174) (Buch-Hansen & Wigger, 2010; Gerber, 1998). This transformation has been driven by top-down pressure from both the European Court and European Commission. ECJ jurisprudence has established the principle of the supremacy and direct effect of EU competition law (Waarden & Drahos, 2002, p. 924) and that individuals have a right to pursue compensation through national courts when they are harmed by breaches of EU competition law (Komninos, 2002). The European Commission, in turn, has contributed to judicialization by enacting secondary legislation that promotes decentralized enforcement through national authorities and national courts (Riley, 2003; Wesseling, 1997).

These developments have been interpreted by a number of scholars as facilitating adversarial legalism and, more broadly, the Americanization of European law. Wigger, for instance, has argued that the reforms of the early 2000's were acting as "a stepping-stone in a much broader process of enhanced convergence towards the US model of private enforcement (104)." Kelemen (2011) has similarly concluded that in the competition field administrative enforcement systems were being gradually replaced with 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).

At first glance, competition policy seems to be a case in line with the Euro-legalism thesis. Since the 1980's, the European Commission has sought to promote the independent enforcement of competition rules through national courts, through a series of cooperation agreements and secondary legislation (Ehlermann, 1996). Moreover, the EU has now enacted legislation to facilitate increased private damages actions in the competition field. At the same

time, efforts to instantiate a strong private enforcement regime have faced consistent opposition from member states concerned about how private litigation would affect public enforcement and legal procedural subsidiarity as well as business groups worried about the high costs of adversarial litigation. Facing this resistance, the Commission has developed narrow private compensation mechanisms that eschew the American model and relied primarily on the harmonization of public administration systems to secure implementation. These political dynamics can be observed through close analyses of the legislative processes leading to the enactment of competition law reforms in 2002 and 2014.

5.1 Competition Law Modernization

In the late 1990's, the European Union began to consider an institutional overhaul of competition policy that would 'modernize' both the procedural and substantive rules regulating competition enforcement. One of the key motivations for procedural reform was to address the Commission's capacity restraints, which had resulted in a backlog of cases and underenforcement in key areas (Ehlermann, 1996; Gerber, 2007). Regulation 1/2003 formally decentralized the enforcement of EU competition law, establishing a dual enforcement system, that allowed national competition authorities to enforce EC competition rules in parallel to the European Commission. (Gerber, 2007; Wilks, 2005). In cases involving interstate trade, national regulators would now be 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). The reform significantly expanded the number of public agencies charged with enforcing EU competition rules, and contributed to a significant increase in the bureaucratic resources dedicated to enforcement. Following this reform, public enforcement actions, initiated by either the Commission or national regulators, increased by more than 800% (Wils, 2013, p. 296).

The European Commission initially hoped that the legislation would also encourage private litigants to independently enforce the law through national courts. Facing significant capacity limitations, the Commission had sought to increase the involvement of national courts in enforcement since the 1980's (Ehlermann, 1996; Wesseling, 1997). In its original reform proposal, the Commission expressed the goal of encouraging private competition litigation as a way to "more equitably" share the burden of enforcement with authorities and to "encourage complainants to turn to the national courts" (Commission, 1999, p. 13). This sentiment was echoed by the European Parliament which expressed support for strengthening the role of private complainants in the competition enforcement process and removing national obstacles to effective private enforcement through national courts (Parliament, 1999, p. 304/367).

However, the effort to promote private litigation gained limited traction, given political opposition to procedural reforms (Ehlermann & Atanasiu, 2001, p. xxxii). Even the general principle of private competition enforcement was attacked by some national authorities as overly "influenced by U.S. antitrust law" and inconsistent with European conceptions of civil justice (Buxbaum: 16-17). As former Commissioner of Competition Karel Van Miert, who was charged with drafting the reform, explained, the possibility of more extensive harmonization of national court procedure or private rights of action was considered at the competition directorate only to be ultimately abandoned due to concerns that they would prove "politically counter-productive" (Ehlermann & Atanasiu, 2001, p. 25). Consequently, the Commission relied instead on "soft means" to encourage private damages actions: removing the Commission's monopoly on enforcement and promoting the involvement of national courts through cooperation agreements and soft law (Ibid).

