Cop or Coach?

Alternative Routes to Preventing Money-Laundering and Promoting Efficient Markets

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Draft: 2 February 2026

Abstract

This Article compares anti-money-laundering (AML) and antitrust enforcement in Europe and the United States. Although their legal traditions diverge, agencies in both regions emphasize case-by-case adjudication and guidance, rather than binding "secondary legislation" or rules with the force of law. Outlining the limitations of existing regulatory strategies in each region, the authors suggest ways that regulatory agencies can better safeguard market integrity amid complex, cross-border, technology-driven business activity.

AML supervision is system-oriented, emphasizing ongoing monitoring and compliance, whereas antitrust enforcement remains investigation-driven and sanction-focused. The difficulty of detecting corporate crime has encouraged reliance on headline penalties. In Europe, high fines imply that administrative enforcement can trigger criminal-law due process protections. In the United States, parallel proceedings and extensive private litigation can prolong disputes and generate high procedural costs with limited guidance that could be transferable across contexts.

We propose two reforms: (1) a clearer separation between administrative and criminal tracks, enabling agencies to prioritize supervision, early intervention, and structured self-reporting (serious misconduct would be referred to criminal authorities); and (2) expanded administrative rulemaking under statutory limits, with stakeholder participation and judicial review. Together, we believe, these reforms could reduce enforcement errors, improve resource allocation, strengthen procedural rights, and enhance agencies' capacity to prevent business-related harm without concentrating unchecked power.

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I. Introduction

Governments justify regulatory policies to protect society from harm, including harm caused by business practices. Yet, policies are not static. They evolve over time in response to political shifts, changes in underlying market conditions, and new knowledge. The law on the books is only part of the story. Business compliance with government regulations depends on both the risk of punishment for non-compliance and management's perceptions of the legitimacy and fairness of public policies.

We review two policymaking systems, two geographic regions, and two types of economic regulation: the enforcement of antitrust laws and anti-money laundering (AML) programs in the US and Europe in recent decades, specifically, efforts to prevent cartelized markets and to limit cross-border flows of "dirty money". Each regulatory area requires legal and non-legal expertise, and enforcement involves both the implementation of general policies and the prosecution of individual cases, brought by expert agencies but often resolved by non-expert courts. We ask how these regulatory systems promote or impede the achievement of their underlying policy goals.

Europe and the US operate in a global marketplace that limits the impact of any one law-enforcement body. As a result, policy made in one jurisdiction can have far-reaching effects beyond its borders. In particular, regulatory models and enforcement practices from the United States have been adopted in Europe, but these transplants sometimes take new forms when they intersect with European legal systems. Although AML and antitrust enforcement now share a common vocabulary, they arrived in Europe and spread through different channels. In AML, the model came mainly through banking and

finance, that is, the standards and assessments of the Financial Action Task Force (FATF) and the leverage of U.S. dollar-clearing and market access. These set expectations that the EU later wrote into directives for national implementation, with national supervisors building risk-based controls, financial intelligence capacity, and settlement practices around these templates.[2] In antitrust, by contrast, the main route ran through European Union (EU) law itself: Regulation 1/2003, the European Competition Network, the Commission's fining and leniency guidance, and later rules on private damages. These gave competition authorities a shared toolbox. American ideas about deterrence, leniency, and private enforcement influenced design choices but were filtered through EU doctrines on abuse of dominance, proportionality, and judicial review. Taken together, these distinct trajectories have gradually produced more harmonized substantive and procedural frameworks, especially for AML supervision of banking and for antitrust enforcement against cartels. Nevertheless, the regulatory landscapes on the two sides of the Atlantic Ocean retain distinct features.

Regulatory convergence and coordination across borders are necessary to control serious crime and bring benefits, including more consistent frameworks for the private sector. However, policies and practices imported from abroad may prove challenging for domestic regulatory agencies if they clash with long-standing routines, enforcement practices, and, at times, even their established institutional identities. Are these challenges merely transitional, likely to fade with experience, or do they represent enduring frictions that should be confronted to ensure effective enforcement across jurisdictions? Formal regulatory rules can be adjusted by amending statutes and issuing guidance documents that reflect changes in the regulated industry and cope with technological developments. But institutions charged with implementing reforms may resist change. Public officials operate within administrative law constraints, procedural safeguards, professional norms, and sectoral expertise, including an ingrained understanding of their proper bureaucratic roles. Even when the basic policy goals remain unchanged, new methods of monitoring and enforcing compliance may develop over time into new views of the basic purposes of the policy.

Around the turn of the millennium, European leaders, including the EU, the Organization for Economic Co-operation and Development (OECD), and national governments—began to adopt a more assertive stance on corporate accountability, targeting both money laundering and anti-competitive behavior. They emphasized sanctions that are "effective, proportionate and dissuasive" for legal persons,[3] and

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[2] *See generally* DAVID LEVI-FAUR, FROM RULE INTERMEDIARIES TO RULE TAKERS: BANKS AND THE MAKING OF GLOBAL ANTI-MONEY LAUNDERING REGIME (2020) (providing a broader presentation of the evolution of AML regulation); Pierre-Hugues Verdier, *The New Financial Extraterritoriality*, 87 GEO. WASH. L. REV. 239 (2019) (explaining the extraterritorial reach of the U.S. regulation of the banking industry). For a discussion of antitrust evolution, see R. DANIEL KELEMEN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION 143-194 (2011) (explaining legal transplants from the United States to Europe), and Wouter P.J. Wils, *Regulation 1/2003: An Assessment After Twenty Years*, 46 WORLD COMPETITION: L. & ECON. REV., 3, 3 (2023) (describing the evolution in Europe from a notification and authorization system, towards a system of ex post enforcement).

[3] In the United States, the level of fines was already higher than in Europe, although in 2004, Congress raised the Sherman Act corporate maximum from $10 million to $100 million. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661. (2004).; 18 U.S.C. § 3571(d). DOJ/FTC materials foreground these maxima to reinforce deterrence. In Europe, since Regulation 1/2003 the EU Commission can fine undertakings up to 10% of worldwide turnover for antitrust violations; the 2006 Fining Guidelines formalize a value-of-sales baseline and expressly pursue deterrence. Council Regulation 1/2003 of Dec. 16, 2002, Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1, 17;Council Guidelines of Sep. 1, 2006, Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006 O.J. (C 210) 2, 3. The EU's call to employ corporate AML penalties as a deterrent to future offences appears clearly in the Third AML Directive—Member States "shall ensure that the penalties . . . are *effective, proportionate and dissuasive* [E/P/D]" — and was flagged in the Commission's 2004 proposal for that directive. Directive 2005/60/EC, of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, 2005 O.J. (L 309) 15, 33A(Art.39); Commission Proposal, COM(2004) 448 final. In the same period,

advanced institutional frameworks such as the European Competition Network (2004) alongside successive and a range of EU AML directives. These developments paved the way for the newly created Anti-Money-Laundering Authority (AMLA).[4] The shift included procedural tools (e.g., leniency, information-sharing) and market-repair instruments (e.g., behavioral remedies), not just higher fines. Despite variations across sectors and countries, the overall trend was toward stronger enforcement in individual cases rather than symbolic penalties (such as sending a letter or a warning).[5] Agencies on both sides of the Atlantic, enforcing antitrust and AML statutes and treaties, emphasized that misconduct ought to be sanctioned through high fines.[6] Yet questions remain. Do these oversight systems help to limit collusion, abusive pricing, money laundering, and tax evasion to the degree expected by citizens? Do they reflect the broader public values that originally justified the legislation? Can agencies justify how they choose which firms and practices to investigate and sanction compared to those untouched by law enforcement?

The connection between the enforcement of antitrust and AML laws and their intended objects is not clearcut. Empirical studies confirm that competition in many industries is weaker than the formal frameworks suggest in both the United States and Europe.[7] Similarly, evaluations of AML frameworks

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the OECD called for corporate bribery penalties with the exact same ambition. *See generally* OECD, RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS OECD/LEGAL/0378 (Nov. 26, 2009) (discussing bribery penalties); OECD, RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS: SETTLEMENTS AND NON-TRIAL AGREEMENTS BY PARTIES TO THE ANTI-BRIBERY CONVENTION (2019) (same).

[4]Regulation 2024/1620 of the European Parliament and of the Council of 31 May 2024 on Establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and Amending Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010, 2024 O.J. (L 1620) 1, 1; Regulation 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering or Terrorist Financing, 2024 O.J. (L 1624) 1, 1.

[5] Richard Vanderford, *European Union Approves New Financial Crime Agency*, WALL ST. J. (30 May 2024, at 16:58 ET), https://www.wsj.com/articles/european-union-approves-new-financial-crime-agency-16a44882.

[6] For instance, the European Commission levied some of the largest cartel fines in history, including €2.93 billion against major truck manufacturers in 2016 and €4.34 billion against Google in 2018 for abuse of dominance in the Android ecosystem. *See* European Commission Press Release IP/14/650, Antitrust: Commission Fines Truck Producers €2.93 Billion for Participating in a Cartel (July 19, 2016); European Commission Press Release IP/18/4581, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018). However, several of the high fines that followed upon corporate crime in Europe were issued by the United States: Danske Bank agreed to a €1.82 billion settlement in 2022 over systemic money laundering. *See* Press Release, U.S. Dep't of Just., Danske Bank Pleads Guilty to Fraud on U.S. Banks in Multi-Billion-Dollar Scheme to Access the U.S. Financial System (Dec. 13, 2022). Additionally, Deutsche Bank paid $630 million in 2017 to U.S. and U.K. regulators for "mirror trading" practices Press Release, N.Y. State Dep't Fin. Servs., *DFS Fines Deutsche Bank $425 Million for Russian Mirror-Trading Scheme* (Jan. 30, 2017). Emmanuelle Auriol, Erling Hjelmeng & Tina Søreide, *Corporate Criminals in a Market Context: Enforcement and Optimal Sanctions*, 56 EUR. J. L. & ECON. 225 (2023) evaluate a set of European corporate sanctions against the deterrence logic, and while the facts are difficult to obtain, they found most sanctions considered were below a level that would zero out the illegal gains, especially taking into account the fact that the chance of being sanctioned is far less than 100%.

[7] In the United States, industry concentration has risen markedly since the 1990s across manufacturing, retail, and services. Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?*, 23 REV. FIN. 697, 705-06 (2019). This trend underscores claims that U.S. markets are less competitive today than in the mid-twentieth century. *See generally* THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS (2019) (discussing the decline of competition within American markets). Similar tendencies are observed in Europe: the OECD has documented high concentration levels in several markets. *See* Matej Bajgar, Giuseppe Berlingieri, Sara Calligaris, Chiara Criscuolo & Jonathan Timmis, *Industry Concentration in Europe and North America*, at 1 (OECD, Working Paper No. 18, 2019). For broader OECD policy analysis noting mounting concerns about market power in digital markets, *see* OECD, Market Concentration (DAF/COMP/WD(2018)46) (2018); OECD, *Going Digital: Shaping Policies, Improving Lives* – Summary (2019). Meanwhile, European Commission reports highlight persistent dominance in sectors such as telecommunications, energy, and finance. *Report on Competition Policy 2019*, at 1, COM (2020) 302 final (July 9, 2020). Research further shows that a small group of highly productive 'superstar' firms have captured

consistently point to their shortcomings in preventing underlying financial crime.[8] There is limited empirical evidence of changes in underlying misconduct, which typically occurs in secrecy. These ambiguous results, of course, do not mean that the statutory frameworks are unimportant in curtailing anti-social business behavior, but only to caution against assuming that they are a sufficient response to the incentives to seek monopoly rents and to transfer criminal proceeds into legitimate markets.

We proceed by examining the tensions that have arisen as legal transfers from the United States interacted with the legal institutions and policy challenges as new regulations and enforcement mechanisms were introduced. In addition to the European Union, we single out Germany, France, and Norway to examine cross-border similarities and differences in the public law and in governance structures. Some of the tensions arise from different legal frameworks for the regulation of businesses and of human beings in the United States and Europe. Our overview suggests governments on both sides of the Atlantic ought to re-examine their enforcement priorities to produce more positive results, even as we recognize that such reforms are only one aspect of the larger problem of noncompetitive and illicit markets.

We begin in Part II by highlighting the enforcement challenges and by describing the current antitrust and AML regimes in Europe and the United States. We posit four interrelated goals of law enforcement: detecting violations, deterring future violations, and enforcing the law in ways that are legitimate both as adequate policy responses and as consistent with each polity's underlying legal framework. Parts III to VI consider four key institutional aspects of enforcement: (1) Before bringing cases, does the agency promulgate executive rules or guidelines, and if so, does it consult with stakeholders? (2) Turning to enforcement efforts, where does the burden-of-proof lie, and (3) what rights do corporate defendants have? Finally, (4) does the law permit private rights of action, and if so, how do they interact with public enforcement? After outlining the issues that arise in enforcement, Part VII asks how these institutional features interact with legislative goals in Europe and the United States. We suggest ways forward that could improve the effectiveness of both types of regulation in both regions. Clearly, there are no magic bullets, but we highlight general lessons that could inform regulatory policy going forward.

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increasing market shares in both the United States and Europe, consistent with winner-takes-most dynamics and rising mark-ups.. *See* Cyrille Schwellnus et al., *Labour Share Developments…* OECD Economics Department Working Paper No. 1503 (2018); Sara Calligaris, Chiara Criscuolo & Luca Marcolin, *Mark-ups in the Digital Era* (OECD, Sci., Tech. & Indus. Working Paper No. 10, 2018). This trend means that even high visibility cases in either the US or Europe may not be sufficient to promote competitive practices in global firms.

[8] Studies find that despite extensive legislation, large scale money laundering continues. *See* Michael Levi & Peter Reuter, *Money Laundering*, 34 CRIME & JUST. 289, 289 (2006); BRIGITTE UNGER, JORAS FERWERDA, MELISSA VAN DEN BROEK & IOANA DELEANU, THE ECONOMIC AND LEGAL EFFECTIVENESS OF THE EUROPEAN UNION'S ANTI-MONEY LAUNDERING POLICY 1 (2014). Some scholars describe AML measures as often symbolic, with limited measurable deterrent effect. *See* Mirko Nazzari & Peter Reuter, *How Well Does the Money Laundering Control System Work?*, 54 CRIME & JUST. 67, 67-70, 102-05 (2025) (finding no evidence that laundering is declining or becoming more difficult, despite system costs); PETER REUTER & EDWIN TRUMAN, CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING (2004) (developing an assessment framework and noting limited evidence that the AML regime reduces predicate crime); *see also* Joras Ferwerda, *The Economics of Crime and Money Laundering: Does Anti-Money Laundering Policy Reduce Crime?*, 5 REV. L. & ECON. 903, (2009) (finding that while certain AML elements—particularly international cooperation—correlate with lower crime rates, the overall evidence of AML's impact on underlying crime remains limited and uneven).); Marco Arnone & Leonardo Borlini, *International Anti-Money Laundering Programs: Empirical Assessment and Issues in Criminal Regulation*, 13 J. MONEY LAUNDERING CONTROL 226, 258 (2010) (describing the development of an international AML regime that largely leaves criminal-law issues under-addressed). More recent assessments show that, while many jurisdictions achieve high technical compliance, the effectiveness of AML regimes in detecting and deterring laundering remains limited. *See* FIN. ACTION TASK FORCE, REPORT ON THE STATE OF EFFECTIVENESS AND COMPLIANCE WITH THE FATF STANDARDS 40 (2022).

II. Enforcement Frameworks for AML and Antitrust

A. The Nature of Offences and Enforcement

In their search for higher profits, firms in the financial sector may ignore AML regulations, and business entities may collude with competitors to fix prices and share markets. These offences facilitate the accumulation of illicit gains stemming from these unlawful arrangements. Although AML violations are often framed as systemic compliance failures, they can also reflect deliberate profit-driven misconduct. Antitrust violations are commonly attributed to strategic decisions made by corporate leadership. In both cases, the firms involved not only want to keep their actions secret; they also will make substantial investments in their legal defense should the misconduct be exposed.

However, there is an important difference between the role of the private sector with respect to each offense. Anticompetitive behavior arises as private firms search for profit and market share, self-interested activities that tip over into illegal actions depending upon where the law draws the line between acceptable and unacceptable activities. In contrast, AML law uses private financial firms to fulfill public goals by giving them an obligation to check on their customers. Banks have an interest in avoiding fraud and self-dealing by insiders that hurt their bottom line, but AML regulations require them to monitor and require information of many customers unrelated to their own core businesses. They are acting as agents of the state in a way which has no direct analogy in the antitrust area. Yet, as we argue, there are a number of similarities in the resulting business-government relations, which make our comparisons particularly apt.

Imposing sanctions that effectively cancel out the offenders' benefits is challenging, if not impossible for government enforcement bodies. Because not all violations are revealed, deterrence requires that fines must be a multiple of the harm from any offence uncovered by public authorities, unless there are other ways to influence corporate behavior.[9] Enforcement is further complicated by intricate corporate structures, cross-border transactions, the use of secrecy jurisdictions, and difficulties in identifying culpable individuals. Indeed, the very complexity of corporate structures may have arisen in an effort to hide malfeasance from state and international authorities.[10]

The societal burden of these offences varies. Antitrust violations primarily affect consumers within the jurisdiction enforcing the regulations, as well as competitors not members of the offending cartel. AML breaches, in contrast, may have global repercussions, particularly in regions already grappling with high levels of criminal activity.[11] Weak monitoring of transactions linked to crimes such as corruption and drug trafficking permits these activities to produce substantial proceeds that require laundering.

The low visibility of these offences to ordinary citizens complicates both the development of appropriate enforcement strategies and the public's understanding of enforcement alternatives. Although citizens may observe elevated prices or suspect dubious financial activities, the underlying harm remains largely invisible. Unlike physical disasters, such as explosions, floods, pandemics, or food contamination, the damage caused by corporate misconduct is diffuse and difficult to attribute to specific actors. Therefore, it may also be difficult to determine the blameworthiness of those involved,

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[9] *See generally* Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 ANN. REV. L. & SOC. SCI. 217 (2010) (explaining the point with reference to collusive crime); Nick Werle, *Prosecuting Corporate Crime When Firms are Too Big to Jail: Investigation, Deterrence, and Judicial Review*, 127 YALE L.J. 1368 (2018) (analyzing why large and highly profitable corporations are difficult to sanction effectively, emphasizing structural barriers to deterrence and the limits of judicial review in cases where firms are "too big to jail").

