Regulation & Governance

Regulation & Governance (2024) 18, 53–72 doi:10.1111/rego.12524

Legalism without adversarialism?: Bureaucratic legalism and the politics of regulatory implementation in the European Union

Chase Foster

Munich School of Politics and Public Policy, Technical University of Munich, Munich, Germany

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 argue that the diffusion of adversarial legalism to Europe has faced significant political opposition in the EU policymaking process which has curtailed the use of private enforcement mandates in EU secondary legislation. European policymakers have relied more on administrative enforcement through public regulatory agencies, a mode of policy implementation 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. Drawing from institutionalist theory, I identify several factors that have encouraged the development of bureaucratic rather than adversarial styles of European legalism, especially member states' commitments to procedural subsidiarity, the negative feedback effects from the US experience with entrepreneurial litigation, and the stickiness of European legal and bureaucratic traditions.

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

1. 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, 2003, p. 9) 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

Correspondence: Chase Foster, Munich School of Politics and Public Policy, Technical University of Munich, Richard-Wagner-Straße 1, 80333 Munich, Germany. Email: chase.foster@tum.de

Accepted for publication 11 March 2023.

Waarden, 2009). While the growth of European secondary legislation might lead European regulators to "adopt American norms," Robert Kagan (1997) argued in the late 1990s, 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 clashing with national legal traditions, adversarial legalism also faces substantial political opposition on the European Union level. While supranational actors such as the European Commission are interested in empowering private litigants to independently enforce EU rules as way to bolster member state compliance, member states prefer bureaucracy-centered enforcement systems that protect the procedural autonomy of their national legal systems and give them some control over the implementation of EU law. 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 interfere with national legal procedures. This veto power is reinforced by the negative feedback effects generated by the US experience with litigation, which leads a variety of EU stakeholders to be skeptical of American enforcement methods. As a result of these political dynamics, I argue that EU lawmakers will be more likely to secure implementation through a mode of governance Kagan (2019) describes as "bureaucratic legalism": formalized but hierarchically structured systems of administrative enforcement. While elements of adversarial legalism may still be adopted in limited areas of the law, these will be narrowly circumscribed instruments that operate in the shadow of the legal structures of bureaucratic legalism.

To support my argument, I draw from institutionalist theories that emphasize how established legal, bureaucratic, and political institutions mediate regulatory diffusion processes in ways that limit convergence while producing new forms of divergence (Legrand, 1997; Radaelli, 2005; Teubner, 2001). One barrier to convergence stems from slow-moving and deeply entrenched legal cultures and political institutions (Damaska, 1986; Kagan, 2007), which can lead legal rules, principles and concepts developed in one jurisdiction to have entirely different meanings and effects when they are adopted in another jurisdiction (Legrand, 1997). A second constraint on convergence stems from political contestation, as a variety of actors seek to either prevent the importation of foreign legal devices or shape their form and function in ways that will better align with established interests, institutions, and values (Teubner, 2001).

I develop 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" policy fields for adversarial legalism to develop. I find that in great contrast to the United States (Farhang, 2010), European directives and regulations do not usually directly encourage or incentivize 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 damages action, aimed primarily at facilitating private compensation following public enforcement actions, and limited in practice by extensive safeguards (Hodges & Voet, 2018; Wils, 2017). The primary focus of EU legislation is aimed at strengthening public regulatory capacities: developing common rules across an increasing number of areas of regulation (Jabko, 2006; Moloney, 2014); delegating implementation of these rules to public regulators at the national level (Majone, 1997; Thatcher, 2002); and creating 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 damages actions through national courts, public enforcement remains predominant. While the private enforcement of public law is increasing in many European jurisdictions, most of this growth 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.

Analyzing the development of key legislation in financial services and competition policy, I find evidence that member state and business opposition to adversarial legalism helps explain these outcomes. Member states see

private enforcement as potentially undermining the effectiveness of public enforcement and the autonomy of established systems of national private law, while business opposition is rooted in the perceived costs of entrepreneurial litigation. In both the competition and securities sectors, the US experience with entrepreneurial litigation is invoked as a cautionary tale. Although member states and business groups have not always prevented the creation of private rights of action or the expansion of civil liability, they have successfully curtailed the scope or altered the form of such measures. European Commission proposals to significantly expand the independent enforcement role of private litigants have either been rejected or superseded by narrowly circumscribed systems of private damages actions that follow successful public enforcement decisions.

The article makes several contributions to current debates in comparative political economy, public administration, and European Union public policy. The first is empirical. Through case studies that combine qualitative analyses of legislative developments in two important policy areas with statistical comparisons of the pattern of public enforcement and private litigation in a crucial case, 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) and regulatory diffusion processes more generally (Pollitt et al., 2001; Radaelli, 2005). 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 that European integration will not necessarily foster adversarial legalism in the long-run. A range of factors will shape the private enforcement of public law, and private litigation will likely continue to play an important, complementary role to public agencies in European regulatory implementation systems. However, given the prominent role of member states in the EU policymaking process, and the negative feedback effects of the US experience with entrepreneurial litigation, American-style private enforcement systems, and especially group litigation, will continue to be politically resisted by key EU-level actors. This should encourage the development of more hierarchically structured systems of regulatory implementation and private restitution that are more in line with European legal traditions and political institutions.

2. 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 at least in part 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 theoretical and empirical reasons to doubt certain aspects of his predictions, especially the contention that EU mandates are systematically empowering and incentivizing private litigants to independently enforce public regulatory rules as well as the prediction that adversarial legalism has become a predominant mode of policy implementation in Europe.