The reform legislation finally enacted in 2003 reflects this political calculus (Council, 2003). The legislation includes vague language about the importance of national courts in competition law implementation, but most of the enforceable provisions focus on facilitating

implementation through public agencies and establishing stronger EU-wide systems to coordinate public enforcement. Notably, the reform contains no measures that directly encourage private litigation or intervene with national court procedure. As Rizzuto notes, "The Regulation and the accompanying Notices essentially confirm the traditional position that actions are to be governed by national procedural rules subject to their compliance with general principles of Community law" (2009, p. 34). Rather than adversarial legalism, competition modernization encourages 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" through public agencies (Kagan, 2019, p. 11).

5.2 Private Damages Actions

During the early 2000's, the European Commission sought once again to bolster the role of private litigants in competition enforcement. The initial impetus was the ECJ's 2002 judgment in *Courage v Crehan* which established an explicit right for private parties harmed by violations of European competition law to receive compensation (Komninos, 2002). Following the 2002 ECJ ruling, the European Commission proposed legislation that would, for the first time, require member states to change certain aspects of their civil procedural rules in order to encourage the private enforcement of competition law. 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). Indeed, in its 2005 Green Paper, the Commission explicitly noted that it aimed to encourage standalone actions that "deal with cases which the public authorities will not deal with, in particular due to resource constraints and other prioritisation needs" (Commission, 2005). To bolster private enforcement, the Green paper suggests the introduction of a number of legal instruments that are drawn explicitly from American

adversarial legalism, including U.S.-style discovery rights, punitive damages, contingency fees, and class action devices (Parcu, Monti, & Botta, 2018, pp. 2-4).

However, the proposal was not well received by either member states or the business community (Hodges, 2014, p. 72). Stakeholder submissions to the Commission's 2005 public consultation make clear that many member states were concerned the proposal would undermine the effectiveness of public enforcement and the procedural subsidiarity of national courts.[iii] The Danish, Dutch, Finnish, French and Norwegian authorities, for instance, all expressed concerns about transforming civil torts into a deterrence device, which they viewed as a public function (Kortmann & Swaak, 2009, p. 341). The Dutch and Danish governments objected to making changes to just one area of national procedural law, without considering broader questions about how these reforms would unbalance existing civil legal procedures.[iv] Major industry associations, for their part, characterized the Commission's proposals as costly devices that would encourage a litigation culture out of step with European legal traditions.[v] Many rejected on principle the need to encourage the private enforcement of public law, with some associations even questioning the legality of the Commission's proposal.[vi]

After receiving this largely negative feedback, the European Commission altered its approach. In a 2007 speech, Competition Commissioner Kroes said she was "well aware of the concerns about importing a system which, in combination with other features, have led to excesses in non-European jurisdictions."[vii] She then reassured her audience that the Commission was "not in favour of introducing wholesale a system which would be alien to our European traditions and cultures, or which would encourage unmerited claims." In its revised 2009 White Paper, 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 new proposal excluded U.S.-inspired provisions such as multiple or punitive damages and pre-trial discovery of evidence.

Yet, even in its narrower form, many stakeholders still thought the legislation went too far in the direction of adversarial legalism. During the White Paper consultation, business associations continued to object to the risks of American-style entrepreneurial litigation, stressing "the need to provide safeguards against abusive unmeritorious litigation, in particular if claims are pursued collectively" (Commission, 2013). Member states also continued to express concerns that the legislation undermined established civil liability systems and risked importing elements of the 'Anglo-Saxon legal tradition.' The Dutch government, for instance, objected that the Commission's proposal "detracts from the internal cohesion of the national systems of law of civil procedure that are embedded in the national legal culture," while the French government attacked several measures as violating either the principle of subsidiarity or the independence of national jurisdictions.[viii] The German government and the *Bundeskartellampt*, issuing a joint statement, similarly argued that the Commission's proposal violated the "subsidiarity principle" and made clear that the German delegation would oppose measures that risked fostering the kind of litigation culture associated with the United States.[ix]