[10] For patterns and incentives, see Svetlana Ledyaeva, *Quantifying Profit Shifting: Evidence from the OECD CbCR Statistics and Comparative Analysis with ORBIS Data* 16 (Helsinki GSE Discussion Papers No. 46, 2025)and Guttorm Schjelderup, *Secrecy Jurisdictions*, 23 INT'L TAX & PUB. FIN. 168, 182 (2016). On corporate opacity, see Michele Riccardi & Andrea Carenzo, *Behind the Curtain: An Empirical Analysis of Corporate Opacity*, 29 EUR. J. CRIM POL'Y & RSCH. 45, 45 (2023).

[11] *See* Auriol, *supra* note 6, at 233 (explaining why the difference matters for law enforcement).

and to draw the line between investments fueled by bribery and others based on legitimate economic considerations, or between competitive and collusive nosiness practices. Even the victims may be unaware of offences that impose hidden costs, and enforcement agencies face significant obstacles in gathering intelligence and securing witness testimony. As a result, mechanisms, such as leniency programs in antitrust enforcement and self-reporting incentives in AML, are routinely employed. However, lacking clear information about the consequences of such crimes and without transparent indicators of how enforcement protects societal values, citizens cannot assess whether their government is effectively safeguarding the public interest.

What is visible, however, is the activity of regulatory agencies. They can compile quantifiable metrics: the number of dawn raids conducted, fines imposed, guidance letters issued, press releases published, and details regarding organizational structure and staffing.[12] Simultaneously, corporations may publicize their complaints—often disseminated through media—regarding intrusive investigations or allegedly unfounded accusations of misconduct. The veracity of such claims ultimately hinges on the outcome of legal processes. Yet, for judges, the complexity of business transactions and market structures, the challenge of verifying harm, and the necessity of linking culpable conduct to adverse consequences render adjudication exceedingly complex and uncertain.[13] As a consequence, it may be difficult for outsiders to judge if agency decisions reflect rigorous legal reasoning, biased prosecutorial case selection, reflecting regulatory capture.[14] If enforcement actions are reviewed in court, the outcomes are frequently unpredictable. But if seasoned legal experts struggle to forecast judicial decisions, how can firms reliably determine whether they are complying with the law? Moreover, does the accumulation of case law enhance or diminish regulatory predictability? Do cases build on and clarify legal doctrine and its application to actual cases, or is there such diversity in judicial judgments that the regulated industry lacks clarity about how to respond to the legal environment?

B. Enforcement Frameworks

Enforcement frameworks for AML and competition law (antitrust) have evolved through legal transplantation and institutional adaptation. Although the European Union has its own regulatory architecture, many foundational enforcement principles—such as deterrence-based strategies, risk-oriented supervision, and negotiated settlements—originated in the United States.

The U.S. AML regime is anchored in the Bank Secrecy Act (BSA) of 1970, which requires financial institutions to maintain records and report suspicious activities, including transactions exceeding

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[12] In various extent, enforcement statistics are made available by the respective authorities, often available on their home pages.

[13] *See* Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J. L. & ECON. 1, 13-15 (1994) (noting that as transactions and market structures become more intricate, the informational demands on adjudicators rise sharply). The difficulty of verifying harm and establishing causal links between conduct and outcomes increases the likelihood of error, making adjudication both costly and uncertain. *See generally* JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE (2006) (describing why complex transactions, information asymmetries, and causation (loss attribution) make adjudication and proof of harm difficult); B. Douglas Bernheim & Erik Madsen, *Price Cutting and Business Stealing in Imperfect Cartels*, 107 AM. ECON. REV. 387 (2017) (explaining analytically patterns of cartel cooperation, which for enforcers make it hard to draw conclusions about illegality).

[14] The risk of capture is not zero in any society. See generally MARIO MARINIELLO, DAMIEN NEVEN & ATILANO JORGE PADILLA, ANTITRUST, REGULATORY CAPTURE AND ECONOMIC INTEGRATION (Bruegel Policy Contribution, 2015) (describing concerns with respect to antitrust); Ariel Ezrachi, *Sponge*, 5 J. ANTITRUST ENF'T 49 (2017) (same). With respect to the risks within AML, a narrower area of regulation, there is a broad literature on the risk of capture in bank regulation. *See generally* ANAT ADMATI & MARTIN HELLWIG, THE BANKERS' NEW CLOTHES: WHAT'S WRONG WITH BANKING AND WHAT TO DO ABOUT IT (2024) (surveying the literature on capture in bank regulation). For a broad introduction to corruption, governance and capture, see generally SUSAN ROSE-ACKERMAN & BONNIE PALIFKA, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (2016).

$10,000 (Currency Transaction Reports) and potentially illicit behavior (Suspicious Activity Reports).[15] The Money Laundering Control Act of 1986 further criminalized money laundering as a standalone federal offence.[16] The Financial Crimes Enforcement Network (FinCEN), in the U.S. Department of the Treasury, leads AML enforcement, supported by prudential regulators, all operating within an administrative framework. FinCEN collects and analyzes financial intelligence, imposes penalties, and coordinates with other agencies such as the Federal Reserve, the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC). The Anti-Money Laundering Act of 2020 modernized the framework, introducing limited beneficial ownership disclosure requirements and expanding FinCEN's authority.[17]

U.S. antitrust law is primarily governed by three statutes: the Sherman Act (1890), the Clayton Act (1914), and the Federal Trade Commission Act (1914).[18] These laws prohibit anti-competitive practices, such as price-fixing, monopolization, and mergers, that substantially impede competition. Enforcement is shared between the Department of Justice's Antitrust Division (DOJ) and the Federal Trade Commission (FTC). The DOJ handles criminal prosecutions, including cartel behavior, while the FTC focuses on civil enforcement and consumer protection. Both agencies collaborate on merger reviews and policy development, guided by instruments such as the 2023 Merger Guidelines.[19]

In Europe, at the EU level, both competition enforcement and AML oversight are administrative in nature, whereas the criminal track may be used at the national level. The extraterritorial reach of U.S. law—especially through dollar-clearing requirements—and multilateral standards from the FATF influenced EU codification. European AML supervision has centralized elements under the newly established AMLA.[20] It combines deterrence and cooperation incentives with legal safeguards, such as proportionality and judicial review, and compared to U.S. legislation, it covers a broader set of obliged entities (i.e., lawyers, accountants, real estate agents, in addition to banks).

European competition enforcement is governed by Regulation 1/2003 and coordinated through the European Competition Network (ECN). Although the EU has emphasized abuse of dominance and proportionality, it has also adopted U.S.-inspired mechanisms, such as leniency programs and settlement procedures, tailored to its legal culture and institutional context. Competition law at the country (member state) level is decentralized but coordinated by a supranational EU system. National Competition Agencies (NCAs) thus act independently, but, at the same time, the Directorate-General for Competition (DG COMP) leads enforcement at the EU level and coordinates via the ECN.

Most enforcement of AML and antitrust offences occurs at the national level, though often in coordination with the relevant EU authority.[21] In Germany, for example, AML enforcement is handled by BaFin (Federal Financial Supervisory Authority), which imposes administrative fines and publishes sanctions under the Geldwäschegesetz. Competition law is enforced by the Bundeskartellamt, which applies turnover-based fines and publishes guidelines to ensure deterrence. France maintains a dual structure for AML enforcement: the Autorité de contrôle prudentiel et de résolution (ACPR) supervises banks, insurance firms, asset managers, and other financial market participants. Both authorities enforce

[15] Bank Secrecy Act, 31 U.S.C. § 5311 et seq. (2023).
[16] Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956-57.
[17] Anti-Money Laundering Act of 2020, Pub. L. No. 116-283, § 6101, 134 Stat. 1192 (2021).
[18] Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2020). The Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (codified at 15 U.S.C. § 13) (1936), also administered by the FTC, focuses explicitly on price discrimination, but it is not a current focus of government enforcement activity.
[19] *2023 Merger Guidelines*, U.S. DEP'T OF JUST. (2023), https://www.justice.gov/atr/2023-merger-guidelines.
[20] The AMLA will complement national level enforcement rather than centralize it, as it will directly supervise selected high-risk cross-border entities and coordinate/converge supervision. In these contexts, it can also impose fines under the EU framework.
[21] For clarity, in competition, NCAs and the Commission share powers (parallel competence). In AML, national supervisors are primary; AMLA adds a top layer for specific entities that may facilitate convergence.

AML/CTF obligations such as customer due diligence and internal controls, collaborate with Tracfin—the Financial Intelligence Unit—and have sanctioning powers, with penalties publicly disclosed to ensure transparency and deterrence. Competition enforcement is the responsibility of the Autorité de la concurrence, which has updated its fining methodology to reinforce predictability and deterrence. In Norway, not an EU member though cooperating closely with largely harmonized legislation,[22] AML supervision is conducted by Finanstilsynet, which issues administrative infringement fees and publishes enforcement decisions. The Konkurransetilsynet enforces competition law (under the Norwegian competition law), including fines up to 10% of turnover, with guidelines emphasizing gravity, duration, and cooperation.

Thus, in these countries, competition law enforcement is primarily administrative and is typically handled by national competition authorities. However, criminal liability may apply to individuals involved in serious cartel conduct, such as bid rigging or fraud. AML enforcement is also administrative, but serious cases—especially those involving organized crime or terrorism financing—are routinely referred to the criminal justice system.[23]

C. Promoting Effective Law Enforcement

Although lacking hard data on each regime's effectiveness, we, nevertheless, seek to assess enforcement strategies, including the relationship between deterrence and the fines imposed through case-by-case adjudication. *Effectiveness,* then, refers to the choices that government regulators make in allocating resources to protect markets as well as the state itself against corporate misconduct.

We assume that enforcement regimes in democratic countries aim at two broad goals, even if these goals take slightly different forms in different societies. The first goal is deterrence—both the detection of misconduct and efforts to deter future violations Second, the enforcement system ought both to accord with society's democratic values and to include legal safeguards for both individuals and corporate entities, consistent with values embodied in the state- society relationship (legitimacy).

We consider how governments in Europe and the United States fulfill these goals, asking how each system attempts to deter offences consistent with norms of public and legal legitimacy. We raise four questions. Case-by-case enforcement plays dominant role in these regulatory areas. Is this appropriate, or should executive rulemaking play a greater role? If so, how should the agency consult with stakeholders and publicly justify the rules it promulgates (Part III)? In the context of major enforcement cases, how does the burden of proof operate in practice (Part IV)? What rights do corporations and individuals have to defend themselves against claimed illegal actions, and how are these rights incorporated into legal proceedings (Part V)? Is there a role for private individuals and firms to complement public enforcement as whistleblowers and/or plaintiffs in private enforcement suits (Part VI)?

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[22] Norway is "EEA-aligned" (European Economic Area), meaning it incorporates most EU single-market legislation into Norwegian law—under oversight of the EFTA Surveillance Authority and the EFTA Court.

[23] In Germany and France, individuals who play a decisive role in organizing or executing cartel agreements may face fines or imprisonment. In Germany, bid rigging is explicitly criminalized under Section 298 of the Criminal Code, while other cartel conduct is generally treated as an administrative offence. In France, individuals may be sentenced to up to four years in prison and fined for fraudulent participation in cartel arrangements. In Norway, competition law enforcement is administrative, but criminal sanctions may apply in cases involving fraud or corruption linked to competition violations. AML enforcement is administrative in all three countries, typically led by financial supervisory authorities (e.g., BaFin in Germany, ACPR/AMF in France, and Finanstilsynet in Norway). However, serious suspected offences—such as laundering proceeds from organized crime or terrorism—are routinely referred to the criminal justice system. In Germany, for example, money laundering is criminalized under Section 261 of the Criminal Code, and predicate offences now include all crimes. Similar provisions exist in France and Norway, where financial intelligence units and law enforcement cooperate closely on serious AML cases.

III. Regulatory Approach

Regulatory agencies differ in their freedom to act against harmful business practices across regions and regulatory domains. Some expert agencies report directly to a ministry or cabinet department headed by a political appointee. Although agencies generally have the authority to initiate case-by-case adjudication with little or no political interference, rulemaking initiatives are subject to ministry priorities. Other agencies, especially in the United States, have no ministerial superiors. They are either in the core executive branch, such as the Environmental Protection Agency, and report directly to the president, or they are headed by multi-member bipartisan commissions, such as the FTC or the Securities and Exchange Commission (SEC).[24]

An agency's primary responsibility is to implement its legislative mandates. But most statutes are not detailed enough to be enforced as they stand. Hence, agency officials need to interpret statutory language and articulate a policy agenda that is consistent with statutory mandates. They may do this through case-by-case adjudication that, even with no explicit administrative guidance, adds up over time to produce a policy stance. The agency's selection of cases produces judicial opinions, as firms test the agency's judgment and as judges review settlements between the agency and private firms.

Alternatively, agencies (or their ministries) may issue general policy documents that make the content of the law clearer both to the relevant firms and to the citizenry. These may take the form of regulations or rules with the force of law, often labeled "secondary legislation," or of guidelines and standards without formal legal authority but likely to influence individual enforcement cases over time. Within the regulatory domains examined, the optimal combination of rulemaking and case-by-case adjudication is not clear. Although economic literature emphasizes factors such as case heterogeneity, detection mechanisms, quickly evolving technology, and the cost of rulemaking,[25] there are also reasons to consider the market structure of sectors subject to regulation. Chopra and Khan contend that exclusive reliance on adjudication entrenches incumbents because dominant firms can absorb litigation costs and exploit legal ambiguity, delaying remedies, and shaping precedent in their favor.[26] In contrast, ex ante rulemaking creates prospective obligations that constrain strategic behavior and level the playing field for smaller competitors. Franck reinforces this view, noting that in markets with high entry barriers and concentrated power—such as digital platforms or payment systems—case-by-case enforcement is too slow and reactive to dismantle structural dominance, whereas systemic rules can open markets more effectively.[27] Kaplow adds that the magnitude of harm from anticompetitive conduct scales with market power, strengthening the case for predictable, rule-based deterrence.[28] Taken together, these analyses suggest that if market power amplifies enforcement asymmetries, rulemaking is not merely a compliance tool but a structural remedy. Nevertheless, adjudication remains as a necessary supplement when rules are applied in contested enforcement cases and if situations arise outside the framework posited by the rulemakers.[29]

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[24] Controversially, one independent body, the Consumer Financial Protection Bureau, has a single head. The constitutionality of so-called "independent agencies," such as the FTC and SEC, is before the US Supreme Court in the current term.

[25] *See* Louis Kaplow, *A Model of the Optimal Complexity of Rules*, 11 J. L., ECON., & ORG. 150, 150; A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 50 (2000); A. Mitchell Polinsky & Steven Shavell, *Public Enforcement of Law*, *in* 1 HANDBOOK OF LAW AND ECONOMICS 403, 403-54 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

[26] Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV., 357, 357 (2020).

[27] Jens-Uwe Franck, *Competition Enforcement Versus Regulation as Market-Opening Tools*, 12 J. ANTITRUST ENF'T 45, 45 (2024).

[28] Louis Kaplow, *On the Relevance of Market Power*, 130 HARV. L. REV. 1303, 1307 (2017).

[29] OECD indicators show that – across countries – many sector regulators lack primary rulemaking authority and instead operate within frameworks set by legislatures or ministries, focusing on implementing and interpreting existing rules rather than creating new ones. Vincent van Langen, Valeria Prieto La Noire, Martha Baxter & Eszter

Rulemaking procedures differ in whether they foster dialogue between the agency and the relevant stakeholders. Given the broad impact of many rules, regulators ought to include actors inside and outside the regulated industry. Such input can help shape the agency's interpretation of its statutory mandates and enforcement priorities. If an agency hears only from the regulated industry, it risks capture and cooptation. Consultation should be broad-based and open-ended, but, of course, it can only supplement, not substitute for, the democratic authority of statutes. However, if carried out well, a consultation process can enhance the effectiveness and legitimacy of regulatory activities by improving information flows, aligning enforcement with public concerns, and fostering trust.[30] Effective involvement requires transparent consultation and participatory tools – such as advisory committees and stakeholder mapping – to integrate diverse perspectives into enforcement priorities. However, such processes are also criticized as imposing a one-size-fits-all framework on a variegated reality or as risking capture by organized interests able to impose a biased interpretation of the underlying statute on the polity. We return to the debate over the value of secondary legislation in our concluding section.

A. Rulemaking by Regulatory Agency in the United States

In the United States, regulatory agencies often can choose whether to address a problem by issuing detailed regulations or through case-by-case enforcement. Consultation with stakeholders occurs primarily at the rule-formation stage before the statute is enforced against individual firms. Under the Administrative Procedure Act (APA), notice-and-comment rulemaking requires the agency to post a public notice of proposed rulemaking in the Federal Register and to invite comments from any interested party. The agency cannot decide whom it wants to hear from. After reviewing the comments, the agency promulgates a final rule along with a public statement of reasons. The rule can then be subject to judicial review of the agency's process for consistency with APA procedures, as well as the rule's legality in light of the substantive goals of the underlying statute.[31] However, the U.S. regulatory fields examined here are distinctive because both rely heavily on case-by-case adjudication rather than the issuance of regulations with legal force.

In antitrust, merger guidelines are general statements of enforcement policy, but they are guidelines, not rules with the force of law. Criminal antitrust cases must be brought by the Department of Justice, which can also bring civil cases;[32] the FTC administers the Clayton Act through civil enforcement

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Danitz, *The 2023 Indicators on the Governance of Sector Regulators* 14 (OECD, Working Paper No. 22, 2025). *See also* OECD COMP. COMM., COMPETITION ENFORCEMENT AND REGULATORY ALTERNATIVES 1 (2021) (discussing regulatory alternatives).

[30] *See generally* Caelesta Braun & Madalina Busuioc, *Stakeholder Engagement as a Conduit for Regulatory Legitimacy?*, 27 J. OF EUR. PUB. POL'Y 1599 (2020) (showing that stakeholder engagement can serve as a mechanism for enhancing regulatory legitimacy, supporting the argument that broad-based consultation improves trust and information flows without replacing statutory authority).