To understand how American adversarial legalism might be limited by both established legal and bureaucratic traditions as well as the institutional design of the European Union it is helpful to consider institutionalist theories that emphasize how diffusion processes are mediated by difficult-to-change legal, bureaucratic, and political institutions (Damaska, 1986; Radaelli, 2005; Teubner, 2001). Legal regime theory recognizes that cross-jurisdictional policy and legal diffusion processes are now commonplace. However, a major finding from this literature is that the transfer of a legal concept, principle or practice from one jurisdiction to another (what some scholars refer to as "legal transplants") is unlikely to result in convergence, as is often predicted in the diffusion literature, but rather new forms of divergence (Teubner, 2001; Woll, 2023). This is on the one hand because foreign legal concepts, principles or practices must be embedded in established legal systems and political institutions, which leads them to have different meanings and effects in practice (Legrand, 1997). On the other hand, this is because the consideration of foreign devices invariably produces "frictions" (Woll, 2023) and "norm collisions" (Fischer-Lescano & Teubner, 2003), that result in political contestation of the imported measures. For this reason, Teubner (2001) has argued that transfer processes are better understood as "legal irritants" that prompt difficult-to-predict evolutionary dynamics that are deeply shaped by processes of translation into existing legal cultures as well as accommodation to political demands. "The result of such a complex and turbulent process," he explains "is rarely a convergence of the participating legal orders, rather the creation of new cleavages in the interrelation of operationally closed social discourses" (441).

We can expect that the diffusion of American legal concepts and practices such as "private attorneys general," or class action lawsuits will generate significant "frictions" and "collisions" with European legal cultures, political institutions and entrenched interests, which, in turn, foster political contestation and accommodation on both the national and European levels. One set of institutional factors pushing against adversarialism, which has been explored in several empirical studies, stems from 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 lawyers tend to be skeptical of legal devices such as class actions 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 a substitute for public enforcement (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). Thus, even if adopted formally, American-style enforcement devices will produce different effects when embedded in European legal systems and political institutions.

A second source of friction, which has not been thoroughly explored in the literature, relates to the organization of the EU's political institutions. 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 European legislation, which can be activated by private parties (Kelemen, 2011, p. 25; McCubbins et al., 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 United States, 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 incentivize 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 (Joerges, 2004; Kagan, 2007).

A second countervailing factor is the perceived economic costs of entrepreneurial litigation based on the US 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 is an ineffective and economically costly method of enforcing public regulatory rules. Actively cultivated by US law professors and business organizations since the 1980s (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; 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. "The negative side of American legalism is not hidden from European observers," Kagan observes. "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).

The combination of normative collisions with existing European legal and bureaucratic systems and political opposition by key decision-makers on the EU and national levels should limit the spread of adversarial legalism in Europe while also inspiring evolutionary processes that lead to new institutional developments. What kind of regulatory implementation system should develop instead in Europe? To answer this question, 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 substantive decisions and procedures are structured by, or expected to

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).

conform to, specific legal rules, rights and duties" (10). The second dimension is the organization of decision-making authority, defined by Kagan as the extent to which the decision-making process is hierarchically "dominated or controlled by an official who is relatively insulated from pressures from disputing parties or affected individuals and organizations" and "controls the process and the standards for decision" (10–12). Although most jurisdictions include elements of all four, Kagan argues that one type will often predominate in particular jurisdictions and/or policy areas (9).

Given the prominent role played by member state governments in the European Union's legislative process, the negative feedback effects of US adversarial legalism, and European bureaucratic and legal traditions, we should expect EU secondary legislation to push regulatory implementation systems only partially 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 European legal traditions, political institutions and established modes of governance as well the preferences of member state governments and the broader business community. Like adversarial legalism, bureaucratic legalism is governed through legal procedures that are detailed, 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 (i.e., fire alarms) or seeking compensation for regulatory victims following public action (i.e., restitution). Private actors may also invoke public regulatory law as either a "sword" or a "shield" in private law disputes, as has long been common practice in Germany, a paragon of bureaucratic legalism (Peyer, 2012; Rodger, 2014). 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. 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. I employ established "systematic process analysis" methods that are now widely used in policy studies (Hall, 2006; Kay & Baker, 2015). I first develop testable hypotheses that are based on theoretical propositions generated from established legal regime and legal diffusion theories. I then systematically evaluate my hypotheses using empirical evidence drawn from each case study, as well as against a plausible rival explanation. Finally, I assess the implications of my results for the characterization of EU policy implementation as a whole.

One part of the analysis is concerned with typological theory: assessing whether EU regulatory mandates and implementation practices are better characterized as adversarial or bureaucratic legalism. To make this assessment, I first 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 expands civil liability or establishes new rights of private action. If bureaucratic legalism is being encouraged, I expect legislation to rely mostly on implementation through public bureaucracies that are accountable to the European Commission and/or EU agencies, using centralized administrative processes rather than decentralized litigation. If adversarial legalism is being encouraged, I expect legislation to explicitly empower and incentivize the private enforcement of public law through courts by either creating explicit private enforcement rights, enhancing monetary damages, or reducing procedural barriers and costs to private litigation (see Farhang, 2010).

Since Europeanization may indirectly or unintentionally foster more adversarial implementation systems, I also examine the empirical pattern of public enforcement and private litigation in the competition field using partial private litigation data generated from two legal studies. In making this assessment, the key criterion is not whether private litigation rates are increasing in Europe, since this outcome would be consistent with both adversarial and bureaucratic legalism. As Kagan (2019) has noted, "adversarial legalism's importance cannot be measured by litigation or adjudication rates alone" (16). The relevant criterion is instead the role that private litigants

play in the broader enforcement architecture: whether "affected parties have considerable opportunity to make arguments and actually influence legal outcomes" (11) and whether private parties shape "the process and the standards for decision" (12). Insofar as I observe an increase in the number of successful stand-alone private lawsuits initiated by individuals and groups of individuals seeking novel remedies, this would be consistent with the development of adversarial legalism since it would suggest that private litigants are shaping the meaning and application of the law independently of public regulators. However, if private lawsuits mainly serve the role of providing individuals with compensation following public determinations this would be more in line with bureaucratic legalism. Although the periods examined are partial, the analysis still provides important insight about the organization of regulatory implementation in the wake of legislative reforms enacted between 1999 and 2014.