The final version of the directive, adopted in 2014 after nearly ten years of delay, largely accommodated these political concerns. The legislation requires member states to moderately ease access to evidence for private plaintiffs and make it easier to establish liability following public enforcement actions (Parcu et al., 2018, pp. 1-5). But notably, the directive does not require member states to establish any incentives to encourage private actions or remove any procedural barriers widely seen as preventing it. While the Commission had initially proposed creating a system of collective redress, this was removed from the legislation following opposition from business associations and member states during the consultation process (Commission, 2013). In some ways, the directive even constrains the role of private litigants, 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).

5.3 The Empirical Pattern of European Competition Enforcement

Although EU secondary legislation in the competition field does not explicitly encourage private litigation as an enforcement or deterrence device, 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, 2018). To assess whether EU competition rules have directly or indirectly encouraged a less hierarchically organized system of enforcement, in this next section, I analyze the pattern of public enforcement and private litigation in the aftermath of the 2002 and 2014 reforms, using publicly available enforcement data and litigation data that has been compiled by legal scholars. The pattern of enforcement and litigation in Europe is compared to the United States, since this represents the archetypical case of adversarial legalism. Since EU competition law is the area of EU policy where there has been the most extensive effort to promote private damages actions, analyzing developments in this area is helpful for evaluating the Eurolegalism thesis as a whole.

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 both playing an independent deterrence function

and independently shaping 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 public and private actions, 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.[x] Moreover, most of the European cases are business-to-business lawsuits seeking injunctive relief, often either to nullify a contract or as a defensive measure against another lawsuit. Only a fraction should be considered equivalent to enforcement actions, in the sense that they have an independent deterrence function 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).

To what extent has the pattern of public enforcement and private litigation changed since 2014, following the adoption of the EU's 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 damages actions compared to the number of public cartel decisions taken by national and European officials. The data suggests that since 2014 there has been an uptick in the number of private damages actions filed and that these cases are more likely to be successful. This is a significant shift in a short period of time and suggests that the Private

Damages Directive has led to more restitution. At the same time, there is little indication that these developments have undermined the authoritative position of regulatory bureaucracies or led the organization of competition enforcement to be less hierarchical, the central criterion of adversarialism (Burke & Barnes, 2017, p. 14; Kagan, 2019, p. 11). Not only are most enforcement actions still initiated by public regulators, but virtually all private compensation 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.

[Table 3 about here]

This pattern suggests that private enforcement is not yet shaping the rules and standards that guide the enforcement of the law. Moreover, the pattern contrasts sharply with the United States, where there are large numbers of private standalone actions and many of the most consequential and important cases "often precede, or else expand the scope of relief sought in, any overlapping government actions" (L. M. Alexander, Stutz, Moss, & Davis, 2021). In Europe, the implementation process continues to be hierarchically dominated by public officials who have official responsibility for fact finding and enforcement. Private litigation plays the more limited role of providing injunctive relief or compensation to harmed parties based on public enforcement.

6.0 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 that confirms certain aspects of Kelemen's predictions while casting doubt on others. I have concurred with his conclusion that European regulatory mandates have led national policy implementation to become more *legalistic* while challenging the contention that Europeanization is leading to the development of more *adversarial* enforcement process which substitute hierarchically organized systems of public enforcement for horizontally structured systems of public and private 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 litigation as an alternative to public enforcement. Most EU mandates enacted in these two sectors strengthen national administrative enforcement capacities and the hierarchical organization of enforcement. The small number of initiatives that explicitly encourage private actions reject the U.S. model. Moreover, the actual pattern of enforcement in the crucial case of competition policy suggests that public authorities on the European and national levels have retained their central, authoritative roles over the meaning and application of the law even after reforms have been enacted.