[31] For an introduction to rulemaking by agencies, see Gillian Metzger, *The Administrative Procedure Act: An Introduction*, POVERTY & RACE RSCH. ACTION COUNCIL 1-2 (2017). *See also* Nat'l Inst. Standards and Tech., *Key Federal Law and Policy Documents: NTTAA & OMB A-119*, U.S. DEP'T COM. (2025), https://www.nist.gov/standardsgov/key-federal-law-and-policy-documents-nttaa-omb-119; Off. Mgmt. & Budget, *OMB Circular A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, EXEC. OFF. PRES. (2016), https://obamawhitehouse.archives.gov/omb/circulars_a119_a119fr. Scholarship related to the role of notice and comment rulemaking in U.S. administrative law is vast. *See generally* Jerry Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 L. & CONTEMP. PROBS. 185 (1994); Jerry Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. REG. 549 (2018); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Administrative Law*, 31 WAKE FOREST L. REV. 745 (1996); PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009).

[32] The Antitrust Division of the U.S. Department of Justice enforces the Sherman and Clayton Acts through both civil and criminal proceedings. *The Antitrust Laws*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/antitrust-laws-and-you.

provisions. Although a court case from 1973 recognized the agency's rulemaking power, scholars differ on how this holding should be interpreted.[33] The debate intensified after the FTC issued a rule in April 2024 banning most non-compete clauses, which was subsequently vacated by two circuit courts. Rather than appeal or revise the rule, the FTC withdrew it and announced a shift toward case-by-case enforcement in this area.[34] This episode illustrates both the legal uncertainty and the practical constraints surrounding the FTC's rulemaking ambitions.

In practice, enforcement commonly focuses on lawsuits against individual firms or cartels based on staff analyses of anti-competitive effects.[35] Generally, both AML and antitrust enforcement cases emphasize procedural fairness, with less emphasis on participatory legitimacy or broad stakeholder participation.[36] However, there is one exception for court-approved settlements under the Antitrust Procedures and Penalties Act of 1974 (the Tunney Act). That act requires the relevant judge to solicit case-specific stakeholder views before approving any Department of Justice civil consent judgment related to mergers and acquisitions under the antitrust laws.[37] The DOJ first files the proposed decree and a Competitive Impact Statement; then after a public-comment period of at least 60 days, the court may enter the decree only if it finds settlement to be "in the public interest." The procedure thus imitates the notice and comment requirements of the APA but for an individual business deal, not a general market regulation.

In addition, in significant antitrust cases—on appeal and sometimes in the trial court—courts generally accept *amicus briefs* from consumer groups, economists, and industry bodies, bringing stakeholder arguments into the judicial record of a particular case and perhaps influencing the holding. Such stakeholders, although not legally required to be consulted by the government agency, can be indirectly influential, especially if the agency seeks to limit the risk of new issues being raised during a court challenge.

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[33] The D.C. Circuit in *National Petroleum Refiners v. FTC* recognized the Commission's authority to issue substantive rules under the FTC Act. 482 F.2d 672 (D.C. Cir. 1973). Pierce argues that this interpretation is tenuous and that the FTC likely lacks power to use notice-and-comment rulemaking to implement Section 5's prohibition on "unfair methods of competition," although he advocates granting the FTC such competence. Richard J. Pierce, Jr., *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?*, Geo. Wash. U. Legal Stud. Rsch. Paper No. 2021-42, at 5 (2021). Others, like Emerson, contend that the statutory text and precedent support such authority, noting that Congress affirmed rulemaking powers through the Magnuson-Moss Act for consumer protection rules. Blake Emerson, *The Progress of FTC Rulemaking*, YALE J. REG. (Mar. 21, 2023), https://www.yalejreg.com/nc/the-progress-of-ftc-rulemaking-by-blake-emerson/.

[34] Tal Marnin, Robin Melman & Kathryn Jordan Mims, *Update: FTC Abandons Non-Compete Rule and Simultaneously Initiates Targeted FTC Noncompete Enforcement Action*, WHITE & CASE (Sep. 5, 2025), https://www.whitecase.com/insight-alert/update-ftc-abandons-non-compete-rule-and-simultaneously-initiates-targeted-ftc).

[35] *See, e.g.*, *Federal Trade Commission Accomplishments, June 2021-January 2025*, FED. TRADE COMM'N (Jan. 19, 2025) (accessed Nov. 1, 2025).

[36] *See generally* Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300 (2016) (discussing how participation rights in administrative law are structured much more around rulemaking than around adjudication); Despina Pachnou, *Due Process in Competition Law Enforcement: The New OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement*, CPI Columns (Feb. 2022), www.competitionpolicyinternational.com/wp-content/uploads/2022/02/OECD-Column-February-2022-2-Full.pdf (describing the OECD Recommendation on transparency and procedural fairness in competition law enforcement). See FATF (2015) together with Dalla Pellegrina & Masciandaro (2009) For a discussion on AML/CTF supervision as a technocratic, risk-based relationship between supervisors and regulated entities rather than an arena for broad stakeholder participation, see generally FIN. ACTION TASK FORCE, EFFECTIVE SUPERVISION AND ENFORCEMENT BY AML/CFT SUPERVISORS OF THE FINANCIAL SECTOR AND LAW ENFORCEMENT: GUIDANCE FOR A RISK-BASED APPROACH (2015) and Lucia Dalla Pellegrina & Donato Masciandaro, *The Risk-Based Approach in the New European Anti-Money Laundering Legislation: A Law and Economics View*, 5 REV. L. & ECON. 931 (2009).

[37] Antitrust Procedures and Penalties Act (Tunney Act), Pub. L. No. 93-528, 15 U.S.C. § 16, 88 Stat. 1706 (1974)].

Regulatory outcomes—such as complaints, consent orders, and formal decisions—are typically made public and accompanied by reasoned explanations to reinforce compliance norms and enable oversight. Federal and state enforcers, along with private plaintiffs, pursue violations through parallel pathways.[38] Civil, administrative, and criminal actions may proceed in parallel or in coordinated fashion, increasing exposure once a breach of law is established.[39]

Under the AML regime, enforcement under the Bank Secrecy Act is coordinated primarily through the FinCEN, in the Department of the Treasury, and the Department of Justice, while agencies with a specific responsibility for bank regulation also play a role.[40] Although guidance and remediation are common initial responses, documented and persistent control failures often lead to formal penalties, with escalation occurring relatively swiftly once violations are substantiated, with no formalized routine for stakeholder participation.

Administration of the BSA can lead to APA rulemaking procedures, including stakeholder consultations, but most existing rules have remained largely unchanged for many years, with reforms typically adding layers to the established framework rather than replacing it.[41] However, the 2020 AML amendments to the BSA led the Treasury to initiate rulemaking procedures during the Biden administration, but there has been no recent follow-up. In early 2025, the BSA's website asked for comments on an "interim final rule" that reduces reporting requirements for U.S. firms under the Beneficial Ownership Information provisions of the 2021 Corporate Transparency Act. However, even given these recent amendments, case-by-case adjudication is central to enforcement of the relevant AML statutes.[42] Rules essentially set the stage for subsequent lawsuits against individual financial institutions.

B. Europe's Collaborative Regulatory Tradition and its Contemporary Expression

Across much of Europe, regulators were traditionally embedded in the public administration as expert bodies tasked with guiding compliance through technical advice and risk-based supervision, under the ultimate authority of a politically appointed minister.[43] In many policy domains, standards as well as regulations sought to clarify the contents of primary legislation. They emerged as a result of dialogue between organized interests (employers' associations, trade unions, and the state) and aimed at broad legitimacy recognized by affected actors through institutionalized consultation. This tripartite form was especially well-institutionalized in the Nordic countries and in Germany's Sozialpartnerschaft, but

[38] We discuss the role of private plaintiffs enforcing public law in Part VI.

[39] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2d ed. 2019).

[40] In addition to the Federal Reserve System, these are the Comptroller of the Currency, and the Federal Deposit Insurance Commission.

[41] *See* 31 C.F.R. ch. X (2023), (implementing the Bank Secrecy Act's anti-money laundering requirements for financial institutions); *Financial Crimes Enforcement Network*, FED. REG., https://www.federalregister.gov/agencies/financial-crimes-enforcement-network (providing a registry of all amendments).

[42] Several sources confirm U.S. AML enforcement of BSA obligations occurs primarily through institution-specific examinations and enforcement actions rather than through further rulemaking: see the FFIEC BSA/AML Examination Manual (describing BSA/AML supervision and enforcement through bank-level examinations) and federal oversight reports that characterize BSA/AML enforcement as a stream of case-specific actions against individual institutions. *See* FED. FIN. INSTS. EXAMINATION COUNCIL, FFIEC BSA/AML EXAMINATION MANUAL (2020); U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-386, BANK SECRECY ACT: OPPORTUNITIES EXIST FOR FINCEN AND THE BANKING REGULATORS TO FURTHER STRENGTHEN THE FRAMEWORK FOR CONSISTENT BSA OVERSIGHT (2006); ; *Termination of Bank Secrecy Act/Anti-Money Laundering Consent Orders* (Fed. Deposit Ins. Corp., Report No. EVAL-22-002, 2021).

[43] *See generally* SUSAN ROSE-ACKERMAN, DEMOCRACY AND EXECUTIVE POWER (2021) portraying continental European administrative law as structuring a bureaucratic, expertise-based administration under ministerial responsibility, with administrative law mediating between civil servants, citizens, and organized groups. Administrative law in these systems emphasizes legality and hierarchical control but also recognizes consultation and negotiated standard-setting as routine tools of governance.

variants of corporatist consultation shaped regulatory policymaking more broadly across continental Europe.[44] In line with that tradition, many regulatory agencies were designed as competence centers ("coaches"), staffed heavily with sector specialists—engineers, accountants, and economists alongside legal experts—expected (and socialized) to "make systems work" through dialogue with firms rather than adversarial conflict.[45] In cases of non-compliance, agencies typically began with written guidance and warnings, while license withdrawals and monetary sanctions were reserved for serious or persistent breaches. The dominant orientation was preventive governance and sectoral competence-building, not punishment.

Since around the turn of the millennium, however, European enforcement has increasingly embraced deterrence through higher administrative fines, leading to legal challenges from the affected firms and industries.[46] Given the shift to a more adversarial approach to enforcement, how do agencies set enforcement priorities, if they can no longer rely on cooperative agreements with firms and industry groups? One option would have been to issue general rules with the force of law ("secondary legislation") directed toward legal violations that arise in particular industries or lines of business. However, in general, that is not what occurred. Instead, case-by-case adjudication replaced negotiated agreements as the main mode of regulation. One reason for the shift toward adjudication is that the expert agencies rarely have authority to adopt binding regulations themselves.[47] They may *propose* secondary legislation and be consulted by their ministry, but they must defer to the ministry's ultimate choices. There are important differences between our two regulatory areas in Europe. Antitrust is a good example of the trend toward adversarial enforcement strategies while AML remains focused on cooperation between public agencies and the regulated financial firms.

At present, for antitrust, the common response to suspected infringements is investigative action—often triggered by complaints, leniency applications, or market monitoring—followed by case-by-case adjudication. National authorities conduct independent analyses of market structures and firm behavior to establish whether conduct violates antitrust rules. Although guidance and advocacy remain part of the toolkit, enforcement is primarily adversarial once formal proceedings begin. Remedies range from cease-and-desist orders to structural or behavioral commitments, and fines can be substantial, calculated on turnover-based methodologies. Much of the rule development occurs at the EU level, where the European Commission issues regulations and guidelines that harmonize substantive standards and procedural frameworks across Member States. Germany's Bundeskartellamt operates through independent decision divisions and applies established fining practices based on turnover

[44] *See generally* TRENDS TOWARD CORPORATIST INTERMEDIATION (Philippe C. Schmitter & Gerhard Lehmbruch eds., 1979) (enshrining the concept of "(neo-)corporatist intermediation": a system in which a limited number of hierarchically organized peak associations (employers, unions) are integrated into policy formulation and implementation by the state, often through formalized bargaining and consultative councils); THE DIVERSITY OF DEMOCRACY: CORPORATISM, SOCIAL ORDER AND POLITICAL CONFLICT (Colin Crouch & Wolfgang Streeck eds., 2006) (highlighting how tripartite or multi-actor arrangements (state–employers–unions) remain central in coordinated market economies in Europe, including in terms of strong institutionalization of corporatist consultation in Nordic countries and Germany's Sozialpartnerschaft).

[45] *See generally* KELEMEN, *supra* note 2 (describing European practice as more cooperative, informal, opaque, and less reliant on the involvement of lawyers and courts than in the United States. He notes that, across Europe, closed networks of bureaucrats and regulated interests developed regulatory policy in concert rather than through litigation).

[46] *Id.*

[47] For secondary legislation issued by ministries, the German Grundgesetz, Article 80 permits delegation so long as the statute lists its "content, purpose, and scope" but does not mention the procedures for the government to use. Grundgesetz [GG] [Basic Law], translation at http://www.gesetze -im-internet.de/englisch_gg/index.html, art. 80.Regulations that will be enforced at the Länder (State) must be approved by the Bundesrat (the upper house representing the states). In the United Kingdom, the two houses of Parliament review and vote on important Statutory Instruments, but they can only vote them up or down, and, in practice, disapproval is uncommon. French ordinances and degrees face different requirements, with ordinances requiring legislative approval. *See* SUSAN ROSE-ACKERMAN, *supra* note 43, at 46-71 (2021) (summarizing these cross-country differences).

methodologies under German law, enabling significant sanctions.[48] In France, the Autorité de la concurrence separates investigation and decision-making through a prosecutorial arm (rapporteurs) and a decision-making college, creating space for firms to contest judgments before high fines are imposed.[49] Across these countries, third parties, such as customers and competitors, may submit complaints, observations, and evidence and can be invited to oral hearings, though such participation is not routinely or formally required.[50] The collaborative heritage is more visible in sector inquiries and market studies than in the fining pipeline itself.[51]

Thus, the emphasis on case-by-case enforcement remains, even as regulators have become more focused on adversarial investigations leading to large fines. At the same time, an intermediate step has been implemented by a number of national competition authorities. They have begun to rely on market investigation tools that provide a framework for imposing behavioral or structural remedies in specific markets. For example, the U.K. Competition and Markets Authority used its market investigation powers in retail banking to mandate an "open banking" data-sharing standard and related measures to improve switching and competition for personal and SME accounts.[52] These enforcement tools are not classed as "secondary legislation," but they operate in a similar fashion and are subject to mandatory stakeholder consultation.[53]

AML authorities have not moved in the adversarial direction. Their default response remains risk-based guidance, remediation plans, and follow-up on governance systems. Escalation to large administrative fines occurs where failings are serious, repeated, or reflect management disregard, but files are built first for supervision rather than sanction—lengthening escalation in practice. In Germany (BaFin), a statutory fine catalogue under the Anti-Money Laundering Act permits significant penalties, yet supervisory practice emphasizes remediation and controls. Public communications and orders are common, and very large fines follow documented, persistent failures. In Norway (Finanstilsynet), supervision, orders, and coercive fines dominate, while administrative penalties are typically reserved for serious or repeated AML failings, with priority on system fixes and board-level accountability. In France (ACPR/AMF), investigation and decision are separated via sanctioning commissions, strengthening legitimacy, and supporting sizeable fines but adding procedural gates in individual cases (e.g., rapporteur's report, hearings, deliberation). Authorities tend to lean on remediation until files are

[48] *Guidelines for the Setting of Fines in Cartel Administrative Offence Proceedings*, BUNDESKARTELLAMT (2021); Anne Caroline Wegner, Helmut Janssen & Sebastian Janka, *Germany: Vigilant Cartel Enforcement Led to Dip in Cases*, GLOBAL COMPETITION REVIEW – ANTITRUST REVIEW (2023).

[49] *Autorité de la Concurrence*, RAPPORT ANNUEL (2024); Légifrance. (n.d.). Code de commerce [C. com.] [Commercial Code] art. L461-1 to L464-10 (Fr.).

[50] Or Brook & Barry Rodger, *Comparative Report: National Judicial Review of Competition Law Enforcement in the EU and the UK*, *in* JUDICIAL REVIEW OF COMPETITION LAW ENFORCEMENT IN THE EU MEMBER STATES AND THE UK (Barry Rodger et al. eds., Wolters Kluwer, 2024), § "Third parties".

[51] Alberto Alemanno, *Unpacking the Principle of Participation in Article 11 TEU: A Legal Realist Critique*, 33 Y.B. EUR. L. 97, 104 (2014).(explaining stakeholder participation is a normative goal in EU governance, but that its implementation—particularly in administrative enforcement—faces structural and legal limitations).

[52] COMPETITION & MKTS. AUTH., RETAIL BANKING MARKET INVESTIGATION: FINAL REPORT 441 (2016); *see also* COMPETITION & MKTS. AUTH., RETAIL BANKING MARKET INVESTIGATION: FINAL REPORT 19 (2017); Retail Banking Market Investigation Order 2017, arts. 14–17 (establishing the Open Banking Implementation Entity and implementation framework).

[53] *See generally* MARKET INVESTIGATIONS: A NEW COMPETITION TOOL FOR EUROPE? (Massimo Motta, Martin Peitz & Heike Schweitzer eds., 2022 (providing an overview) and Jasper van den Boom, Inge Graef, Giorgio Monti, Cedric Argenton & Eric van Damme, *Towards Market Investigation Tools in Competition Law: The Case of the Netherlands*, 14 J. EUR. COMPETITION L. & PRAC. 553 (2023)(discussing recent national developments).

ready for full judicial review, with no routine for soliciting stakeholder views once a case has got this far.[54]

European regulatory systems, especially at the EU level, have broadened stakeholder engagement to address concerns about legitimacy and technocratic governance.[55] At the same time, a stronger emphasis on deterrence and exceptional fines—particularly in competition—pushes cases onto a formal, adversarial sanctions track with less room for dialogue than supervision. The shift from a "coach" to a "cop" orientation may weaken the consensus- and expertise-based administrative culture from which legitimacy has traditionally been drawn.