A second part of the analysis is concerned with identifying and evaluating causal mechanisms: assessing the political factors that have led the EU to eschew adversarial legalism and develop instead more hierarchically structured forms of policy implementation. I closely analyze the evolution of several key initiatives, both successful and unsuccessful, that have sought to encourage the private enforcement of public law. For each initiative, I identify the source of the proposal, the expressed preferences of different institutional actors and stakeholders, and the evolution of each proposal during the course of the legislative process. Tracing the legislative process over time allows me to precisely identify whether member states and business organizations have consistently opposed private enforcement initiatives proposed by the Commission, and to assess whether and how this opposition has shaped both the legislative process and legislative outcomes.

The case studies are based on close analyses of legislative documents, stakeholder consultations, newspapers articles, and interviews with decision-makers. In most cases, these documents were available online; however, in a few instances, I received them through a public records request. In addition to the primary document analysis, I also have canvassed the extensive secondary literature in law that exists in both areas. The time period examined is from 1999 to 2020, a period when the EU pursued major re-regulatory initiatives in each of these areas. Further information about the data sources used to develop the case studies, including summaries of select documents, are available in an Online Appendix.

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, 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 horizontally structured, litigation-based implementation systems would lead to only a modest shift in 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 suggest that adversarial legalism is not the most appropriate ideal type to characterize the juridification of European regulation.

4. Legalism without adversarialism in European securities regulation

Since the 1990s, 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). Moreover, much of the inspiration for these changes stemmed from US securities laws, which has long had an outsized influence on financial regulations around the world (Simmons, 2001).

Some scholars have viewed the Europeanization of financial services regulation as an impetus for adversarial litigation and the development of strong private enforcement regimes. Given the limited implementation capacity of supranational actors in this policy arena, it was predicted that EU legislators would explicitly empower and incentivize 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 directly expanded civil liability, or established new rights for private investors to enforce public rules against traders or corporate directors (Cherednychenko, 2020b; 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 significant monetary damages for violations of security rules (Cox et al., 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, EU legislators have created a more hierarchically organized public regulatory architecture. Member states are 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 Court of Justice of the EU (CJEU) as well as national courts have so far not derived extensive private enforcement rights from EU legislation (Cherednychenko, 2021, p. 1370).

4.1. Markets in financial instruments legislation

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, 2020b, 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 create private rights of action or explicitly expand civil liability. In certain respects, it limits private rights of action, by recharacterizing investor protection from being a private law question "enforced through private rights of actions, to being a function of public supervisory and enforcement action" (Moloney, 2014, p. 951).

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 companies 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 proposed more sweeping reform, arguing that investors should be able to "take agencies to court when there has been negligence or violation of applicable rules" (ESMA, 2011). These proposals were clearly inspired by the American system of financial regulation. However, the Commission dropped the idea after finding that most member states and organized business associations

opposed it (Cherednychenko, 2020a, p. 17; Moloney, 2012, p. 421). Of the 17 member states that expressed an opinion about expanding civil liability during the 2010 MiFID review, 12 expressed opposition and only two indicated unqualified support.[ii] As one member state argued, given the "differences in Member States' legal regimes, their customs and legal culture, which provide for different treatment, it would be impossible to set a common approach in this field."[iii] Business associations also came out against the proposal, arguing that an expansion of civil liability would likely lead to higher costs for businesses and consumers. One financial industry representative organization speculated that the Commission's proposal "could give rise to moral hazard, and destabilize EU markets, by encouraging vexatious claims of breaches where the market moves against professional clients' positions."[iv]

During legislative negotiations, the European Parliament 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 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 restitution mechanisms which are administered through public bureaucracies (Parliament, 2012; Wallinga, 2019, pp. 526–527). In this way, the EU adapted private restitution into a public administrative function, a structure more in line with European legal systems and political institutions.

4.2. Other areas of financial services regulation

A similar pattern can be seen in other areas of EU financial services regulation. Time and again, EU lawmakers have rejected private enforcement devices in favor of hierarchically organized systems of public administrative enforcement or restitution. For instance, the Transparency Directive, the Market Abuse Regulation, the Securitisation Regulation, Unfair Commercial Practices Directive, and the General Product Safety Directive, each focus exclusively on strengthening public regulatory bodies, leaving it to courts to determine whether there are any implications for private law (Cherednychenko, 2020b). 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 does EU law require member states to incentivize private damages actions or to remove procedural barriers to civil litigation (Cherednychenko, 2021; Della Negra, 2020; Wallinga, 2019). Close legal analyses of legislative developments in this field 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 explicitly reference civil liability, the aim is often to limit the development of adversarial legalism by directing liability concerns toward alternative non-litigation channels. 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 (Cherednychenko, 2020b, p. 9; 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).[v] Thus, even in the exceptional instance where private enforcement rights were adopted in a limited area of European law, the enforcement of these rules will still depend on national civil procedures which in most member states are inhospitable to party-driven processes.

All in all, the design of EU securities legislation suggests that European securities enforcement remains far apart from American adversarial legalism even after more than 30 years of intensive re-regulation at the European level. Member state and industry opposition have led the Commission to abandon or curtail new rights of private action while explicitly limiting civil liability in some cases. European legislators have instead relied primarily on hierarchically structured systems of bureaucratic legalism to secure regulatory compliance.

5. Legalism without adversarialism in European competition regulation

Competition policy is another "crucial case" that can be used to assess whether European legislation relies primarily on bureaucratic or adversarial modes of legalism. Since the 1980s, flexible and discretionary systems that predominated in the 1960s and 1970s have been gradually replaced with systems that are more "coercive, punitive, and juridical" (Kelemen, 2011, p. 174). This transformation has been driven by top-down pressure from both the European Court and European Commission. CJEU 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 enacted secondary legislation that promotes decentralized enforcement through national authorities and national courts (Riley, 2003; Wesseling, 1997).