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 ECJ use EU regulatory mandates to expand civil liability (Wallinga, 2019), or if entrepreneurial litigators find creative ways around restrictive national rules of procedure (Coffee, 2018). To a limited extent, in some policy areas, European legislation has expanded civil liability and opportunities for private enforcement. By introducing new substantive requirements, and shaping broader discourse, Europeanization may also have more subtle but ultimately profound effects on private law regimes (Hans-W Micklitz, 2018). And it should be emphasized that 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 EU legislation does not explicitly require or encourage it.

However, as I have shown through a close examination of two crucial cases, the European Union itself is not systematically encouraging the development of adversarial legalism through secondary legislation. Rather than American-style adversarial legalism, the hierarchically accountable and bureaucratically dominated mode of regulatory enforcement consistently utilized in EU legislation 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 on the national level in limiting the growth of adversarial litigation in Europe (e.g. Bignami (Bignami, 2011; Cioffi, 2009; Kagan, 2007; Van Waarden, 2009). The explanation here has built on these insights by showing that the forces of resistance to adversarial legalism can be found at the EU-level as well. Central to this resistance has been member states' veto power through the Council, which has provided them with an institutionalized role through which they can moderate and subordinate openings for adversarial legalism as a way to protect the procedural autonomy of national courts and the centrality of bureaucratic modes of governance. I have also shown that the negative feedback effects of the US experience with adversarial litigation has contributed to this resistance, providing a strong argument for business groups and member states alike to resist proposals that would instrumentalize private litigation as a substitute for public enforcement.

My emphasis on the forces of resistance within the European Union lawmaking process is important because it suggests that the continuing expansion of the *acquis communautaire* will not necessarily undermine, and may even reinforce, hierarchically organized systems of bureaucratic implementation at the national level. Even if European integration wholly transforms national legal and bureaucratic systems, and a fully codified European area of justice crystallizes (Hartnell, 2002; Hans-W Micklitz, 2018), adversarial legalism may not follow; if it does, it will be a version that is much more restrained and narrowly circumscribed than the system 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-resourced interests, provides reason to doubt that adversarial legalism is likely to become a predominant 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 policy areas. 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 regulatory implementation will continue to vary across levels of government, policy areas, and countries, with bureaucratic legalism being one of several styles adopted.

Future scholars should investigate how the path dependencies of existing legal and bureaucratic systems, member states' role in the European policymaking process, and the negative feedback effects from U.S. entrepreneurial litigation have shaped 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 and which precludes the involvement of 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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[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] The 2003 Prospectus Directive and 2004 Transparency Directive also require member states to subject those responsible for issuer disclosure to national civil liability regimes. But tellingly, Moloney calls them "tentative steps" that are likely to have limited effects since they "do not engage with the range of potential plaintiffs, the nature of liability, causation, or the quantum of damages."

[iii] All of the consultation submissions can be found here https://ec.europa.eu/competition/antitrust/actionsdamages/documents.html.

[iv] See for instance the Dutch government's comments on the 2005 Green Paper. < https://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/netherlands_ministry_of_economic_affairs_nl.pdf>. See also the Danish government's contribution: < https://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/danish_government_en.pdf>.

[v] For instance, France Telecom characterized the Commission's proposal as excessive and interfering too much with member state legal systems. https://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/france_telecom.pdf>. See also the discussion in (Hodges, 2014, p. 73).

[vi] See especially the response from the German Chamber of Industry and Commerce. <https://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/dihk.pdf>.

[vii] Conference on collective redress for European consumers, Nov. 9, 2007; SPEECH/07/698. Accessible at < https://tinyurl.com/32dzjbnc>.

[viii] The Dutch authority's submission can be accessed at< https://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/nether_en.pdf>. The French government's response can be found at < https://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/france_fr.pdf>.

[ix] See the German delegation's submission to the White Paper consultation: https://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/bund_en.pdf.

[x] 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).

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 (2019, 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.