C. Regulatory Approaches and Stakeholder Involvement in the United States and Europe

In both regions, regulatory agencies enforce antitrust and AML legislation primarily through case-by-case adjudication. Agencies on both sides of the Atlantic have very limited ability to promulgate secondary law in these regulatory areas. In both regions, stakeholders are little involved in setting enforcement priorities and crafting generic remedies. Those affected by monopolized markets and the easy flow of dirty money are seldom involved in agency priority-setting or in advising on deterrence-oriented strategies.[56]

In Europe, collaboration between agencies and regulated businesses often begins in pre-enforcement stakeholder fora. Once an investigation into suspected compliance failure or intentional offence opens, interactions shift to a more arm's length posture, though remediation, supervision, or settlement remain possible outcomes. In U.S. antitrust enforcement, the Department of Justice and the FTC pursue violations through case-by-case, adjudication-oriented processes—that may proceed to federal court—with investigations frequently culminating in public complaints or decisions containing detailed competitive analyses.[57] Comparative administrative-law scholarship emphasizes that the differences in rulemaking and hearing procedures arose from contrasting administrative traditions and constitutional architecture, rather than mere policy choices.[58] Yet, established traditions should be analyzed in the light of modern circumstances and in the different connections between legal strategies and the nature of underlying policy goals.

In Parts IV, V, and VI, we move from the agencies' rulemaking activities to case-by-case enforcement under both statutes and administrative rules. We recognize that if the agency does not promulgate rules with the force of law, then overall policy patterns can show themselves in the cases that are selected and in punishments or structural remedies. These patterns may reflect a conscious agency effort to implement its policy goals, or they may arise as judges and other commentators review past agency

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[54] *See* Laure de Batz, *Financial Market Enforcement in France*, 55 EUR. J. L. & ECON. 409, 427 (2023); *Combating Money Laundering | Autorité de contrôle prudentiel et de resolution*, BANQUE DE FRANCE, https://acpr.banque-france.fr/en/nos-missions/combating-money-laundering.

[55] *See* JUSTIN GREENWOOD, INTEREST REPRESENTATION IN THE EUROPEAN UNION (4th ed. 2017), chs. 2-3 & 6 (showing institutionalized stakeholder influence in EU rulemaking while only indirect influence on enforcement); Christine Quittkat, *The European Commission's Online Consultations: A Success Story?* 49 J. COMMON MKT. STUD. 653, 653 (2011) (questioning whether consultation mechanisms achieve broad participation, highlighting risks of capture even in open processes).

[56] Based on a comparative study of Europe and the United States, transparency in both regions is regarded as a precondition for meaningful stakeholder engagement in rulemaking, while enforcement remains less participatory and more opaque, raising concerns about accountability. *See generally* Susan E. Dudley & Kai Wegrich, *The Role of Transparency in Regulatory Governance: Comparing US and EU Regulatory Systems*, 19 J. RISK RSCH. 1141, (2016). *See* Van Langen, *supra* note 29, at 22-23 (providing empirical evidence that stakeholder engagement is institutionalized as part of accountability, but its depth varies across countries, and enforcement processes remain comparatively closed).

[57] The system also allows for significant private enforcement, as we return to in Part VI.

[58] *See generally* ROSE-ACKERMAN, *supra* note 43; Kagan, *supra* note 39; PUBLIC ADMINISTRATION AND EXPERTISE IN DEMOCRATIC GOVERNMENTS (Susan Rose-Ackerman ed., 2024); COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2d ed. 2017).

enforcement efforts. Judicial review will be especially important if the courts impose their own interpretations of a statute's purposes in ways that undermine or reinforce agency regulatory efforts. Furthermore, leaving the policy implications of judicial review to one side, the nature of judicial review varies across different legal systems. For example, the burden of proof or the rights of litigants can have implications for the policies that can be legally implemented under the statute. After our review of case-by-case enforcement, we return to rulemaking to recommend reforms in the policymaking systems in both regions.

IV. Assessing Legality: Burden of Proof and Evidentiary Standards

A. Europe's Inquisitorial Tradition

In Europe's civil-law systems, the ideal model of fact-finding is judge- or authority- led and truth-oriented. The regulatory agency (i.e., the non-criminal administrative authority) is responsible for assembling and weighing the record rather than arbitrating between opponents (or "adversaries"). Two background ideas shape regulatory enforcement: the search for material truth and the principle of proportionality,[59] outcomes should reflect what actually happened and be proportionate to demonstrated harm and culpability. Judicial review (including legality review) must confirm that coercive outcomes (fines, orders) rest on a sufficiently reasoned decision that can withstand legality, proportionality, and equality-before-the-law review by a court.[60] These features structure how non-criminal agencies, including competition/antitrust and financial/AML supervisors, build a case and how reviewing courts assess it.[61]

Formally, the administrative standard of proof is "more probable than not" – a balance of probabilities –significantly lower than "beyond a reasonable doubt." In civil-law systems, this reflects the non-criminal nature of administrative enforcement, even though inquisitorial procedures and judicial review often raise the practical evidentiary threshold. In practice, however, several "inquisitorial pressures," due to the proactive role of authorities and the expectation that firms will seek judicial scrutiny, push the effective evidentiary demand upward.[62] First, record sufficiency is measured against judicial review: agencies anticipate intense legality/proportionality scrutiny and therefore invest in detailed record-building (internal emails, transaction data, econometrics, governance documentation, internal controls) to defend both infringement claims and fine calibration. Yet, despite these demanding duties, enforcement regimes fall short in creating effective pathways for whistleblowers to report financial

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[59] Embedded in EU law: *Treaty on European Union*, art. 5(4), 2012 O.J. (C 326) 13; Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, 2015 O.J. (L 141/64). .. *See also* Mark Pieth & Radha Ivory, *Emergence and Convergence: Corporate Criminal Liability Principles in Overview*, *in* CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK 3, 3-60 (Mark Pieth & Radha Ivory eds., 2011) (providing an introduction and assessment of corporate criminal liability, contrasted to U.S. regulation).

[60] MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 166-68 (1986); Jud Mathews & Joshua Spannaus, *The Lawfulness of Public Law in Germany and the United States*, *in* PUBLIC ADMINISTRATION AND EXPERTISE IN DEMOCRATIC GOVERNMENTS 28, 39 (Susan Rose-Ackerman, ed., 2024).

[61] For proportionality review of sanctions in EU competition law, see *Chalkor AE Epexergasias Metallon v. Commission*, Case C-386/10 P, ECLI:EU:C:2011:815, ¶¶ 63-67 (confirming the EU courts' "unlimited jurisdiction" over fines, including their amount and proportionality). For AML, see *WM and Sovim SA v. Luxembourg Business Registers*, Joined Cases C-37/20 & C-601/20, ECLI:EU:C:2022:912, ¶¶ 89-91 (striking down rules on public access to beneficial-ownership registers as a disproportionate interference with privacy and data-protection rights). For an overview of how these and related judgments shape the proportionality test for AML measures, see *Proportionality in Anti-Money Laundering Regulation*, COUNCIL OF BARS & L. SOC'YS EUR. (2020).

[62] ANDRIANI KALINTIRI, EVIDENCE STANDARDS IN EU COMPETITION ENFORCEMENT (2019), ch. 4 ("The Standard of Proof in EU Competition Enforcement") & ch. 7 ("Evidence Standards and Standards of Judicial Review").

crime. Even after the EU Whistleblower Directive, European systems remain anchored in internal reporting. Labor protections, lacking the direct-to-enforcer channels and incentive structures that characterize U.S. practice.[63]

Second, reason-giving duties remain at the agency level, the decisionmaker, in the agency or in court, must prepare a file that is self-sufficient and transparent enough to justify the outcome. Third, systemic ripple effects arise even without strong stare decisis; [64] adverse annulments travel across the system, creating a conservative bias in proof-building. An annulment—say, in an antitrust case on algorithmic price coordination—shapes not just that file; it travels—shaping how future cases are selected, investigated, reasoned, and settled across agencies and courts. To avoid repeating the outcome, agencies react by raising their own bar: they collect more data, run more econometrics, write longer decisions, and narrow theories to "safer" ones. The consequence is that, even where the formal standard is "balance of probabilities" (or an equivalent[65]), inquisitorial review incentives pull agencies toward quasi-judicial evidentiary accuracy before imposing large administrative sanctions.

These dynamics complicate settlement-driven enforcement, which nonetheless has expanded in Europe on both criminal and administrative tracks. In EU competition law, the Commission's 2008 cartel settlement procedure has become a standard route for resolving many cartel cases, as documented by Wils in his assessment of all cartel decisions concluded between 2008 and 2023.[66] Yet practices at the country level vary significantly. In AML, major European enforcement actions against banks also are frequently concluded through large settlements or administrative resolutions, such as the Dutch Public Prosecution Service's €775 million settlement with ING for structural AML/CTF failures and the Central Bank of Ireland's 2025 enforcement action against Coinbase Europe Limited for AML breaches resolved through an administrative fine.[67]

However, even if settlements happen, several inquisitorial features constrain U.S.-style bargaining.[68] For one, confession is not a sufficient basis for sanction: an acknowledgement of liability or facts may trigger reductions, but the authority still issues a reasoned decision grounded in its independent

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[63] *See* Nedim Hogic, *Financial Incentives for Whistleblowing: A Comparative Perspective*, 10 EUR. J. COMPAR. L. & GOVERNANCE 176, 203 (2023) (arguing that U.S. bounty programs under the SEC and IRS materially increase detection of economic crime compared to EU systems); *see also* Christian Uhlmann, *The Americanization of Whistleblowing? A Legal-Economic Comparison of Whistleblowing Regulation in the U.S. and Germany Against the Backdrop of the new EU Whistleblowing Directive*, 27 U.C. DAVIS J. INT'L L. & POL'Y 149, 149-50 (2021) (explaining that U.S. law mobilizes private actors for public enforcement through monetary rewards and direct channels, while European regimes remain rooted in internal reporting and labor protections).

[64] See *generally* European Parliament, The General Principles of EU Administrative Procedural Law 15–17 (2015) (identifying the EU administration's duty to give reasons and to provide a complete, transparent file).
See also Takis Tridimas, Precedent and the Court of Justice: A Jurisprudence of Doubt?, in *Philosophical Foundations of European Union Law* 307, 307–10 (2012) (explaining that, although the CJEU does not adhere to strict stare decisis, its judgments generate a quasi-precedential pull with systemic effects).

[65] Prépondérance des probabilités in France; preponderance of the evidence in the United Kingdom.

[66] Wouter P.J. Wils, *The European Commission's Cartel Settlement Procedure: An Assessment After Fifteen Years*, 15 J. EUR. COMPETITION L. & PRAC. 130 (2024).

[67] *See ING Pays 775 Million Due to Serious Shortcomings in Money Laundering Prevention*, NETH. PUB. PROSECUTION SERV., https://www.prosecutionservice.nl/latest/news/2018/09/04/ing-pays-775-million-due-to-serious-shortcomings-in-money-laundering-prevention (Sep. 4, 2018); *The Central Bank Takes Enforcement Action Against Coinbase Europe Limited for Anti-Money Laundering Failures*, CENT. BANK OF IR., https://www.centralbank.ie/news/article/press-release-enforcement-action-against-coinbase-europe-limited-6-November-2025 (Nov. 6, 2025).

[68] Despite the conflict between inquisitorial principles and pragmatism, settlements (also referred to as non-trial resolutions) account for the majority of resolved foreign-bribery cases and financial sanctions among Parties to the OECD Anti-Bribery Convention, even if these cases are handled under criminal law. *See generally,* Radha Ivory, & Tina Søreide, *The International Endorsement of Corporate Settlements in Foreign Bribery Cases*, 69 INT'L & COMPAR. L. Q., 945, (2020).

assessment of the record and fine methodology, often subject to court control.[69] National analogues differ in form: in France, the Convention judiciaire d'intérêt public (CJIP) requires judicial approval with scrutiny of the factual basis and proportionality.[70] In England and Wales, Deferred Prosecution Agreements under the Crime and Courts Act 2013 likewise require judicial oversight of fairness and proportionality.[71] Second, calibration duties persist: fines must be reasoned with reference to gravity, duration, gains, recidivism, cooperation, and mitigation; authorities cannot trade away calibration for speed without risking annulment or reduction on review. And finally, a public-law orientation with transparency expectations limits the flexibility of negotiated outcomes: even where confidentiality is needed, the decision is expected to explain the evidentiary basis and the rationale for the outcome.[72]

The implications are visible in both antitrust and AML. In antitrust, procedurally mature leniency and settlement frameworks allow agencies to combine strong incentives for self-reporting (leniency) with reasoned administrative decisions subject to robust judicial review, especially at the EU level.[73] At the same time, the evidentiary burden remains demanding, notably in abuse cases and complex cartels where market definition, effects analysis, internal documentary evidence, and econometrics must survive detailed appellate scrutiny.[74] Settlements can simplify proof and reduce litigation risk, but they do not and cannot substitute for the authority's own record. Moreover, the more attractive leniency and settlement are in the administrative track, the harder it may become to preserve coherent criminal enforcement against individuals in those Member States that have criminal cartel offences, given constraints on reusing leniency materials, double-jeopardy concerns, and fair-trial protections in the criminal courts.

In AML supervision, the enforcement architecture is formally split between administrative supervision of regulated entities and criminal law responses to money laundering. Supervisory workflows are preventive and systems-focused; liability assessments depend on complex governance structures, cross-border flows, and the design and operation of internal controls. Inquisitorial expectations—material truth, proportional calibration to systems failures, and reason-giving about risk management and remediation—generate heavy documentation demands before very high fines can be defended as proportionate. Because the harm is diffuse and the causal chain to particular transactions is long, supervisory agencies tend to prioritize remediation and corrective measures, and ongoing monitoring over "headline sanctions." Large settlement resolutions in this administrative track can be pragmatically attractive, but they also risk blurring the distinction between administrative and criminal enforcement,

[69] To what extent a court must approve a settlement varies across countries.

[70] And note: CJIP is not to be interpreted as a verdict (like settlements are in some other countries) but it requires both public hearing and court approval. *Code de procédure pénale* [Fr.], art. 41-1-2 (2020).

[71] Crime and Courts Act 2013, sch. 17 (UK); *Deferred Prosecution Agreements—Code of Practice*, CROWN PROSECUTION SERV. & SERIOUS FRAUD OFF. (2020).

[72] *See generally* Tina Søreide, *Principled and Transparent Settlement-Based Enforcement of Corporate Liability*, *in* NEGOTIATED JUSTICE IN TRANSITIONAL CORRUPTION - BETWEEN TRANSPARENCY AND CONFIDENTIALITY (Franziska Hohl Zürcher & Nadja Capus eds., 2024 (analyzing these constraints—and the tensions they create—and arguing that corporate settlements in civil-law systems are a pragmatic response to complex cross-border crime but sit awkwardly with criminal law's truth-seeking ideals, double-jeopardy guarantees, and expectations of transparency and proportionality in adjudication). *See also* Kalle Moene & Tina Søreide, *Scope and Precision in the Laws Against Corporate Bribery*, *in* PUBLIC SECTOR PERFORMANCE, CORRUPTION AND STATE CAPTURE IN A GLOBALIZED WORLD 162 (Susan Rose-Ackerman ed., 2024) (analyzing settlement outcomes when legality is hard to determine and enforcers have a high burden of proof).

[73] Commission Notice on the Conduct of Settlement Procedures in Cartel Cases, 2008 O.J. (C 167) 1.

[74] Illustrative EU settlement cases include DRAMs (2010) and Trucks (2016), which demonstrate the Commission's reliance on independently established records alongside acknowledgements of liability. *DRAMS (Case AT.38511)*, European Commission, 2011 O.J. (C 181) 15; *Trucks (Case AT.39824)*, European Commission, 2017 O.J. (C 108) 6..

raising questions about how far negotiated outcomes with institutions should influence, pre-empt, or constrain the separate criminal track for money-laundering offences committed by individuals.[75]

Thus, antitrust has institutionalized negotiated outcomes most successfully, upon an established and largely formalized leniency-settlement-reasoned decision process.[76] In contrast, AML supervisory enforcement, although formally flexible, often exhibits a supervisory/remedial equilibrium because evidentiary and calibration demands are harder to satisfy in cases of systemic failure.

B. United States: Adversarial Architecture and Negotiated Resolutions

U.S. corporate enforcement is embedded in an adversarial legal system characterized by party-driven litigation, broad pre-trial evidence gathering (discovery), and a prominent role for private actors. As Robert Kagan has argued, this model—termed "adversarial legalism"—relies on formal legal contestation and judicialized policymaking, often in contrast to the more bureaucratic or inquisitorial approaches found in civil-law jurisdictions. Within this structure, enforcement agencies such as the Department of Justice (DOJ) and the SEC pursue violations through litigation or settlement, with a pronounced emphasis on deterrence and cooperation incentives, including programs to encourage reporting by whistleblowers.[77]

Two systemic features enhance prosecutorial leverage and the likelihood of negotiated outcomes. First, parallel proceedings—civil, criminal, and administrative—are not only permitted but often coordinated, as courts have generally accepted the practice of conducting simultaneous investigations.[78] This coordination enables agencies to use a range of investigative tools—including subpoenas, grand jury proceedings, and civil discovery, which allows parties to require documents and testimony before trial. Second, overlapping federal offences, including wire fraud, mail fraud, conspiracy, and money laundering, provide prosecutors with multiple charging pathways. This redundancy, described by Stuntz as the "pathological politics of criminal law," expands prosecutorial discretion and enhances bargaining power in corporate cases.[79]

The foundational standard for corporate liability further enhances prosecutorial leverage. Under the doctrine of respondeat superior, a corporation may be held criminally liable for the acts of any employee

[75] Examples include the Swedish Finansinspektionen's SEK 4 billion administrative fine on Swedbank for serious AML deficiencies (2020) and the UK FCA's civil penalty on Standard Chartered (£102.2m, 2019) for poor AML controls. See Finansinspektionen *FI issues warning and administrative fine of SEK 4 billion to Swedbank AB (publ) for serious deficiencies in its work to combat money laundering* (Mar. 19, 2020), https://www.fi.se/en/published/press-releases/2020/fi-issues-warning-and-administrative-fine-of-sek-4-billion-to-swedbank-ab-publ/;
; see also FIN. CONDUCT AUT*FCA fines Standard Chartered Bank £102.2 Million for Poor AML Controls*, https://www.fca.org.uk/news/press-releases/fca-fines-standard-chartered-bank-102-2-million-poor-aml-controls (Apr. 9, 2019).