But if the European Commission and Court have sometimes sought to encourage the private enforcement of public law, member states and industry associations have also consistently opposed adversarial legal measures. Political contestation has led the Commission to rely primarily on the harmonization of public administration systems to secure implementation while developing narrower private enforcement systems that eschew the American model. These political dynamics can be observed through close analyses of the political debate surrounding reforms pursued from 1999 to 2014.

5.1. Competition law modernization

In the late 1990s, 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, which 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, the public enforcement of EU competition rules, 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 lead to a significant increase in private competition law enforcement through national courts. Facing significant capacity limitations, the Commission had sought to increase the involvement of national courts in enforcement since the 1980s (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" (European 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 increase the enforcement role of private litigants gained limited traction, given member states' opposition to procedural reforms (Ehlermann & Atanasiu, 2001, p. xxxii). While most member states in principle supported the involvement of national courts, few were willing to countenance civil procedural reforms

that would facilitate robust systems of private enforcement. In a 1999 survey of member state support for reform, the Commission found that "[n]one of the Member States" supported the harmonization of national procedural rules and several expressly opposed it (Commission, 1999). Even the general principle of private competition enforcement was attacked by some national authorities as overly "influenced by US antitrust law" and inconsistent with European conceptions of civil justice (Buxbaum: 16–17). Industry was also opposed, with one association predicting that decentralized enforcement through the courts would encourage "frivolous or vexatious litigation, aiming at frustrating legitimate business plans" (EU Commission, 2000). 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). In the face of this opposition, 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" (Rizzuto, 2009, p. 34). Rather than adversarial legalism, the EU's competition modernization reform encouraged an enforcement approach closer to Weber's bureaucratic ideal type, emphasizing administrative enforcement through public agencies.

5.2. Antitrust damages directive

During the early 2000s, the European Commission sought once again to bolster the role of private litigants in competition enforcement by facilitating private damages actions. The initial impetus was the European Court's 2002 judgment in Courage v Crehan which established an explicit right for private parties harmed by violations of European competition law to receive monetary compensation (Komninos, 2002). Following the ruling, the European Commission proposed legislation that would, for the first time, require member states to change certain aspects of their civil procedural rules, which were seen as discouraging private damages actions. 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 prioritization needs" (European 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 US-style discovery rights, punitive damages, contingency fees, and class action devices (Parcu et al., 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 as well as the procedural subsidiarity of national courts. 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 additionally 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.[vi] 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.[vii] 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.[viii]

After receiving this largely negative feedback, the European Commission altered its approach. In a 2007 speech, Competition Commissioner Kroes acknowledged 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."[ix] She then reassured her audience that the Commission was "not in favor 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" (European Commission, 2008). The new proposal excluded US-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 objected 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" (European Commission, 2013). Member states also expressed 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.[x] 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.[xi]

The final version of the Antitrust Damages Directive, adopted in 2014 after nearly 10 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 (European 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 more party-driven enforcement patterns, 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 the development of a more horizontally structured and party-driven enforcement system, in this next section, I analyze the pattern of public enforcement and private litigation in the aftermath of the 2002 and 2014 competition law reforms. Where the data is available, the pattern of enforcement and litigation in Europe is compared to the United States, the archetypical case of adversarial legalism. More information on coding decisions as well as the data sources used to conduct this analysis are available in the Online Appendix.

Table 2 reports the total number of public enforcement actions and private antitrust cases initiated in the European Union and United States from 2005 to 2010. In the United States, private litigation is the predominant mode through which the law is enforced. Private antitrust litigation constitutes 93% of federal district case filings. Research has shown that many of these cases are not only economically significant, leading to billions of dollars

TABLE 2 Public and Private Antitrust Enforcement, United States and Europe, 2005–2010.

	United States			European Union		
	Public cases filed (civil & criminal)	Private cases filed	Percent public	Public cases (envisaged decisions)	Private cases filed (estimate)	Percent public
2005	75	865	8%	78	62	56%
2006	43	1150	4%	77	65	54%
2007	69	1029	6%	85	65	57%
2008	63	1062	6%	72	59	55%
2009	54	646	8%	81	61	57%
2010	70	537	12%	103	46	69%
Average	62	882	7%	83	60	58%

Source: Rodger (2014), European Competition Network, US Federal Courts. Calculations by the author.

TABLE 3 EU Cartel Enforcement, Public and Private, 2014–2018.

	Commission cartel decisions	European Union		
		National cartel decisions	Successful cartel damages actions (estimate)	Percent public
2014	10	68	9	90%
2015	5	65	17	80%
2016	6	53	16	79%
2017	7	44	18	74%
2018	4	50	41	57%
Average	6	56	20	76%

Source: Laborde (2019), European Commission, European Competition Network. Calculations by the author.

in judgments each year (Davis & Kohles, 2021), but also that private litigation shapes the rules and standards adopted in antitrust case law (Crane, 2019). Additionally, many private antitrust cases are initiated independently of government action by individuals or groups of plaintiffs claiming to pursue a public rather than merely private interest (Davis & Lande, 2013).

In Europe, by contrast, public enforcement plays the predominant role. In terms of total public and private actions, public enforcement constituted 58% of cases. However, because nearly all "envisaged decisions" result in a sanction, and only one third of private cases succeed, the ratio of successful public to private actions is closer to 4:1. 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 small fraction of cases was equivalent to "private attorneys general" in the United States. Just 17% of cases involved monetary damages, and most of these were follow-on actions that relied on public judgments (Rodger, 2014, p. 154). Only 0.4% of cases—a total of just five cases in 27 countries—involved groups of consumers (i.e., class actions) (Rodger, 2014, p. 162). This contrasts with the United States, where significant numbers of private antitrust lawsuits involve groups of consumers seeking monetary redress. For instance, one study found that from 2009 to 2019, 1217 consolidated "class action" antitrust lawsuits were filed, which resulted in $24.16B in settlements (Davis & Kohles, 2021).