[76] *See generally* Zhijun Chen & Patrick Rey, *On the Design of Leniency Programs*, 56 J. L. & ECON. 917 (2013) (discussing leniency programs); Reinaldo Diogo Luz & Giancarlo Spagnolo, *Leniency, Collusion, Corruption, and Whistleblowing*,13 J. COMPETITION L. & ECON. 729 (2017) (discussing how to destabilize illegal networks more generally). Both sources-- underscore that leniency and whistleblowing mechanisms work best when they are predictable, credible, and protect informants, while avoiding designs that encourage abuse or weaken overall deterrence.

[77] The U.S. system systematically benefits from insider information in the development of new cases. Whistleblower bounties (SEC/CFTC) and qui tam actions under the False Claims Act raise detection probabilities by rewarding high-value tips. The Antitrust Division's Leniency Program and DOJ-wide voluntary self-disclosure policies spur "first-in" strategies that break collusion and reveal facts at low public cost.

[78] Affirmed in *SEC v. Dresser Industries*, 628 F.2d 1368 (D.C. Cir. 1980), where the D.C. Circuit held that parallel proceedings are unobjectionable absent demonstrable prejudice to the defendant.

[79] William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 505 (2001).

acting within the scope of employment and, at least in part, for the benefit of the company.[80] This principle[81] does not require proof of senior management intent or a corporate "mind," thereby exposing firms to significant trial risk even when individual culpability is diffuse. Charging and resolution policies are codified in the Department of Justice's Justice Manual,[82] which instructs prosecutors to consider factors such as voluntary self-disclosure, cooperation, remediation, and the pervasiveness of misconduct. The Corporate Enforcement and Voluntary Self-Disclosure Policy provides inducements in a structured and predictable manner: declinations with disgorgement for timely self-reporting and full cooperation, reduced penalties in the presence of aggravating factors, and calibrated credit for remediation efforts. These frameworks aim to promote predictability and allow firms to internalize enforcement risk in compliance planning.

In the United States, corporate enforcement is often resolved through negotiated outcomes, such as criminal guilty pleas, deferred prosecution agreements (DPAs), non-prosecution agreements, and civil and administrative settlements with regulators, such as the SEC. In these settings, prosecutors and enforcement agencies retain substantial control over the factual narrative and sanctions, while judicial involvement, where it exists, is largely limited to checking basic legality and voluntariness rather than re-examining the underlying record. By comparison, in most European systems, enforcement authorities are expected to adopt reasoned decisions that can be scrutinized on both procedure and substance.

The evidentiary posture in U.S. enforcement emphasizes litigation readiness but permits earlier resolution. Prosecutors prepare strong evidentiary records to meet legal thresholds for pre-trial motions and expert testimony, while also anticipating related private lawsuits. However, the availability of broad discovery and flexible charging options allows earlier settlements without fully substantiating each fact to the standard required in European administrative enforcement. Admissions in plea agreements, DPAs, or SEC statements of fact often suffice to resolve cases, provided the admissions align with internal DOJ criteria for cooperation, remediation, and voluntary disclosure.

C. Divergence in Evidentiary Demands

Although enforcement tools in the United States and Europe increasingly converge, the systems diverge in institutional roles and evidentiary expectations. U.S. authorities operate in an adversarial setting where expansive discovery, parallel proceedings, and jury risk create early incentives for settlement.[83] Firms often resolve cases based on admissions in plea agreements, DPAs, or SEC statements of fact. In contrast, European authorities—guided by inquisitorial principles—must issue reasoned, reviewable decisions based on their own evidentiary record, which raises documentation demands and limits informal settlements.

This structural divergence shapes enforcement strategies. European agencies must justify sanctions through detailed assessments of legality, proportionality, and calibration, while U.S. enforcers can conclude cases without verifying every fact to the same standard.[84] Consequently, European competition authorities favor evidence-rich cartel cases, and AML supervisors emphasize systemic remediation that will produce systematic reforms in financial institutions.

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[80] Although this constitutes a form of objective liability, criminal prosecution still requires proof beyond a reasonable doubt.

[81] This principle was established in *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909).

[82] U.S. Dep't of Just., Just. Manual § 9-28.000 (2023).

[83] *See generally* Tina Søreide & Kasper Vagle, *Settlements in Corporate Bribery Cases: An Illusion of Choice?*, 53 EUR. J. L. & ECON. 261 (2022) (comparing regimes and finding adverse incentives in both regions; possibly creating too strong incentives to accept liability in one region, against too weak incentives to reach a conclusion and move on in the other).

[84] For a study of criminal law evidentiary burdens across Europe and the United States, see generally Renée Lettow Lerner, *The Inquisitorial Advantage in Criminal Procedure*, 89 GEO. WASH. L. REV. 513 (2021).

Whistleblowing by insiders might seem a plausible enforcement route, but it remains underutilized in both systems. In Europe, cultural and institutional barriers prioritize internal reporting and labor protections, rather than reporting violations to public authorities. Robust bounty programs encourage whistleblowing in the United States, but public agencies still require independently verifiable records to open a case so inside information cannot fully substitute for public investigations.[85]

V. Due Process and the Recognition of Corporate Rights

The legal framework governing rights critically shapes both the construction and judicial sustainability of cases involving substantial administrative penalties in the form of fines or structural remedies. In practical terms, imposing and upholding such fines is typically more challenging in Europe than in the United States—especially where European law extends procedural safeguards of the criminal law into the administrative sphere.

A. Corporate Rights in European Enforcement

Administrative sanctions in Europe may engage the "criminal limb" of Article 6 of the European Convention on Human Rights (ECHR) if the proceeding qualifies as "criminal" under the Engel criteria—that is, how the offence is classified in national law, its inherent nature, and the severity of the potential penalty.[86] Once this threshold is met, criminal procedural safeguards—such as access to an independent and impartial tribunal, adversarial proceedings, equal opportunity to present one's case, and reasoned judgments—, are invoked, not just by human defendants, but also by those representing legal persons. The European Court of Human Rights has affirmed that fines imposed for competition and market-abuse violations can trigger procedural rights analogous to those available to criminal defendants.[87] In EU competition law, these rights operate in tandem with the EU courts' unlimited jurisdiction over the level of fines. Consequently, substantial administrative penalties must be constructed and defended with the rigor of criminal proceedings, thereby increasing evidentiary and judicial review burdens.[88] In short, the standard of proof nominally remains the more-probable-than-not standard of the civil law, but, in practice, will be more difficult to establish than in cases of less severe claims.

Rules governing self-incrimination further influence the procedural architecture of enforcement. Under the jurisprudence of the ECHR, individuals cannot be convicted on the basis of statements obtained under legal compulsion—a principle established by case law.[89] In the context of EU competition law, undertakings may be required to provide pre-existing documents and factual records, but they cannot

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[85] *See generally* Jeffrey Vincent Butler, Danila Serra, & Giancarlo Spagnolo, *Motivating Whistleblowers*, 66 MGMT. SCI. 605 (2020) (describing factors and system features that promote whistleblower reporting); KATE KENNY, WHISTLEBLOWING: TOWARD A NEW THEORY (2019) (same).

[86] *See generally* Engel and Others v. The Netherlands, App. Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (June 8, 1976), https://hudoc.echr.coe.int/eng?i=001-57478 (discussing the origin of these criteria).

[87] See *A. Menarini Diagnostics S.r.l. v. Italy*, App. no. 43509/08, Eur. Ct. H.R. (2011), concerning antitrust fines, and *Grande Stevens and Others v. Italy*, App. nos. 18640/10 et al., Eur. Ct. H.R. (2014), addressing market-abuse sanctions.

[88] Described in Part IV, the European inquisitorial tradition leads to a similar comprehensive presentation of facts, but the set of corporate rights, described here, evolved much later than the inquisitorial tradition, is a different dimension, yet part of the same civil law tradition.

[89] Saunders v. United Kingdom, App. no. 19187/91, Eur. Ct. H.R. ¶ 68 (1996) ("The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused."), and Funke v. France, App. no. 10828/84, Eur. Ct. H.R. ¶ 44 (1993) (holding that a customs officer could not compel the plaintiff to provide "the evidence of offences he had allegedly committed"). Both cases established that statements obtained under legal compulsion cannot form the basis of a criminal conviction, although they address slightly different themes.

be compelled to admit liability.[90] If the criminal-process limb applies, these constraints shape interview protocols and the admissibility of responses—particularly in AML cases that cross administrative and criminal domains.[91]

The principle of *ne bis in idem* (no double jeopardy, as enshrined in ECHR Protocol No. 7 and the EU Charter of Fundamental Rights) restricts the imposition of multiple penalties for the same conduct.[92] Parallel administrative and criminal proceedings are permissible only when they are sufficiently linked in substance and time and are proportionate in their cumulative effect.[93] In practice, authorities must carefully manage procedural separation, rights notifications, and evidentiary boundaries to ensure compatibility between the two tracks.

Judicial oversight in Europe is engaged both substantively and procedurally. The inquisitorial tradition described in Section 4 implies that courts scrutinize proportionality, legal reasoning, and methodological soundness in administrative enforcement. This includes the power to reassess the level of fines, in competition cases as well as for cases dealing with money laundering and financial supervision.[94] Under the principle of effective judicial protection, courts may annul, reduce, or adjust sanctions if they find procedural flaws, disproportionality, or insufficient evidentiary support. The duty to provide reasons is mandatory, and publication of decisions is generally practiced, subject to anonymization and confidentiality requirements.[95]

In sum, because criminal-grade procedural protections may apply to administrative sanctions when the stakes are high, complex enforcement actions in Europe require investigative and legal rigor akin to criminal proceedings. This front-loads procedural obligations and makes it difficult to pass even the civil law standard of proof for liability, particularly in competition and AML enforcement.

B. Corporate Rights under U.S. Regulatory Enforcement

In the United States, procedural safeguards associated with criminal prosecutions only apply within the criminal domain. Civil and administrative penalties are ordinarily reviewed under constitutional due process and the Administrative Procedure Act, which requires courts to ensure that agency decisions

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[90] Case 374/87, Orkem v. Commission of the European Communities, 1989 E.C.R.-3283 (clarifying that undertakings may be required to provide pre-existing documents and factual records but cannot be compelled to admit liability).

[91] *See* Council of Europe: European Court of Human Rights, *Guide on Article 6: Right to a Fair Trial (Criminal Limb)* (2022), (confirming that administrative proceedings with punitive character—such as financial and AML enforcement—may trigger fair trial guarantees, including rights during questioning). For discussion, see generally Sara De Vido, *Anti-Money Laundering Measures Versus EU Fundamental Freedoms and Human Rights*, 22 CAMBRIDGE Y.B. EUR. L. STUD. 1271 (2020) and Silvia Allegrezza & Grazia Bruzzese, *Supervision and Enforcement of EU's Anti-Money-Laundering and Countering the Financing of Terrorism*, *in* EU BANKING AND CAPITAL MARKETS REGULATION: OPEN ISSUES OF VERTICAL INTERPLAY WITH NATIONAL LAW 487 (2025).

[92] NE BIS IN IDEM IN EU LAW (Bas van Bockel ed., 2016)

[93] See *A and B v. Norway*, Apps. nos. 24130/11 & 29758/11, Eur. Ct. H.R. (2016), where the Court held that parallel administrative and criminal proceedings do not violate the ne bis in idem principle under Article 4 of Protocol No. 7 to the European Convention on Human Rights, 117 U.N.T.S. 302, provided they are sufficiently connected in substance and time and proportionate in their cumulative effect.

[94] While competition law has developed a particularly detailed framework for judicial review—including the Court of Justice's "unlimited jurisdiction" under Article 261, Treaty on the Functioning of the European Union, [2012] O.J. (C 326) 161—similar standards apply in other areas where administrative sanctions may have punitive character and thus trigger rights under ECHR, Art. 6.

[95] See Article 47 of the Charter of Fundamental Rights of the European Union and CJEU case law on effective judicial protection. Transparency is further supported by Council of Europe recommendations on publication of judicial decisions, which advocate online access subject to anonymization and confidentiality Council Conclusions on Best Practices regarding Online Publication of Court Decisions, 2018 O.J. (C 362); COUNCIL OF EUROPE, PUBLICATION OF JUDICIAL DECISIONS: POINTS FOR CONSIDERATION (2020).

are not arbitrary or capricious.[96] For punitive sanctions, constitutional protections such as the Excessive Fines Clause serve as additional constraints. Civil penalty cases do not trigger the procedural guarantees afforded in criminal trials, such as the right to a jury, the presumption of innocence, or the requirement of proof beyond a reasonable doubt.[97] As a result, agencies may impose significant civil penalties while relying on administrative-law review and excessiveness checks, without incurring the procedural burdens of criminal litigation.

In the context of information-gathering, U.S. law does not recognize a Fifth Amendment privilege against self-incrimination for corporations. This principle—established through the collective-entity doctrine—means that corporate entities cannot refuse to produce organizational records, even if such materials might be considered incriminating under European standards.[98] Regulatory authorities routinely employ administrative subpoenas or civil investigative demands to compel documents and testimony, subject to statutory limits and reasonableness standards. Importantly, an individual custodian's personal privilege does not shield corporate records from disclosure. Individuals retain Fifth Amendment protections in their personal capacity, but these do not extend to records held on behalf of a corporation. In practice, this framework enables U.S. enforcement agencies to build civil-penalty cases without self-incrimination constraints.

Parallel civil and criminal proceedings are broadly permissible under U.S. law, and courts rarely stay one in favor of the other.[99] Moreover, because civil penalties are not considered criminal punishment under the Double Jeopardy Clause, they can be imposed either before or after related criminal proceedings. This allows agencies to pursue coordinated enforcement strategies, including in antitrust and AML, provided that procedural fairness and discovery management are maintained.

Judicial review of civil penalties in the United States focuses on whether agencies have provided a reasoned explanation for their decisions and whether the evidence supports the outcome. Courts apply standards from administrative law, including doctrines that defer to agency expertise and structured frameworks for assessing penalties. If the administrative record is well-developed, these mechanisms often support the agency's decision. At the same time, courts remain attentive to constitutional limits, such as protections against excessive fines and requirements for procedural fairness. Compared to Europe—where criminal-grade procedural safeguards may apply—U.S. agencies face a lower threshold for defending even large civil penalties, which remain civil in nature provided statutory intent and effect are regulatory rather than punitive.[100]

[96] Under the Administrative Procedure Act §§ 556–57, if a statute requires a formal, on-the-record hearing, courts apply the "substantial evidence" test. 5 U.S.C. § 706(2)(A), (E).

[97] *See generally* Hudson v. United States, 522 U.S. 93 (1997) (clarifying the civil–criminal distinction for constitutional purposes, holding that civil penalties generally do not trigger the procedural protections afforded in criminal trials, such as the right to a jury or proof beyond a reasonable doubt).

[98] Braswell v. United States, 487 U.S. 99 (1988) (holding that a custodian of corporate records cannot invoke the Fifth Amendment privilege against self-incrimination to resist a subpoena for those records, because the privilege is personal and does not apply to collective entities).

[99] SEC v. Dresser Industries, Inc., 628 F.2d 1368 (D.C. Cir. 1980) (en banc) (holding that parallel civil and criminal proceedings are generally permissible under U.S. law, and courts rarely stay one in favor of the other absent special circumstances).

[100] United States v. Ward, 448 U.S. 242 (1980) (holding that civil penalties remain civil in nature for constitutional purposes when Congress intended them as regulatory and their effect is not so punitive as to transform them into criminal sanctions).

Public enforcement documents—such as complaints, consent orders, and final decisions—are routinely published in both antitrust and AML contexts. These materials often serve as a foundation for follow-on private litigation, thereby amplifying the deterrent effect of public enforcement.[101]

In sum, because civil penalties in the United States remain civil in nature, enforcement agencies can pursue substantial sanctions with comparatively lighter procedural requirements than in Europe—provided they construct a well-reasoned and evidence-supported case.

C. Corporate Rights in a Comparative Perspective

In Europe, when criminal-procedure safeguards apply to administrative enforcement, they have the effect of requiring robust fact-finding and judicial review. These safeguards are triggered when sanctions are classified as "criminal" under ECHR standards (not merely because they deter crime). In the United States, civil penalties remain largely civil, governed by due process and excessiveness review, without criminal-law protections. European authorities face stricter limits on compelled information and must coordinate enforcement tracks, while U.S. agencies can compel records and run parallel proceedings more freely. U.S. decisions also more often lead to private lawsuits, enhancing deterrence, whereas European confidentiality rules limit such reuse.

Both systems aim to protect corporate rights, but differences in thresholds and procedures mean that administrative fines at a level capable of deterring crime are generally more difficult to construct and sustain in Europe than in the United States. These differences are central to understanding how enforcement practices promote deterrence and legitimacy across jurisdictions.

VI. Private Litigation in Enforcement

Private litigation complements public enforcement (i.e., enhances deterrence) when it raises the expected cost of wrongdoing, surfaces information that public agencies might otherwise struggle to obtain, and keeps pressure on firms to invest in compliance.

Whether it actually does so depends on three practical conditions: (i) who has standing and a reason to sue (identifiable victims or representative claimants), (ii) how costly it is to bring and prove a claim (aggregation, access to evidence, litigation finance, fee rules), and (iii) how reliably public decisions can be 'converted' into civil liability (follow-on use of agency findings, settlement dynamics). Where those conditions are met, private suits can significantly amplify deterrence. Where they do not, public enforcement remains the main lever, and private actions play a limited role.[102]

How it works in practice – and the balance between public and private tools –varies not only across countries, but also across regulatory domains: antitrust law has developed a relatively mature ecosystem for private damages claims, particularly in the United States, whereas AML remains largely driven by public law, with limited scope for private actions. These divergences reflect not only institutional design

[101] See, e.g., *Braswell v. United States*, 487 U.S. 99 (1988) (confirming that corporations receive constitutional protections such as due process, speech and search-and-seizure protections, but lack any Fifth Amendment privilege against self-incrimination for corporate records).

[102] For a discussion of public enforcement's significance, see generally Polinsky & Shavell, *supra* note 25, Coffee, *supra* note 13. Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (Alon Harel & Keith Hylton, eds., 2012). *But see* Albert H. Choi & Kathryn E. Spier, *Class Actions and Private Antitrust Litigation*. 14 AM. ECON. J.: MICROECONOMICS 131, 131 (2022) (explaining when class action benefits society).

and legal history, but also differing conceptions of harm, standing, and procedural mechanisms that affect the cost and feasibility of litigation.[103]

A. Europe: Expanding Private Enforcement, Uneven Deterrence

Across Europe, EU policy increasingly supports private actions as a complement to public mechanisms, yet despite legislative reforms, the practical impact of private lawsuits remains limited and unpredictable.

The EU Antitrust Damages Directive harmonizes important procedural elements—such as disclosure rules, extended limitation periods,[104] and the binding effect of final decisions by national competition authorities – to support private claims.[105] Still, cautious judicial interpretation and national legal cultures have curbed its deterrent effect. The Commission's 2020 Communication underscores that access to a public authority's file is a "measure of last resort", reaffirming the primacy of public enforcement. While this may seem at odds with the Directive's goal of facilitating private claims, it reflects a deliberate policy trade-off: protecting leniency and settlement mechanisms.[106]

The Representative Actions Directive introduced a framework for collective consumer redress, but its implementation varies significantly across Member States. Differences persist in how "qualified entities," which are the only approved organizations that may bring claims. There are also differences in the use of opt-in versus opt-out regimes[107] – where opt-out systems generally yield broader participation and stronger deterrence. Third-party litigation funding is expanding across the region, yet the EU lacks a unified regulatory framework.[108] National rules on standing, costs, and disclosure continue to shape the practical viability of private enforcement.[109]

Some jurisdictions stand out. The United Kingdom has become a leading forum for collective actions, thanks to its opt-out regime under the Consumer Rights Act 2015 and a landmark Supreme Court ruling

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[103] For context on American and European approaches to antitrust litigation, *compare* Kagan's adversarial legalism, KAGAN, *supra* note 39, at 64 ("In the late nineteenth century small American merchants, farmers, and shippers, pressed hard by railroads and other large corporations, pushed Congress to enact antitrust laws and make them enforceable in the courts by private lawsuit.") *with* Kelemen's Eurolegalism, KELEMEN, *supra* note 2, at 144 ("[I]n designing the EU competition regime, policy makers initially rejected central aspects of the American system, such as its heavy reliance on private enforcement . . . . However, when the EU introduced a package of reforms in 2004 to "modernize" competition policy, a central goal was to move the EU away from a centralized administrative control model and toward and decentralized private enforcement model, in which private litigation . . . would play a central role.").

[104] "Limitation period" in this context being the legally defined time frame within which a claimant can bring an action for damages in court. After this period expires, the right to sue is barred, even if the underlying violation occurred.

[105] Directive 2014/104 of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance, 2014 O.J. (L 349) 1.

[106] *See* Directive 2014/104/EU, 2014 O.J. (L 349) 1; and *see* European Commission, *Communication on the Protection of Confidential Information by National Courts in Proceedings for the Private Enforcement of EU Competition Law*, 2020 O.J. (C 242) 1 (emphasizing that disclosure of sensitive evidence, including leniency and settlement materials, is strictly limited and that any access to a public authority's file must balance private-enforcement needs against safeguarding public enforcement mechanisms).

[107] In opt-in systems, individuals must actively join the group action; in opt-out systems, they are automatically included unless they choose to leave.

[108] *See generally* EVA LEIN, CONSTANCE BONZÉ, RHONSON SALIM, FRANK ALLEWELDT & SENDA KARA, MAPPING THIRD PARTY LITIGATION FUNDING IN THE EUROPEAN UNION (2025) (describing fragmented national approaches and discuss whether more EU-level regulation is needed to ensure transparency, fairness, and claimant protection).

[109] *Id.* (finding fragmented national approaches and ongoing debate about whether more EU-level regulation is needed to ensure transparency, fairness, and claimant protection).

in favor of 46 million consumers.[110] The Netherlands too offers a favorable environment, following 2020 that enables opt-out claims (for Dutch residents), court-approved settlements, and broad acceptance of third-party funding –even allowing entities like trusts to represent victims not individually identified in advance. Elsewhere in Europe, private enforcement faces more hurdles Loser-pay rules increase financial risk, disclosure obligations are often limited, and restrictions on contingency fees—historically prohibited and now only partially allowed in some jurisdictions, together with uncertainty around third-party funding, significantly dampen litigation volume and impact.[111]

In the AML domain, enforcement in Europe remains overwhelmingly public-law driven.[112] The new EU AMLA, headquartered in Frankfurt, became operational in 2025 and is scheduled to assume direct supervisory powers over a first group of high-risk, cross-border financial institutions from January 1, 2028. Despite this institutional shift, private enforcement—such as damages actions by investors or customers—remains rare and relatively underdeveloped. The EU AML framework and national implementing laws focus on supervisory compliance, suspicious-transactions reporting, and administrative or criminal sanctions, without creating a harmonized private right of action for breaches of AML rules.[113] Where AML issues do appear in civil litigation—such as shareholder actions arising from the Danske Bank Estonia scandal, or investor suits linked to banks' Know Your Customer (KYC)/AML control failures—they are typically framed as securities fraud or disclosure claims under company and capital-markets law, rather than direct AML violations.[114]

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[110] The Supreme Court's decision in *Merricks v. Mastercard* [2020] UKSC 51 opened for a wave of collective actions before the Competition Appeal Tribunal (CAT).

[111] Despite apparently weak incentives, practitioners claim antitrust litigation is going up. Dave Dalton, Jürgen Beninca, Nicholas Cotter, *JONES DAY TALKS®: Private Antitrust Litigation in Europe: The Big Picture*, JONES DAY, https://www.jonesday.com/en/insights/2020/10/jones-day-talks-private-antitrust-litigation-in-europe-the-big-picture (Oct. 2020).

[112] See, for example, the Luxembourg AML framework, where enforcement is organized through supervisory authorities and criminal prosecution, and "Luxembourg law does not foresee private enforcement actions for AML offences"; injured parties must rely on general civil-law remedies rather than an AML-specific cause of action. ADRIEN PIERRE & VANESSA GOMEZ PENA, ANTI-MONEY LAUNDERING – LUXEMBOURG: LEGAL AND ENFORCEMENT FRAMEWORK 21 (Michael Huertas ed., 2023). For a more general account, see generally Benjamin Vogel, *Potentials and Limits of Public–Private Partnerships Against Money Laundering and Terrorism Financing*, EUCRIM –EUR. CRIM. L. ASS'NS F. 52 (2022), analyzing the preventive, public–private structure of EU AML/CFT law and noting limited remedies for customers affected by de-risking.

[113] Comparative guidance notes that AML frameworks are designed for regulatory enforcement rather than private remedies; injured parties typically rely on general tort or contract principles (e.g., misrepresentation, breach of duty), as AML rules do not create a private right of action. *See* Directive (EU) 2015/849 (AMLD4), as amended by Directive (EU) 2018/843 (AMLD5) (establishing supervisory and criminal-law obligations for obliged entities and competent authorities, but creating no private right of action for individuals; private remedies remain governed by national tort and contract law).

[114] Examples include investor litigation connected to the Danske Bank Estonia scandal (with civil claims in Denmark and U.S. securities actions alleging failures to disclose AML risks). SEC v. Danske Bank A/S, 2022,No. 7:22-CV-10509 (S.D.N.Y. filed Dec. 13, 2022); *Danske Bank Pleads Guilty, Agrees to Pay More than $2 Billion in Coordinated Resolution of Investigations into Fraud Related to its Anti-Money Laundering Controls*, GREENBERG TRAURIG, https://www.gtlaw.com/en/insights/2022/12/danske-bank-pleads-guilty-2-billion-fraud-anti-money-laundering-controls (Dec. 16, 2022). Another example is investor actions against ING following its €775 million Dutch AML settlement and subsequent disclosures. *ING Receives Summons from Investors*, ING, https://ing.com/news/2024/02/ing-receives-summons-from-investors.html (Feb. 6, 2024). Finally, a key example is U.S. shareholder suits against Deutsche Bank, which alleged misstatements about the effectiveness of KYC/AML controls in relation to high-risk clients, including Jeffrey Epstein and Russian oligarchs. Gabrielle Saulsbery, *Deutsche Bank Settles for $26.3M over Epstein, Oligarch Ties*, BANKING DIVE, https://www.bankingdive.com/news/deutsche-bank-settles-lawsuit-jeffrey-epstein-oligarchs-relations-26-million/632660/ (Sep. 26, 2022); Reuters, *Deutsche Bank in $26.3 Million Shareholder Settlement over Epstein, Russian Oligarch Ties*, EURONEWS, (Sep. 24, 2022). These cases are structured as securities- or disclosure-based claims, not as private enforcement of AML statutes.

B. The United States: Private Suits Amplify Deterrence

In the United States, private suits materially raise the *expected* cost of corporate misconduct once facts surface through public investigation. The legal framework actively supports suits by (i) multiplying monetary exposure for prevailing plaintiffs; (ii) channeling mass claims through a mature opt-out class-action system and operates without a loser-pays rule,[115] and (iii) enabling broad discovery, now governed by proportionality.[116]

In antitrust, the Clayton Act authorizes treble damages with one-way fee shifting allowing any person injured by antitrust violations to recover threefold damages plus legal costs.[117] U.S. courts also apply procedural filters to prevent speculative suits: plaintiffs must present a plausible factual basis for collusion at filing and later show evidence pointing to coordinated action rather than independent behavior. To avoid double recovery, damages are generally limited to direct purchasers, though exceptions and state-level variations exist.[118]

These mechanisms enable strong private enforcement while maintaining procedural discipline, reinforcing trust in public antitrust enforcement. [119] There is no true AML equivalent to private antitrust damages in U.S. federal law. The main federal AML statute, the Bank Secrecy Act,[120] does not provide a general private right of action.[121] As in Europe, private AML-related private claims in the United States must generally be brought under other legal theories – such as securities fraud or negligence. As a result, these claims do not benefit from the specialized presumptions, treble-damages and fee-shifting mechanisms that characterize antitrust damages actions, and they play a much more limited role in the overall enforcement architecture.[122]

Institutionally, U.S. agencies anticipate private follow-ons. They craft complaints and public statements with liability narratives that support civil suits, while also offering cooperation credits to avoid discouraging self-reporting. This creates a tacit division of labor: public enforcement establishes liability and remedies; private suits extend compensation and deterrence. Large cases are often resolved

[115] Once a court "certifies" the class, all persons in the defined class are included by default unless they opt out. This lets thousands or millions of small, similar claims be pursued together—crucial where no single claimant would litigate alone. FED. R. CIV. P. 23. Also note that unlike most European systems, the United States generally follows the American Rule on legal fees—each side pays its own—so there is no default "loser-pays" cost shifting. FED. R. CIV. P. 54. In antitrust, however, successful plaintiffs can recover their attorneys' fees by statute, which further strengthens incentives to sue. Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 4304).

[116] U.S. "discovery" lets parties demand relevant evidence from each other (documents, data, depositions). Since 2015, Rule 26(b)(1) of the Federal Rules of Civil Procedure requires discovery to be proportional to the needs of the case—judges weigh importance of the issues, amount in controversy, parties' access to information, and burden/benefit. The result is still broader than typical European disclosure, but with tighter judicial management to curb excess. FED. R. CIV. P. 26(b)(1).

[117] Clayton Act § 4.

[118] Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) (rejecting the "pass-on" defense when applied against direct purchasers); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (establishing that only direct purchasers have standing in federal antitrust cases). For an overview of state laws challenging *Illinois Brick*, see ABA, ANTITRUST LAW DEVELOPMENTS (9th ed. 2022).

[119] By comparison, EU private antitrust actions rely on proportionate, court-managed disclosure and on the Damages Directive's facilitation of claims (e.g., effects of NCA decisions, passing-on), but do not use Twombly- or Matsushita-style gates; weak claims are more often managed through evidentiary proportionality, costs ("loser pays"), and the Directive's black-list for leniency/settlement materials.

[120] Currency and Foreign Transactions Report Act of 1970 (informally known as the Bank Secrecy Act), 12 U.S.C., § 1829b, 12 U.S.C., §§ 1951-1960, 31 U.S.C. §§ 5311-5314, §§ 5316-5336.

[121] *See* James v. Heritage Valley Fed. Credit Union, 197 F. App'x 102, 106 (3d Cir. 2006) (establishing no private cause of action to enforce the BSA).

[122] *See* Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 ARIZ. L. REV. 1009, 1009 (2008); Giovanni Scarcella, *Qui Tam and the Bank Secrecy Act: A Public-Private Enforcement Model to Improve Anti-Money Laundering Efforts*, 90 FORDHAM L. REV. 1359, 1383-91 (2021).

through court-approved settlements[123] with judicial scrutiny of fee awards. These features raise defendants' expected costs and encourage earlier settlements once liability risk becomes clear.

Together, the ability to capitalize on government victories and the structural facilitation of private suits make follow-on litigation a credible complement to public enforcement – and a significant enhancer of deterrence. Scholars like Arlen have noted, however, that broad corporate liability may have undesired consequences: firms might avoid documenting misconduct to reduce exposure, potentially undermining internal compliance efforts.[124]

C. Structural Contrasts in Private Enforcement: Europe vs. United States

The contrast between Europe's inquisitorial legal tradition and the U.S. adversarial model is especially clear in how private litigation interacts with public enforcement. In the United States, private suits—particularly in antitrust—are supported by identifiable plaintiffs, opt-out class actions, fee recovery, and broad discovery, making them an effective deterrence tool. AML, by contrast, offers limited standing and narrower remedies.

In Europe, procedural and financial barriers—such as loser-pays rules, limited disclosure, and funding constraints—raise the cost and risk for claimants, though the United Kingdom and Netherlands offer more permissive frameworks. Although the EU Damages Directive improves the use of public enforcement outcomes in private litigation, cross-border and evidentiary challenges persist.

In both regions, AML enforcement remains largely public, with few private damages claims. For agencies, deterrence depends on context: where private suits are credible, public enforcement can lay the groundwork for follow-ons; where private enforcement is weak, the burden falls on public sanctions and supervisory design.

VII. Promoting Regulatory Goals and Satisfying Public Law Values

Antitrust and AML laws are public policies whose aim is to influence the private sector to act in the public interest by enhancing market competition and restricting the flow of dirty money across political borders. Yet, important differences exist as substantive policy goals intersect with established public law traditions in Europe and the United States. Their contrasting enforcement models reflect the different roles assigned to state and private actors in their legal structures. They also reflect differences in the role of law and the courts in relation to public agencies and business firms. In Europe, public law is authority-centered and review-intensive. Regulators lead in fact-finding and decision-making; private parties seek protection against administrative overreach if the law is enforced against them. In the United States, where enforcement relies on an adversarial blend of public action and private litigation, private parties work within the litigation infrastructure (discovery, aggregation, fee rules, settlement review) to contest and to seek to invalidate agency actions. Based on the goals of detection and deterrence, we consider the ways in which agency enforcement conforms to each legal system's basic norms of procedural and substantive justice. We then step back from the legal landscape to link policy goals and enforcement processes. Both regulatory areas rely heavily on case-by-case adjudication, even in the United States where agency rulemaking dominates other regulatory areas. We argue that both legal systems should consider the potential of rulemaking as a mechanism to implement their various statutes' policy goals.

Drawing on the material outlined above, we first highlight how detection and deterrence in antitrust and AML regulation vary between Europe and the United States. This exercise demonstrates that the

[123] FED. R. CIV. P. 23(e). *See generally* Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697 (2019) (presenting the system).
[124] Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994).

claimed broad differences between "adversarial legalism" in the United States and a more cooperative regulatory environment in Europe exaggerates the contrast along some dimensions and underplays it on others. Taking these observations as background, we argue that, in both systems, the emphasis on case-by-case adjudication as the primary route to enforcement for antitrust and AML misses an opportunity to use rulemaking more extensively as a route to policy implementation.

A. Europe's Enforcement Machinery

Overall, European regulatory statutes embody a *supervision-first* tradition that steers workflows, pacing, and communications. Fact-gathering seeks to diagnose governance failures and mandate remediation, with escalation to sanctions once the evidentiary record is strong enough for review. Agencies, especially in AML supervision, are organized and socialized to repair systems before engaging in punishment. In competition enforcement the pipeline is more formal, but the same incentives toward careful record-building apply.

A defining characteristic is the inquisitorial, authority-led development of the case file, with successive internal reviews. Duties of reason-giving, proportionality, and anticipated judicial scrutiny pull documentation toward quasi-criminal rigor where fines are substantial.[125] Legitimacy is supported in EU member states where the separation of functions is institutionalized, e.g., rapporteurs and sanctions colleges in France, independent decision divisions in Germany, but added procedural requirements may affect the timing and selection of cases. EU coordination promotes harmonization and consistency across jurisdictions, but it can also constrain the space for exceptionally high penalties, as common standards and proportionality requirements encourage authorities to justify exceptional sanctions in light of practice in other member states. Many cases are challenged in EU courts with the verdicts helping to determine the outcome of cases at the national level, even in jurisdictions not directly involved in the case being litigated before an EU court. The space for private litigation varies by domain and country: private damages actions complement competition enforcement unevenly across Member States, while AML remains overwhelmingly within public law.

*Detection capacity***.** The regulatory systems employ various mechanisms to promote incentives for self-reporting or whistleblowing. Among these, antitrust leniency programs represent the most formalized transparent channel for voluntary disclosure, offering clear procedural pathways and legal incentives for cooperation. In AML, self-reporting may reduce sanctions through the proportionality assessment and credit for confession, but benefits are less codified and predictable. For both domains, broad, party-driven discovery is not available; "fishing expeditions" are explicitly constrained and transfers of evidence across regulatory domains/regimes are narrower than in adversarial systems. Whistleblowing is under-incentivized in many European jurisdictions due to cultural reservations, limited financial rewards, and uneven confidentiality. Existing reporting and audit data rarely produce actionable leads on their own. Finally, self-reporting of legal violations is unlikely if actors cannot judge what is unlawful or if coming forward raises a credible risk of heavy sanctions or retaliation. Clearer, more stable rules and guidance would make reporting more feasible.