To what extent has the pattern of public enforcement and private litigation changed since 2014, following the adoption of the EU's Antitrust Damages 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 shows that since 2014 private filings have increased and these cases have been more likely to be successful. Although European monetary awards are still a small fraction of American ones, their recent growth suggests that the EU Directive has been impactful.[xii]

But if EU initiatives have led to institutional change, there is little indication that they 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. According to Laborde (2019), 98% of private cartel damages actions finalized from 1998 to 2019 followed public enforcement actions—either from the European Commission (40%) or national regulators (57%). Furthermore, only 2.5% of cases—a total of six over more than two decades—were brought by end consumers. The pattern contrasts sharply with the United States, where there are not only large numbers of class action lawsuits pursued by groups of consumers but also many of the most consequential and important cases "often precede, or else expand the scope of relief sought in, any overlapping government actions" (Alexander et al., 2021).

While EU legislation has undoubtedly altered the architecture of enforcement in important ways and created new mechanisms for consumer restitution, it has done so in ways that are distinct from the adversarial legal system in the United States. The design of EU legislation and the pattern of enforcement suggests that the implementation process continues to be hierarchically dominated by public officials who have official responsibility for fact finding and enforcement. While private damages actions are increasing, most are based on public enforcement actions and therefore are complementary to bureaucratic legalism.

6. Discussion and conclusion

Since the 1990s, 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 Europeanization has led policy implementation to become more legalistic while challenging the contention that EU legislation is encouraging the development of adversarial enforcement processes thatare characterized by policy implementation through 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 heavily relied on adversarial legalism as a mode of governance. Most EU mandates enacted in these two sectors mandate public administrative enforcement through national regulatory agencies, which are hierarchically accountable to EU actors. The small number of initiatives that explicitly encourage private actions reject the US 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 in the wake of significant reforms.

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 CJEU 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. 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 describes as bureaucratic legalism. Whereas American antitrust and securities enforcement occurs through decentralized public and private litigation and is characterized by substantial numbers of individual and class action 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 national bureaucratic and legal inertia in limiting the growth of adversarial litigation in Europe and the convergence of regulatory procedure with the United States (Bignami, 2011; Cioffi, 2009; Kagan, 2007; Van Waarden, 2009). The explanation here has built on this literature by showing that barriers to adversarial legalism exist on the EU-level as well. The central source of political contestation are member states, who have used their institutionalized veto power through the Council to 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. Organized business interests have been another source of opposition, often invoking the US experience with entrepreneurial litigation as a cautionary tale best avoided.

My emphasis on political opposition to adversarial legalism within the European Union lawmaking process is important because it suggests that the continuing expansion of the acquis communautaire may not lead to horizontally structured and party-driven systems of policy implementation and dispute resolution. Even if European integration wholly transforms national legal and bureaucratic systems, and a fully codified European area of justice crystallizes (Hartnell, 2002; Micklitz, 2018), adversarial legalism may not follow; if it does, it will be a version embedded in European legal cultures and political institutions, and therefore more restrained and narrowly circumscribed than the version 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. Arguably, a more likely outcome would be the further development of hierarchically structured systems of collective redress, which are more compatible with established bureaucratic and legal institutions (Hodges & Voet, 2018).

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 organized through looser, nonhierarchical supranational regulatory networks, a mode of governance better characterized as "cooperative legalism" (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.

"Legal and political traditions," Kagan (2019) notes in the second edition of his book *Adversarial Legalism*, "like individuals, are not easily changed" (6). Despite recent reform attempts to limit litigation and discourage class action lawsuits, he concludes that adversarial legalism is as strong as ever in the United States. In this study, I have shown how several decades of efforts by European policymakers to improve regulatory implementation and create new mechanisms for private restitution have also been shaped by significant path dependencies. While the Commission has succeeded in expanding bureaucratic regulatory capacity and bolstering public enforcement of EU law, its initiatives to empower private litigants or reform national civil procedures have repeatedly been blocked or subordinated by institutional actors who view adversarial legalism as out of step with European institutions or economic interests. Even where reform has succeeded, it has been embedded in national legal systems that are in most cases inhospitable to party-driven processes. While regulatory diffusion processes do generate significant pressure for regulatory reform, the evolution of regulatory institutions

ultimately remains a political choice, albeit one that is deeply structured by established legal systems and modes of governance.

ACKNOWLEDGMENTS

For valuable suggestions on an earlier version of this manuscript, the author thanks Peter Hall, Mattia Guidi, David Levi-Faur, Troels Krarup, Zlatina Georgieva, three anonymous reviewers, and participants in the ECPR's Panel on Varieties of Regulatory Capitalism held at Nottingham University in June 2017. Open Access funding enabled and organized by Projekt DEAL.

Funding Information

The author received no financial support for the research, authorship, and/or publication of this article.

Data availability statement

The data that support the findings of this study are available from the corresponding author upon reasonable request.

Endnotes

[i] This article is focused on the private enforcement of public law against market actors as defined by Farhang (2010). I do not analyze private lawsuits against member states under EU law (Börzel, 2006) or litigation primarily based on private law (Micklitz, 2018).

[ii] This is based on an analysis of all member state response to the Review of the Markets in Financial Instruments Directive (MiFID). The full text of member state responses to the European Commission's question about civil liability is included in the Online Appendix.

[iii] See "Member state submission 23" in the Online Appendix.

[iv] See "Business organization submission 1" in the Online Appendix.

[v] 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 (2014) calls these "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" (950).

[vi] 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.

[vii] 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).