Deterrence capacity. The likelihood of sanctions (and the time it takes to impose them) are conditioned by the 'supervision-first' orientation and demanding expectations regarding proof (implying a de facto high burden of proof). Agencies must anticipate intensive review of legality, effects, and procedure.[126] In several countries appeal prospects and internal quality-assurance practices can make early settlements less attractive than full adjudication (firms perceive a higher expected net value if they

[125] *See generally* ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005) (discussing principles for enforcement and sanctions); 25 EUROPEAN CRIMINAL PROCEDURES (Mireille Delmas-Marty & J.R. Spencer eds., 2002) (providing a still relevant account of criminal procedure across several European countries and under what conditions these principles may apply to administrative sanctioning).
[126] *See generally* OECD, THE STANDARD AND THE BURDEN OF PROOF IN COMPETITION LAW CASES (2024) (discussing the implications of the evidentiary standards in antitrust enforcement).

appeal rather than settle). Although there are evident public sector efforts to raise penalties, application remains uneven across jurisdictions and domains: very high fines are more regularly observed in antitrust (large cartel/abuse cases) than in AML, where remedies often take priority over sanctions. Private follow-on litigation has expanded under the EU Damages Directive in antitrust and the (general) Representative Actions framework, yet national features—such as loser-pays rules, constrained disclosure, and funding limits—weaken private players' incentives to pursue such cases. Individual accountability, through criminal liability and administrative disqualification exist, but are sparingly employed (with notable variation across member states).

Legitimacy and checks. Democratic anchoring is supported by corporatist/tripartite traditions and structured stakeholder involvement in the evolution of standards. The rights framework shapes enforcement design: when sanctions are severe, the ECHR "criminal limb," ne bis in idem (no double jeopardy) constraints, and proportionality review require investigative and legal rigor similar to criminal proceedings and careful coordination across administrative and criminal tracks. Institutional arrangements differ: some authorities both investigate and sanction with limited external oversight, while others separate investigation and adjudication. Internal quality control varies and is not always visible to the public. Transparency and access-to-file rules promote fairness, yet protections--especially for leniency materials--can limit private re-use of facts.

B. United States' Enforcement Machinery

Case-by-case enforcement in the United States is adversarial by design. Agencies build litigation-ready records early. Parallel administrative/criminal tracks are normal, often carried out by different agencies, given the Department of Justice's monopoly on criminal prosecutions. Public documents (complaints, consent orders, penalty notices) are drafted with follow-on use in subsequent court cases in mind. The prosecutorial leverage is strong: overlapping offences can be addressed simultaneously, there is broad corporate liability (respondeat superior), and coordinated proceedings make negotiated outcomes credible and often efficient.[127] In antitrust, a framework for private litigation complements public law – with treble damages, opt-out class actions, and fee shifting. By contrast, AML lacks a general private right of action, so outcomes hinge more on public enforcement and supervisory remedies.

Detection capacity. Several U.S.-specific features risk serious consequences for suspected corporate offenders. Pre-trial evidence-gathering (discovery) is broad—though subject to proportionality—which raises the costs of withholding information, with prosecutors/courts receiving a fuller factual record as litigation proceeds. Whistleblowing protections are formalized with confidentiality protections and bounty programs. Self-reporting and cooperation policies often are codified, clarifying credits for timely disclosure and processes for remediation. Such measures make internal detection more likely to surface externally. Public filings and supervisory data (e.g., securities disclosures, bank supervision) create documentation that can be made available for discovery. The predictability and clarity of rules and guidance can be uneven if built up through case-by-case regulation, but published settlements and agency policy statements facilitate compliance, and they make clear how corporations ought to act through self-reporting or whistleblowing.[128]

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[127] *See generally* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687 (1997) (describing the adversarial structure of U.S. corporate enforcement, the breadth of respondeat-superior liability, and prosecutors' ability to leverage overlapping offences and negotiated resolutions). Also, see generally Geoffrey P. Miller, *The Compliance Function: An Overview*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018). (explaining the adversarial nature of U.S. enforcement, the central role of criminal enforcement and prosecutorial leverage, and the incentives created by broad corporate liability rules).

[128] For an account of the structures that must be in place to secure these aims, see generally Arlen, *supra* note 102; Jennifer Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the*

Deterrence capacity. Sanction levels are substantial by international standards and more consistently applied across domains (than in Europe). In addition, public and private enforcement interact in ways that promote deterrence. Because class actions and follow-on suits are credible and often large, firms face strong incentives to settle once liability risk crystallizes, and, therefore, conclusions are reached faster than in systems that lean on full merits review of administrative decisions. At the same time, high penalties trigger incentives for private litigation, and there are aggressive defense and expert battles (as also occur in Europe) intensified by collateral private suits. Broad corporate liability can create "information-avoidance incentives" at the margin if firms believe internal detection will inevitably translate into multiplied exposure. Enforcement processes and litigation can take time, especially because several enforcers may be involved (several federal plus state enforcers) while the sophisticated system for private litigation may drag on, and for some corporate enforcers, cases can take years to reach a final conclusion despite the incentives to settle.

Jury Trials. The use of juries in civil cases is rare outside of the United States, including in anti-trust and AML enforcement. The seventh amendment to the U. S. Constitution states:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Although uncommon in practice, the possibility of invoking the time and expense of a civil jury trial can influence settlement negotiations, including cases where one of the parties is a government entity enforcing a regulatory statute. In *SEC v, Jarkesy,* the Supreme Court held that where the SEC seeks civil penalties for securities fraud, the respondent has a common-law right to a jury trial in federal court.[129] That right turned on the vexed distinction between a "public right", where a jury trial would not be available, and a "private right", falling under the Seventh Amendment. The opinion does not confront the common criticism that jury trials for regulatory offences ask a group of people with no expertise in the subject of the lawsuit to resolve issues that typically require a mixture of technical and legal expertise. Furthermore, as some of the commentary recognizes, the holding in the case is unlikely significantly to increase the number of jury trials. Instead, it will give lawyers for the defendants additional leverage in settlement negotiations, especially if the agency is deeply resource constrained.

The implications of this case for enforcement of antitrust and AML are currently unclear, but a few preliminary observations are possible. The FTC has civil enforcement responsibilities in antitrust, but it is already prevented by law from levying fines on firms that violate the law.[130] Rather its remedies are structural, such as divestment requirements. Fines are understood in *Jarkesy* as the archetypal common law remedy, and the FTC is already insulated from the claim that it is violating private rights. Furthermore, the case does not directly apply to AML violations, yet a note in the *Yale Journal on Regulation* speculates that some courts might use the case to expand the notion of "private rights" in other areas.[131] Hence, AML prosecutions may face significant constraints, assuming the government otherwise seeks to enforce AML laws imposing fines as well as structural remedies.

Legitimacy and checks. In the United States, legal legitimacy is produced through adversarial contestation before independent courts, with corporate rights enforced by procedural due process, reason-giving, and judicial review of agency action. Broad discovery, cross-examination, and evidentiary motions allow firms and private plaintiffs to test government claims. Private enforcement—

US, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH (Tina Søreide & Abiola Makinwa eds., 2020).

[129] 603 U. S. 109 (2024).

[130] *Client Alert: Jarkesy and Loper Bright: What Do They Mean for the FTC?*, RULE GARZA HOWLEY, https://www.rulegarza.com/client-alert-jarkesy-and-loper-bright-what-do-they-mean-for-the-ftc/ (July 30, 2024).

[131] James Fallows Tierney, *Jarkesy's First-Order Consequences*, YALE. J. REG., , https://www.yalejreg.com/nc/jarkesys-first-order-consequences-james-fallows-tierney/ (July 3, 2024).

through statutory rights of action, class actions, treble-damages in antitrust, contingency fees, FOIA-driven transparency,[132] amicus briefs, and court-approved settlements—supplies an external check that both supplements and scrutinizes public enforcement. Courts also police settlement fairness[133] and the public interest in government consent decrees and review civil penalties for excessiveness and procedural regularity. In this system, corporate rights are vindicated not by importing criminal safeguards into administration, but by open contest, robust discovery, and layered review that together sustain perceived legitimacy of outcomes.[134]

C. Implications for Performance and Reform

Agency performance is not a matter of administrative law alone and not even a matter of 'the executive branch' alone. It should be structured and assessed across the branches of governance. Consistency between the reasonable goals of government control and enforcement and what governments actually do depends on political/legal interactions. Regulatory performance, which aims to protect society against harm, must still recognize citizens' fundamental rights. Achieving these interrelated goals depends on how responsibilities and information are split and shared between criminal and administrative tracks, and how democratic accountability operates within the sphere of law enforcement.

In the United States, overlapping criminal, civil, and private law pathways signal high expected sanctions early in the process. That situation tends to accelerate negotiated outcomes and creates credible incentives for self-reporting and remediation. In Europe, by contrast, the enforcement forum/track in antitrust and AML is primarily administrative, yet if expected fines are large, criminal-grade safeguards effectively apply. This pulls evidentiary work and proportionality analysis to the front of the process and nudges firms to "lawyer up" for defense on the basis of system governance and corporate rights. Put differently, allocation of enforcement energy across tracks/forums produces different enforcement and compliance logics. In the United States, a detect-and-disclose model pairs with remediation; in Europe, evidence-ready systems control is geared to withstand review. These features are anchored in each system's regulatory traditions and are not easily altered. Reforms must work within the prevailing allocation of roles, de facto burdens of proof, and the configuration of corporate and individual rights.

Within Europe, very high administrative penalties ought to be reserved for matters where evidentiary accuracy and proportionality can be demonstrated by the public agency within reasonable time and subject to its resource constraints. Where those conditions are unlikely to be met, the most serious, blameworthy conduct might be better managed in the criminal track so that full safeguards apply--either against firms themselves or their responsible managers. Agencies might resist that option if such cases are moved from their jurisdiction into the criminal justice system. Alternatively, if agencies retain control, criminal prosecutions with their higher standard of proof will require both more specialized expertise and greater time commitments from the agency, especially for those cases that go to court, rather than settle.

Furthermore, regulatory agencies can then prioritize forward-looking, solution-oriented measures—stopping harmful practices, using market inquiries where needed, accepting commitments, imposing access or conduct remedies, issuing warnings upon detected failures, applying periodic penalty

[132] The FOIA (Freedom of Information Act) establishes a presumptive right of public access to federal agency records, subject to nine exemptions (e.g., national security, law-enforcement, deliberative process, trade secrets, and personal privacy). Agencies must make timely determinations and proactively disclose certain materials; since 2016, release is required absent "foreseeable harm." *See* 5 U.S.C. § 552.
[133] *See, e.g.*, FED. R. CIV. P. 23 (discussing class actions).
[134] MARTIN REDISH, DUE PROCESS AS AMERICAN DEMOCRACY (2024).

payments, requiring milestone-based remediation, and, where the law allows, using director disqualification in cases of serious or repeated control failure.[135]

In the United States, the same multi-track design that promotes deterrence and supports early resolutions brings distinct risks. Exposure from both federal and state enforcers, combined with private class actions, can produce duplicative financial consequences and remedies that do not fit together well. Large public penalties may also attract collateral litigation, raising costs that may promote better deterrence or, alternatively, impose extra costs with little social benefit. If aggregated exposure becomes too predictable or severe, managers may rationally avoid generating internal records, *weakening* detection. Finally, broad discovery (and the possibility that an agency's announced enforcement priorities may be set aside on judicial review) can create a regime where firms find it difficult to know if they comply with the law because agencies do not provide clear, stable guidance. Managing these features—so that deterrence remains credible without discouraging internal detection --matters for the system's ability to promote corporate compliance.

In short, the simple dichotomy between adversarial legalism in the United States and a more cooperative form of regulation in Europe misses much of the way antitrust and AML enforcement actually plays out. First of all, the notion of a cooperative negotiated regulatory environment does not capture the reality of the situation in Europe. Even if public agencies negotiate solutions with their private counterparts, they do this in the light of an inquisitorial legal tradition in which the courts have a definitive role in interpreting the law. Lacking common-law notions of precedent but still influenced by past court decisions, judges claim a unique role in determining the meaning of legal texts. Judges assert their dependence upon the codified law, even as they recognize that the judiciary must interpret statutory and constitutional language that is less than crystal clear. Hence, attempted settlements between an agency and a business firm may not pass muster if the court that interprets the underlying legal basis differently. Thus, even though settlements in the United States also require court approval, Europe's inquisitorial legal system places a greater obligation on the judiciary to articulate their legal bases.

D. Regulatory Agencies Fit for Their Purpose

Antitrust and AML laws are illustrative of regulatory policies that seek to control the behavior of major economic business and financial organizations that interact with the state across a range of fields. Thus, we conclude with two broad policy recommendations that, we argue, can help governments enhance their regulatory efficacy. Under optimistic assumptions, they could reduce the procedural burdens, lower enforcement errors, improve the use of scarce resources, increase the risk of detection, strengthen incentives for self-reporting, and ensure better protection of defendants' rights—ultimately improving agencies' ability to protect society from business-related harm. We recognize that neither option will be straightforward to implement, but we aim to generate discussion that could lead to constructive reforms. The first set of reforms concerns ways to improve case-by-case enforcement, the primary means of enforcement in both regulatory areas and both regions. The second concentrates on improving the way overall policy is set, including the greater use of administrative rules.

1. Allocate enforcement responsibilities clearly and consistently across criminal and administrative tracks, and promote corporate self-reporting within a supervision-oriented regulatory model

Both antitrust and AML enforcement are complicated by the lack of clarity concerning what counts as a criminal offense and which legal violations can be handled as civil offenses. Suspected corporate misconduct of the most serious sorts, potentially driven by financial self-interest, requires comprehensive investigations. Because corporations will likely respond with extensive rights claims,

[135] Of course, using the whole toolbox is not a new idea, but for some agencies, the policy shift towards imposing larger fines may have overshadowed some options. *See generally* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992) (providing a principled approach).

the most effective approach may be to assign such cases to the system specifically designed for such tasks: the criminal justice system.

There are fundamental differences between administrative and criminal law in all legal systems, and their respective strengths should be strategically leveraged. Criminal investigators, for instance, have access to a broader set of investigative tools, including wiretapping, search and seizure, compelled testimony, and surveillance. Given the existence of serious misconduct motivated by financial gain, society needs robust mechanisms to verify facts and hold both corporations and individuals accountable, with sanctions sufficient to deter future violations by others operating in the same spheres. At the same time, defendants facing serious allegations, including risk of serious penalties, must be able to assert their legal rights, either as human beings or as organizations.

Ordinarily, administrative agencies are not structured to investigate and prosecute criminal cases and may lack the infrastructure to provide criminal-procedure rights for corporate defendants and their managers. In the United States, statutes with parallel civil and criminal tracks reserve criminal prosecutions to the Department of Justice, while regulatory agencies pursue civil or administrative remedies. However, prosecuting serious cases of corporate crime within the criminal justice system may fail if prosecutors lack the sectoral expertise needed to prove complex offences beyond a reasonable doubt. Without it, there is a risk that the cases referred by regulatory agencies for criminal prosecution are not prioritized. Severe cases may be ignored or returned to the agency for civil law enforcement. A more principled allocation of enforcement responsibilities therefore requires rules that clarify what constitutes illegal conduct and mechanisms to embed domain expertise within criminal enforcement (e.g., specialized units or joint task forces). Criminal justice efforts should pursue serious market-related offences, even in jurisdictions without corporate criminal liability. In such systems, prosecutions of responsible individuals should proceed in tandem with administrative penalties or other regulatory consequences against the firm for non-compliance.[136]

Even if the most serious forms of corporate misconduct are handled through criminal cases against individuals and/or firms (where corporate criminal liability is an option), regulatory agencies remain central. They can impose administrative penalties for failures as a "first line of defense" –e.g. deficient reporting or audit controls, failure to investigate or report internal red flags, or failure to prevent tacit collusion (in antitrust) or detect and escalate suspicious transactions (in AML) that do not meet criminal thresholds. Where non-compliance persists, agencies should also be empowered to sanction responsible individuals as well as firms, including through director- and officer-level disqualification, removal, or prohibition orders that bar service in managerial roles for a defined period or permanently.[137]

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[136] Jon Petter Rui & Tina Søreide, *Governments' Enforcement of Corporate Bribery Laws: A Call for a Two-Track Regulatory Regime*, 132 TIDSSKRIFT FOR RETTSVITENSKAP 1, 1 (2019) (explaining with respect to corporate bribery regulations and enforcement, where the administrative track is largely non-existent, why a clearer institutional distinction between intrinsically different regulatory tasks will secure a more efficient regulation of corporate bribery and other forms of corporate misconduct). Hence, the arguments presented here apply for the enforcement of corporate bribery legislation as well and are highly relevant for jurisdictions that pursue such cases by criminal law alone. In France, the establishment of an administrative track, in addition to criminal enforcement, appears to have improved enforcement efficiency. *See generally* Arlen, *supra* note 128 (providing a comparative assessment of such regimes in the United States, France, and the United Kingdom).

[137] Examples include U.K. director disqualification orders and, in competition cases, CMA (the British antitrust enforcer) applications for director disqualification under the Enterprise Act. *Company Directors Disqualification Act 1986*, c. 46 (U.K.); *Enterprise Act 2002*, 2002 c. 40 (U.K.). Also look at EU/Member-State "fit and proper" regimes for management of regulated entities (e.g., financial services) with withdrawal-of-approval powers, U.S. banking "removal and prohibition" orders; and U.S. securities-law officer/director bars. 12 U.S.C. § 1818(e); Securities Exchange Act of 1934, § 21(d)(2) (codified as amended at 15 U.S.C. § 78u(d)(2)); Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 20(e). These tools are aimed at individual accountability for governance failures and can accompany, or substitute for, firm-level penalties.

A clearer separation between the administrative and criminal tracks would mitigate the "high-penalty orientation" concern discussed in Part IV. When empowered to impose very large fines for past conduct, administrative agencies can drift toward backward-looking, evidence-maximizing case building rather than forward-looking, solution-oriented market design. The result is an emphasis on proving historical violations that will hold up in court over asking how to restore competitive conditions or ensure compliance in the presence of aggressive tax planning, tacit collusion, or opaque financial flows. The prosecutorial posture –playing the "cop" rather than the "coach" – can further constrain constructive dialogue with firms and reduce the agency's capacity for preventive, market-fixing interventions.