[viii] 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.

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

[x] 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.

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

[xii] In 2018, private antitrust damages actions in Europe generated €32 M in awards (Laborde, 2019), compared to $5.3B in the United States (Davis & Kohles, 2021).

References

Alexander, L. M., Stutz, R., Moss, D. L., & Davis, J. P. (2021). The critical role of private antitrust enforcement in the United States commentary on: 2020 antitrust annual report: Class Action Filings in Federal Court.

Andenas, M., & Chiu, I. H. (2013). *The foundations and future of financial regulation: Governance for responsibility*. Routledge.

Bignami, F. (2011). Cooperative legalism and the non-Americanization of European regulatory styles: The case of data privacy. *The American Journal of Comparative Law*, 59(2), 411–461.

Bignami, F., & Kelemen, R. D. (2018). Kagan's Atlantic crossing: Adversarial legalism, Eurolegalism, and cooperative legalism. In J. Barnes & T. F. Burke (Eds.), *Varieties of legal order: The politics of adversarial and bureaucratic legalism*. Routledge.

Börzel, T. A. (2006). Participation through law enforcement: The case of the European Union. *Comparative Political Studies*, 39(1), 128–152.

Burke, T. F. (2002). *Lawyers, lawsuits, and legal rights: The Battle over litigation in American society*. University of California Press.

Burke, T. F., & Barnes, J. (2017). Introduction: What we talk about when we talk about law. In *Varieties of legal order* (pp. 1–19). Routledge.

Büthe, T., & Mattli, W. (2013). *The new global rulers: The privatization of regulation in the world economy*. Princeton University Press.

Buxbaum, H. L. (2005). German legal culture and the globalization of competition law: A historical perspective on the expansion of private antitrust enforcement. *Berkeley Journal of International Law*, 23, 474.

Cherednychenko, O. O. (2020a). Rediscovering the public/private divide in EU private law. *European Law Journal*, 26(1-2), 27–47.

Cherednychenko, O. O. (2020b). Financial regulation and civil liability in European law: Towards a more coordinated approach? In *Financial regulation and civil liability in European law*. Edward Elgar Publishing.

Cherednychenko, O. O. (2021). Islands and the ocean: Three models of the relationship between EU market regulation and national private law. *The Modern Law Review*, 84(6), 1294–1329.

Cichowski, R. A. (2007). *The European court and civil society: Litigation, mobilization and governance*. Cambridge University Press.

Cioffi, J. W. (2009). Adversarialism versus legalism: Juridification and litigation in corporate governance reform. *Regulation & Governance*, 3(3), 235–258.

Coffee, J. C. (1987). The regulation of entrepreneurial litigation: Balancing fairness and efficiency in the large class action. *The University of Chicago Law Review*, 54(3), 877–937.

Coffee, J. C. (2018). The globalization of entrepreneurial litigation: Law, culture, and incentives. In *Research handbook on representative shareholder litigation*. Edward Elgar Publishing.

Conant, L. (2006). Individuals, courts, and the development of European social rights. *Comparative Political Studies*, 39(1), 76–100.

Council, E. (2003). *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*.

Cox, J. D., Thomas, R. S., & Kiku, D. (2004). Public and private enforcement of the securities laws: Have things changed since Enron. *Notre Dame Law Review*, 80, 893.

Crane, D. A. (2019). Toward a realistic comparative assessment of private antitrust enforcement. In D. Gerard & I. Lianos (Eds.), *Reconciling efficiency and equity: A global challenge for competition policy* (pp. 341–354). Cambridge University Press.

Damaska, M. R. (1986). *The faces of justice and state authority: A comparative approach to the legal process*. Yale University Press.

Davis, J. P., & Kohles, R. (2021). 2020 Antitrust Annual Report: Class Action Filings in Federal Court. *Available at SSRN*.

Davis, J. P., & Lande, R. H. (2013). Defying conventional wisdom: The case for private antitrust enforcement. *Georgia Law Review*, 48, 1.

Della Negra, F. (2020). The regulatory design and goals of civil liability in EU securities regulation after the global financial crisis: Trends and perspectives. *Financial Regulation and Civil Liability in European Law*, 160–180.

Eckstein, H. (1975). Case studies and theory in political science. In F. Greenstein & N. Polsby (Eds.), *Handbook of political science* (Vol. 7, pp. 79–138). Addison-Wesley.

Egeberg, M., & Trondal, J. (2009). National agencies in the European administrative space: Government driven, commission driven or networked? *Public Administration*, 87(4), 779–790.

Ehlermann, C.-D. (1996). Implementation of EC competition law by national anti-trust authorities. *European Competition Law Review*, 17, 88–95.

Ehlermann, C.-D., & Atanasiu, I. (2001). *European Competition Law Annual: Effective private enforcement of EC Antitrust Law*.

ESMA. (2011). SPEECH/11/514. Michel Barnier. "The new European Securities and Markets Authority: helping enhance the resilience of financial markets." [Press release]. https://www.esma.europa.eu/document/new-european-supervisory-markets-authority-helping-enhance-resilience-financial-markets-0

European Commission. (1999). *White paper on modernisation of the rules implementing Articles 85 and 86 of the EC treaty*. https://europa.eu/documents/comm/white_papers/pdf/com99_101_en.pdf

European Commission. (2000). *White paper on reform of regulation 17: Summary of observations*.