A more principled separation of enforcement tracks and fora would require different reforms in different contexts. In the United States, there appears to be less concern about how parallel proceedings may unfold—often involving broad liability, expansive discovery, and few restrictions on the use of evidence. But such proceedings may have a cost to society if it places firms accused of misconduct in a difficult position. They may quickly accept settlements simply to escape the uncertainty and reputational damage associated with prolonged legal conflict. In this context reform may be motivated by a concern about over-deterrence. However, in the United States too, it is important to distinguish between the cop and coach roles, and to allow regulatory agencies to operate as forward-looking regulators with a mandate to engage in efforts to make markets work better.

Generally, however, because regulators face structural information asymmetries vis-à-vis firms, monitoring alone will not reveal all compliance failures. Agencies need credible pathways that make it rational for firms to approach them. Firms are more likely to self-report when two conditions hold: (i) legal boundaries and expected consequences are sufficiently predictable; and (ii) the agency can distinguish negligent or system-level failures from intentional criminal conduct. In the United States, this logic is institutionalized through clear credits for voluntary self-disclosure and cooperation, alongside the background possibility of substantial sanctions. In Europe "supervision-first" practices can produce a similar effect if mitigation for early disclosure and remediation is transparent and reliable. A clearer separation of functions also helps. Where the gravest, intentional misconduct is referred to the criminal track, administrative agencies can focus on preventive supervision and remedial orders. This reduces role conflict (the same team alternately acting as "coach" and "cop") and encourages firms to seek guidance earlier.

Settlement capacity matters across procedural traditions. In administrative forums, it is generally easier to resolve cases by agreement when the authority is not required to prove criminal misconduct. Predictable, transparent settlement frameworks—linking reductions to timely disclosure, verified remediation, governance changes, and recidivism controls—lower appeal incentives and the likelihood of collateral follow-on exposure, while still delivering observable compliance improvements.[138]

Where firms are uncertain about the legality or riskiness of a practice, an administrative agency can proceed in a forward-looking manner: require cessation pending assessment, or place the burden on the firm to substantiate that the practice is unlikely to harm competition, financial integrity, or other protected interests.[139] Such tools (warnings, commitments, access or conduct obligations, periodic penalty payments, milestone-based remediation, and—where authorized—managerial disqualification for repeated control failures) can change behavior faster than pursuing maximal penalties.

[138] With reference to the enforcement of bribery regulations, Rui and Søreide, *supra* note 136 explain that non-trial resolutions —though criticized for compromising European criminal law principles—may provide more legal flexibility in the administrative track, to motivate disclosure, remediation, and corporate governance reforms that strengthen compliance.

[139] In competition and AML supervision, interim measures, commitments, and periodic penalty payments can practically place the onus on firms to demonstrate that risks are controlled, without formally reversing the burden of proof for sanctions.

Robust whistleblower protection and incentives remain indispensable complements to formal enforcement, supported by systems that guarantee safe, confidential, and direct reporting to law enforcers. Without such channels, critical information about serious misconduct will remain hidden. Agencies should also be empowered, subject to appropriate safeguards, to leverage evidence obtained by other public bodies, ensuring a more integrated and effective enforcement architecture. Cross-use of information must respect legal constraints (privilege, purpose-limitation, and rights of defense), but where the administrative system aims at prevention rather than punishment, carefully structured information-sharing can improve detection without undermining corporate or individual rights.[140]

2. Equip regulatory agencies with the authority, resources, and resilience to oversee regulated entities and markets credibly and independently, including giving them the authority to make rules with the force of law

Agencies need to be able to respond to harmful practices and to identify appropriate solutions based on updated expertise and close collaboration with research institutions, such as universities, as well as agencies' own research divisions. Institutional robustness can be strengthened in several ways, including through organizational design, so that decision-making structures cannot easily be dismantled or rendered inactive. Agencies that concentrate power in a single director, for example, may be vulnerable to capture; serious decisions should be made by a properly constituted decision-making body, such as a board—even when the agency is formally subordinate to a ministry. Moreover, actual robustness must be supported by reporting mechanisms that can be activated if ministries attempt to override agency decisions, as well as by internal channels for employees to report suspected illegality within the agency itself.

Avoiding capture by regulated interests calls for independent decision-making, supported by checks and balances and transparent, reasoned decisions. Robustness also requires that the agency has the strategic capacity to prioritize, decide efficiently, and monitor multiple markets. To sustain legitimacy and impact, the primary posture should be the "coach" role—standard-setting, supervision, and corrective guidance—while reserving the "cop" role for clear violations and referring serious misconduct to the criminal justice system. This allocation preserves deterrence and due process, yet keeps the agency focused on forward-looking market fixes.

Finally, to make a meaningful difference and protect society from harm, agencies must have lawful timely access to information needed to monitor compliance, subject to necessity, proportionality, and safeguards. This does not abolish corporate rights; it clarifies that such rights cannot be invoked to block legitimate oversight aimed at preventing harm. For example, banks should not process transactions without verified beneficial-ownership information, and regulators should be able to obtain and analyze datasets necessary to assess whether prices reflect coordinated behavior— including coordination facilitated by algorithms—while protecting trade secrets and confidential data through appropriate controls.

Case-by-case enforcement can produce legal principles over time as courts and tribunals develop and systematize case law—most explicitly in common-law systems, but also with significant precedential guidance in European jurisdictions. However, in the regulation of corporations, the holdings in multiple cases over time are unlikely to provide sufficient guidance for corporate compliance: a ruling on unlawful conduct in one market may not effectively guide behavior in a different market or context.

Individualized enforcement can consume significant resources within administrative agencies, especially when high fines trigger extensive corporate-rights claims. In cases of legal uncertainty, agencies may prefer to reopen a rulemaking process rather than risk annulment in court. If case

[140] In Europe, agencies must be mindful of ne bis in idem, privilege against self-incrimination, and limits on re-purposing compelled information across tracks, while in the United States, parallel proceedings are more routine but require careful coordination to protect individual rights.

preparation and litigation stretch over several years, regulatory decisions lose timeliness and may have little impact on compliance. This is especially likely in sectors subject to rapid technological change and shifting market organization, where delayed decisions quickly become obsolete or misaligned with current risks.

After considering the current situation in antitrust and AML, we recommend that regulatory agencies should have the authority to make rules implementing regulatory statutes. Such authority would enable timely updates to technical standards that can keep pace with scientific and technological, and business-model change. Of course, the legislature retains ultimate control and may amend the enabling statute if political conditions change.

The American APA provides a procedural framework for rulemaking in agencies that make policy under statutes implemented by both cabinet departments and agencies that lack cabinet rank or are independent of the core executive branch. In Europe, however, the distinction between an agency and a ministry is generally more clearly defined, with each agency, for example, an antitrust authority, formally organized under a ministry whose head sits in the cabinet. Even if the agency in Europe can decide which individual case to bring, say, against an alleged cartel, it cannot generally issue a rule with force of law. Thus, adapting the U.S. rulemaking model to most European states would face an additional hurdle related to the structure of parliamentary governments. A series of cases may, de facto, produce a general policy that is accepted by the regulated industry and the courts as guiding firm behavior. However, making it concrete through a formal rule would be seen as violating the chain of legitimacy flowing from the voters to the legislature to the cabinet and its ministers. Agencies advise the ministry and resolve individual cases, similar to a court, but they are not in the chain of legitimacy that is considered essential for making political/policy choices.

In Europe, objections to delegating rulemaking authority with the force of law to technocratic agencies typically rest on several concerns: that such bodies may not adequately weigh broader distributive and macro-economic considerations, that agency-made rules may become fragmented and inconsistent, and that delegating both regulatory and enforcement functions to independent authorities risks weakening democratic legitimacy and concentrating power. While we take these concerns seriously, our argument supports a more extensive use of clarifying secondary legislation by the agencies that oversee markets. This can be reconciled with European constitutional traditions if rulemaking powers are carefully circumscribed and procedurally constrained: hearing processes can be more formalized than they are today; rulemaking procedures can be subject to checks and balances, including judicial review; and secondary norms must remain consistent with primary legislation and limited to clarifying its interpretation. Moreover, if serious allegations of misconduct can be referred to the criminal justice system, agencies will not be able to operate simultaneously as rulemakers, investigators, and courts. Instead, they will occupy a clearer legal role within a broader enforcement architecture, which can strengthen their standing with stakeholders rather than undermine it.

Rulemaking by agency, therefore, may include formal features that make it consistent with the public accountability of executive action.[141] Rulemaking authority under the notice-and-comment provisions of the APA, requires the agency to provide public notice and an opportunity for any interested person to submit information and views on a proposed policy. The agency must take account of and respond to substantive comments and, most importantly, issue a public statement of reasons justifying the final rule. Judicial review is available to challenge the adequacy of these procedures as well as their consistency with the underlying statute. This framework has been in place since the passage of the APA

[141] In the United States as well as in the EU, see Charter of Fundamental Rights of the European Union art. 11, 2012 O.J. (C 326) 391, 393 (providing for freedom of expression and information, including the freedom to receive and impart information).

in 1946, and its application expanded with the growth of regulatory statutes giving rulemaking authority to agencies and ministries.

The process has many critics and is far from perfect. It can be slow, especially adding the time involved in judicial challenges. And while the APA requires public notice in the *Federal Register* before a rulemaking, the agencies are not obliged to publicize their agenda ex ante or present the nature of the regulatory effort in plain language. Even so, issuing general rules subject to public accountability helps accommodate regulatory realities and strengthens the democratic legitimacy of executive policymaking.[142]

Rulemaking competence does not exclude case-by-case enforcement under an enacted rule. Many agency decisions are context-specific or company-specific, and individual enforcement actions can be brought against those who violate the rules. The point is that relying on individual case investigations alone, aimed at determining illegality and imposing fines—especially under conditions of legal ambiguity—may be less efficient (in terms of promoting compliance with limited resources) than rulemaking.[143]

With this in mind, the choice between case-by-case adjudication and rulemaking turns on which tool more reliably promotes compliance given resource constraints. The main reason we advocate for rulemaking is the limitations of case-by-case enforcement, as discussed earlier in this paper. In Europe, this includes the de facto high burden of proof and the extensive corporate rights that can be invoked. In the United States, individual "big cases" often consume substantial resources on legal disputes, with limited clarity emerging on the boundary between lawful and unlawful conduct in the affected markets. In technical domains—such as engineering—it is common for agencies to issue clarifying rules that help ensure that businesses operate on a level playing field. Complex business transactions and strategies are no less intricate, and despite efforts to train judges, it is unrealistic to expect case-by-case adjudication to consistently clarify the law. For external observers, a lack of predictability also makes it difficult to assess the accountability of the enforcement system.

This recommendation on rulemaking, together with the first recommendation above, can strengthen agencies' "coach"-role. It builds on traditions of dialogue with industry on complicated regulatory matters and stakeholder engagement: it draws on the expertise in the private sector and requires proximity to the sector.[144] Such dialogue is easier to harness when the purpose is better rules, not rules designed primarily to facilitate investigation and penalties (assuming there are mechanisms in place to promote integrity /checks prevent overly cozy relationships).

Although agency collaboration with firms is a stronger tradition in Europe, U.S. regulators, including in competition and financial markets, engage widely with stakeholders, both within and outside the relevant industries. Before opening a formal comment period, agencies use Advance Notices of Proposed Rulemaking (ANPR) to gather feedback, and small business panels are convened under specific statutes to assess regulatory impact. Widespread prior consultation with industry and other

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[142] *See, e.g.*, ROSE-ACKERMAN, *supra* note 43, at 72-85, 246-52.

[143] In Europe, several competition authorities now have competence to impose far-reaching remedies without proving specific infringement, often named a market investigation tool. *See generally* Motta, Peitz & Schweitzer *supra* note 53. Germany's 11th GWB amendment, for example, lets the Bundeskartellamt impose behavioral or structural measures following a sector inquiry when markets do not function well, even absent an infringement finding. *Gesetz gegen Wettbewerbsbeschränkungen* (GWB), § 32f, as amended by Act of 25 October 2023, BGBl. I 2023, p. 294 (Ger.). In the U.K., the regime likewise allows remedies, including after-market investigations that identify adverse effects on competition. In some contexts, this tool will meet the need of an alternative approach, but it will not cover the need for rulemaking, because it produces case-specific, market-bounded remedial orders; it is an administrative remedial power, and not a delegation to legislate.

[144] In Europe, scholars have emphasized the importance of stakeholder proximity in rulemaking. *See generally* CLAUDIO RADAELLI & FABRIZIO DE FRANCESCO, REGULATORY QUALITY IN EUROPE: CONCEPTS, MEASURES AND POLICY PROCESSES (2013); Alemanno, *supra* note 51.

stakeholders is the norm.[145] The approach, however, differs from European practice. In the United States, prior consultation occurs in the light of the subsequent hearing process under the APA notice-and-comment process, where the proposed rule is published, the agency hears from business, civil society, and experts, and issues a statement of reasons along with its final rule. In Europe, primary legislation is typically preceded by comprehensive hearing processes before parliamentary approval. For administrative rulemaking by agency or ministries, formal requirements for stakeholder consultation differ across jurisdictions. Nevertheless, substantial consultation often takes place at the agency's discretion and in response to political realities.[146]

Hence, both European and U.S. regulators usually involve stakeholders early and at scale—via expert groups, advisory committees, and impact assessments. In the United States, APA rulemaking procedures act as a legally enforceable requirement for ex ante consultation.[147] In Europe, informal consultations lack robust checks for legitimacy and transparency that could be ameliorated by a legal framework for consultation processes that could draw on and, perhaps, improve upon U.S. practice. Even if a notice and comment process leads to a final rule that differs little from the proposed rule, which does not imply that it is a meaningless exercise. Those who communicate with the agency at early stages know that whatever influence they have will be tested by the subsequent open process and requirement that the agency issue a statement of reasons.

VIII. Conclusions

Comparative public law is a fascinating but difficult exercise. Analogous regulatory problems arise across political borders in jurisdictions with differing political-economic systems and legal traditions. Multinational firms and financial institutions may hope for uniform legal rules across borders, saving administrative costs and making the economic environment more predictable and transparent. Yet, variations in national regulatory systems can also be gamed by profit-oriented firms, especially those with substantial market power and resources. These firms can exploit regulatory gaps and shape enforcement priorities, for example, by using litigation leverage in antitrust cases to delay remedies or by exploiting evidentiary hurdles in proving tacit collusion. They may locate their headquarters in low-tax systems with few disclosure requirements, place manufacturing operations in jurisdictions with lax safety and environmental regulations and choose financial centers with weak AML regimes to obscure ownership or move funds. International businesses' preferences for the type and style of regulation need not comply with the legal framework that best promotes overall market efficiency and fairness.

But there is another important actor whose interests are an essential part of the story. Regulatory authorities and established legal traditions shape regulatory content. Public bodies may have their own internal logic, which restricts the plausible regulatory options and the way they play out in practice. If enforcement involves powerful actors, regulatory design must be robust enough to prevent strategic behavior that could undermine policy goals. To make these complexities concrete, we focused here on the United States and Europe, deeply intertwined political-economic systems, with similar stated interests in competitive markets and in limiting money laundering. Thus, one might expect to see their similar goals play out in similar law enforcement structures and patterns. However, converging goals are not sufficient to produce uniform legal frameworks. Even without deep conflicts over goals, their

[145] Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxics Regulations*, 63 ADMIN. L. REV. 99, 126 (2011).
[146] OECD, GOVERNMENT AT A GLANCE 16 (2025) (noting that consultation quality for subordinate regulations lags behind consultation for primary laws, and this gap has widened slightly from 2014 to 2024). *See also* OECD, OECD REGULATORY POLICY OUTLOOK 29 (2025).
[147] However, the limitations of these requirements are highlighted in actions of the current administration that is moving to shrink comment periods and to avoid initiating new rulemaking processes.

differing public law frameworks have created a complex set of overlapping and sometimes conflicting enforcement strategies.

Our conclusions, outlined in the previous section, take a functional perspective that does not prioritize either the adversarial traditions of U.S. law or the inquisitorial legal structure of Europe. Both legal systems distinguish between criminal and administrative/civil enforcement, but they overlap and intertwine in ways that often are not functionally related to underlying policy goals. The features of criminal law related to the burden of proof, the nature of the legal process, and the level of punishment raise distinctive issues when the plaintiff is a corporation. Both antitrust and AML law force the state to confront the difference between civil and criminal enforcement when corporations and other types of organizations are implicated, as well as their managers and employees. Rather than taking on the vexed question about what it means to be a "person", we argue for a treatment of business organizations and their managers that clarifies the nature of the required evidence and avoids having to attribute states of mind to either institutions or humans. Nevertheless, law enforcement should permit severe punishments for deterrence that recognizes the low chance that any particular malfeasance will be uncovered, given the limited funds available to enforcement bodies.

Our assessment of case-by-case regulatory enforcement has led us to conclude that regulatory statutes should give rulemaking authority to expert agencies, both those that are ultimately accountable to a politically appointed minister and those with the independent authority to regulate, subject to other accountability mechanisms, such as a board with political party balance. Legislative bodies, worried that delegation to experts would lead to political naivete or to their capture by narrow business interests, have drafted statutes that overly limit agencies' ability to apply their expertise to implement regulatory goals. Authorizing legislation would incorporate political tradeoffs, subject to the constraints of constitutional and human rights. The agency, then, would have the space to apply its expertise, both to design policy responses via rules and to resolve individual cases within the legislature's broad policy framework. Allowing agencies to implement policy through administrative rules will be especially important in sectors dominated by large incumbent organizations, where the ambiguities of case-by-case enforcement can be exploited by regulated entities to delay or dilute compliance. An agency with clear rulemaking authority can reduce enforcement asymmetries and curb strategic litigation or regulatory arbitrage. In short, speaking as two economists who have taught, worked, and written for many years at the intersection of law, public economics, and regulatory policy, we urge a pragmatic, outcome-oriented approach to the design of regulatory legislation that asks how alternative regulatory approaches are linked to underlying policy goals, whatever the dominant theories of public law, individual and collective rights, and the adjudicatory process overall.