European Commission. (2005). *Green paper - Damages actions for breach of the EC antitrust rules {SEC(2005) 1732}/*COM/2005/0672 final */*. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005DC0672

European Commission. (2008). *White paper on damages actions for breach of the EC antitrust rules*. https://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf
European Commission. (2013). *Commission staff working document executive summary of the impact assessment damages actions for breach of the EU antitrust rules*. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013SC0204&from=EN
European Parliament. (1999). *European Parliament resolution on the Commission White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty*. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51999IP0069(01)&qid=1460393767972&from=EN
European Parliament. (2012). *Report on the proposal for a directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council* (*recast*). https://www.europarl.europa.eu/doceo/document/A-7-2012-0306_EN.html#title1
Farhang, S. (2010). *The litigation state: Public regulation and private lawsuits in the US*. Princeton University Press.
Fischer-Lescano, A., & Teubner, G. (2003). Regime-collisions: The vain search for legal unity in the fragmentation of global law. *Michigan Journal of International Law*, 25, 999.
Gerber, D. J. (2007). Two forms of modernization in European competition law. *Fordham International Law Journal*, 31, 1235–1265.
Gerring, J. (2007). Is there a (viable) crucial-case method? *Comparative Political Studies*, 40(3), 231–253.
Grace, S. M. (2005). Strengthening investor confidence in Europe: US-style securities class actions and the acquis communautaire. *Journal of Transnational Law & Policy*, 15, 281–304.
Grisinger, J. L. (2012). *The unwieldy American state: Administrative politics since the new Deal*. Cambridge University Press.
Hall, P. A. (2006). Systematic process analysis: When and how to use it. *European Management Review*, 3(1), 24–31.
Hartnell, H. E. (2002). EUstitia: Institutionalizing justice in the European Union. *Northwestern Journal of International Law & Business*, 23(1), 65–138.
Hertig, G., & Lee, R. (2003). Four predictions about the future of EU securities regulation. *Journal of Corporate Law Studies*, 3(2), 359–377.
Hodges, C. (2014). Collective redress: A breakthrough or a damp sqibb? *Journal of Consumer Policy*, 37(1), 67–89.
Hodges, C., & Voet, S. (2018). *Delivering collective redress: New technologies*.
Issacharoff, S., & Miller, G. P. (2012). Will aggregate litigation come to Europe? In J. Backhaus, A. Cassone, & G. B. Ramello (Eds.), *The law and economics of class actions in Europe: Lessons from America* (pp. 37–68). Edward Elgar Publishing.
Jabko, N. (2006). *Playing the market: A political strategy for uniting Europe, 1985–2005*. Cornell University Press.
Joerges, C. (2004). The challenges of Europeanization in the realm of private law: A plea for a new legal discipline. *Duke Journal of Comparative & International Law*, 14, 149.
Kagan, R. A. (1997). Should Europe worry about adversarial legalism? *Oxford Journal of Legal Studies*, 17, 165–183.
Kagan, R. A. (2003). *Adversarial legalism: The American way of law*. Harvard University Press.
Kagan, R. A. (2007). Globalization and legal change: The "Americanization" of European law? *Regulation & Governance*, 1(2), 99–120.
Kagan, R. A. (2019). *Adversarial legalism: The American way of law*. Harvard University Press.
Kay, A., & Baker, P. (2015). What can causal process tracing offer to policy studies? A review of the literature. *Policy Studies Journal*, 43(1), 1–21.
Kelemen, R. D. (2003). The EU rights revolution: Adversarial legalism and European integration. In T. A. Börzel & R. A. Cichowski (Eds.), *The state of the European Union: Law, politics, and society* (Vol. 6, pp. 221–234). Oxford University Press.
Kelemen, R. D. (2006). Suing for Europe: Adversarial legalism and European governance. *Comparative Political Studies*, 39(1), 101–127.
Kelemen, R. D. (2008). The Americanisation of European law? Adversarial legalism à la Européenne. *European Political Science*, 7(1), 32–42.
Kelemen, R. D. (2011). *Eurolegalism: The transformation of law and regulation in the European Union*. Harvard University Press.
Kelemen, R. D., & Sibbitt, E. C. (2004). The globalization of American law. *International Organization*, 58(1), 103–136.
Komninos, A. P. (2002). New prospects for private enforcement of EC competition law: Courage v. Crehan and the community right to damages. *Common Market Law Review*, 39(3), 447–487.
Kortmann, J., & Swaak, C. H. R. A. (2009). The EC white paper on antitrust damage actions: Why the member states are (right to be) less than enthusiastic. *ECLR: European Competition Law Review*, 30(7), 340–351.
Laborde, J.-F. (2019). Cartel damages actions in Europe: How courts have assessed cartel overcharges. In: Concurrences.
Lazer, D., & Mayer-Schoenberger, V. (2001). Blueprints for change: Devolution and subsidiarity in the United States and the European Union. In K. Nicolaidis & R. Howse (Eds.), *The federal vision: Legitimacy and levels of governance in the United States and European Union* (pp. 118–143). Oxford University Press.
Legrand, P. (1997). The impossibility of 'legal transplants'. *Maastricht journal of European and comparative law*, 4(2), 111–124.
Levi-Faur, D. (2005). The political economy of legal globalization: Juridification, adversarial legalism, and responsive regulation. A Comment. *International Organization*, 59, 451–462.
Levi-Faur, D. (2011). Regulatory networks and regulatory agencification: Towards a single European regulatory space. *Journal of European Public Policy*, 18(6), 810–829.
Levy, J. S. (2008). Case studies: Types, designs, and logics of inference. *Conflict Management and Peace Science*, 25(1), 1–18.
Majone, G. (1997). From the positive to the regulatory state: Causes and consequences of changes in the mode of governance. *Journal of Public Policy*, 17, 139–167.
Marjosola, H. (2014). What role for courts in protecting investors in Europe—A view from Finland. *European Review of Contract Law*, 10(4), 545–570.

McCubbins, M. D., Noll, R. G., & Weingast, B. R. (1987). Administrative procedures as instruments of political control. *Journal of Law, Economics, & Organization*, 3(2), 243–277.
McNollgast. (1999). The political origins of the Administrative Procedure Act. The *Journal of Law, Economics, & Organization*, 15 (1), 180–217.
Micklitz, H.-W. (2015). The transformation of enforcement in European private law: Preliminary considerations. *European Review of Private Law*, 23, 491–524.
Micklitz, H.-W. (2018). *The politics of justice in European private law: Social justice, access justice, societal justice*. Cambridge University Press.
Moloney, N. (2011). The European securities and markets authority and institutional design for the EU financial market—A tale of two competences: Part (2) rules in action. *European Business Organization Law Review*, 12(2), 177–225.
Moloney, N. (2012). Liability of asset managers: A comment. *Capital Markets Law Journal*, 7(4), 414–422.
Moloney, N. (2014). *EU securities and financial markets regulation*. Oxford University Press.
Mügge, D. (2014). *Europe and the governance of global finance*. Oxford University Press.
Nagy, C. I. (2019). *Collective actions in Europe: A comparative, economic and transsystemic analysis*. Springer Open.
Parcu, P. L., Monti, G., & Botta, M. (Eds.). (2018). *Private enforcement of EU competition law: The impact of the damages directive*. Edward Elgar Publishing.
Peyer, S. (2012). Private antitrust litigation in Germany from 2005 to 2007: Empirical evidence. *Journal of Competition Law and Economics*, 8(2), 331–359.
Peyer, S. (2016). Compensation and the damages directive. *European Competition Journal*, 12(1), 87–112.
Pollitt, C., Bathgate, K., Caulfield, J., Smullen, A., & Talbot, C. (2001). Agency fever? Analysis of an international policy fashion. *Journal of Comparative Policy Analysis*, 3(3), 271–290.
Posner, E., & Véron, N. (2010). The EU and financial regulation: Power without purpose? *Journal of European Public Policy*, 17(3), 400–415.
Quaglia, L. (2010). *Governing financial services in the European Union: Banking, securities and post-trading*. Routledge.
Radaelli, C. M. (2005). Diffusion without convergence: How political context shapes the adoption of regulatory impact assessment. *Journal of European Public Policy*, 12(5), 924–943.
Rehder, B. (2009). "Adversarial legalism" in the German system of industrial relations? *Regulation & Governance*, 3(3), 217–234.
Riley, A. (2003). EC antitrust modernisation: The commission does very nicely-thank you! Part two: Between the idea and the reality: Decentralisation under regulation 1. *European Competition Law Review*, 24(12), 657–672.
Rizzuto, F. (2009). Does the European Community have legal competence to harmonise national procedural rules governing private actions for damages from infringements of European Community antitrust rules. *Global Competition Litigation Review*, 2(1), 29–48.
Rodger, B. (2014). *Competition law: Comparative private enforcement and collective redress across the EU*. Kluwer Law International.
Sabel, C. F., & Zeitlin, J. (2010). *Experimentalist governance in the European Union: Towards a new architecture*. Oxford University Press.
Scholten, M. (2017). Mind the trend! Enforcement of EU law has been moving to 'Brussels'. *Journal of European Public Policy*, 24(9), 1348–1366.
Scholten, M., & Ottow, A. (2014). Institutional design of enforcement in the EU: The case of financial markets. *Utrecht L. Rev.*, 10, 80.
Shapiro, M., & Sweet, A. S. (2002). *On law, politics, and judicialization*. Oxford University Press.
Simmons, B. A. (2001). The international politics of harmonization: The case of capital market regulation. *International Organization*, 55, 589–620.
Slaughter, A.-M. (1999). Judicial globalization. *Virginia Journal of International Law*, 40, 1103.
Stephenson, M. C. (2005). Public regulation of private enforcement: The case for expanding the role of administrative agencies. *Virginia Law Review*, 91(1), 93–173.
Stewart, R. B. (1993). Antidotes for the American disease. *Ecology Law Quarterly*, 20(1), 85–101.
Sweet, A. S., & Brunell, T. L. (2004). *The judicial construction of Europe*. Oxford University Press.
Teubner, G. (2001). Legal irritants: How unifying law ends up in new divergences. In P. Hall & D. Soskice (Eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (pp. 417–441). Oxford University Press.
Thatcher, M. (2002). Regulation after delegation: Independent regulatory agencies in Europe. *Journal of European Public Policy*, 9(6), 954–972.
Trondal, J. (2010). *An emergent European executive order*. Oxford University Press.
Tsebelis, G., & Garrett, G. (2000). Legislative politics in the European Union. *European Union Politics*, 1(1), 9–36.
Van Waarden, F. (2009). Power to the legal professionals: Is there an Americanization of European law? *Regulation & Governance*, 3(3), 197–216.
Waarden, F. V., & Drahos, M. (2002). Courts and (epistemic) communities in the convergence of competition policies. *Journal of European Public Policy*, 9(6), 913–934.
Wallinga, M. (2019). Why MiFID & MiFID II do (not) matter to private law: Liability to compensate for investment losses for breach of conduct of business rules. *European Review of Private Law*, 27(3), 515–556.
Warren, M. G. (2011). The US securities fraud class action: An unlikely export to the European Union. *Brooklyn Journal of International Law*, 37(3), 1075–1114.
Wesseling, R. (1997). The commission notices on decentralisation of EC antitrust law: In for a penny, not for a pound. *European Competition Law Review*, 18, 94–97.
Wilks, S. (2005). Agency escape: Decentralization or dominance of the European Commission in the modernization of competition policy? *Governance*, 18(3), 431–452.

Wils, W. P. (2013). Ten years of regulation 1/2003: A retrospective. *Journal of European Competition Law & Practice*, 4(4), 293–301.
Wils, W. P. (2017). Private enforcement of EU antitrust law and its relationship with public enforcement: Past, present and future. *World Competition*, 40(3), 14–23.
Woll, C. (2023). *The geopolitics of negotiated corporate justice, woll*. Princeton University Press.

Supporting information

Additional Supporting Information may be found in the online version of this article at the publisher's web-site:

Data S1. Supporting Information

