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## **The ECJ and Judicial Activism**

**The Influence of the European Court of Justice on the Making of the European Union**

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# Abstract

The imprint of the European Court of Justice on the European Integration has been historical. The sole purpose of the Court's establishment was aimed at faithful interpretations of the legal texts; nevertheless, over the years, the Court has broadened the scope of its authority, and has become an important institutional player of the Union. Under the Court's agency, the legal facia of the European Union has changed drastically, and so has the direction of the integrative process. The Court's innovative and creative interpretations of the Treaties have allowed it to introduce the most revolutionary legal concepts, some of them being the doctrine of direct affect and the supremacy rule. With the introduction of these legal concepts, the legal system of the Union has acquired a constitutional dimension while the Union itself has become a political phenomenon with an unprecedented character. On the way to consolidate the legal system of the European Union, the Court has not manoeuvred alone. Other institutional agents have contributed to the creation of the project as we know it today. In the light of these facts, the author of the project at hand explores the influential work of the European Court of Justice, while taking into consideration structural/functional means, motives and opportunities available to Court to exercise its authority. Also, the author dedicates time to delving on the special relationships established with other institutional actors while consulting theoretical accounts of the same. Ultimately, the essay attempts to contribute to the body of scholarship making assumptions about the role that the ECJ has played in Europe's integrative process.

*Keywords:* European Court of Justice, European Integration, direct effect, supremacy, preliminary ruling procedure

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# 1 Introduction

Since the ideational conception of integrated Europe, the project has been an intriguing topic for academic deliberation. As the contours of the project's design gradually expanded, the continent witnessed maturation of an economic/political body with comprehensive sovereign structure of unprecedented character. Scholars of diverse academic backgrounds have, ever since, tried to fathom dynamics within the structural framework of the new political phenomenon and make predictions of the future directions and forms the same would take. Over time, the project of European Union exceeded its initial goals of making economic and political reconstructions for collective and peaceful ends. New contracting arrangements have created new obligations, rights, expectations and interests for the members. The system itself was expected to protect the delegated rights and resolve the ever increasing volume of disputes arising from contractual exchanges. The European Court of Justice, the legal body addressing these issues, was not fully recognized as influential until the process of juridicisation of politics smeared the line separating the realm of politics and law. Ever since, the future of the Union has been questioned in the face of an established supranational legal order in which the European Court of Justice claims authority over national courts, national law and interpretation of EU Treaties (Carrubba, Gabel & Hankla 2008:435).

The final contours of the legal system have been a product of competing, overlapping and collaborative forces of Europe. Namely, interactions between the ECJ and national judges, other supranational institutions, member state governments and private litigants have had implications on doctrinal, constitutional and legislative outcomes. These relationships have extended and transformed not only the Union's character, but also the legal system of the Member States. Through the legal proceedings of the Court, the dynamics between the mentioned constitutive

parts of the Union have changed substantially over time. The case-laws of the Court have brought to bear important principles of EU law, the doctrine of direct effect, the supremacy rule, state liability and general principles of law, which were not originally introduced by the Treaties and, as such, revolutionized the legal system of the Union. Interactions between litigators, member states executive branches, judges and national courts have produced a system that drove integration further while allowing the Union to develop its expansionary character.

The legal character of the Community has inspired a network of social scientists to embark on the mission of exploring the effect of the European Court of Justice on this development. Similarly, the research project at hand, motivated by the nature of the Union's legal integration, will focus on exploring the Court's influence on the evolution of the integrative process of Europe, that is to say, European legal integration. In order to accomplish the proposed task, the author looks at the Court's legal opportunities, means and motivations for actualizing its integrative agenda, together with examining collaborative forces that has appeared conducive to realizing the Courts potential and spreading of its authority. The investigation of the legal aspects of the EU development, thus, proceeds in few parts. We start off the discussion with outlining different theoretical approaches that have dominated scholarship on European integration. After having considered theoretical debates, the project discusses legal opportunities available to the Court for actualizing its legal potential, and examines its legal means and relationship with other agents in the Union. In the section to immediately follow, the author embarks on a theoretical quest of an abstract discussion about the European fortress and the ECJ as one of its institutional blocks.

## **2 Theoretical Framework**

The founding fathers of the European project had intended constructing a hybrid institutional system founded on a preconceived logic of a democratic ideal, based on the rule of law (Caldeira & Gibson 1995:356). The legal authority delegated to the Court was set out in the Treaties and has changed little ever since, nevertheless, the Union's legal system has transformed substantially over time (Armstrong 1998:157). The established judicial order has developed supranational dimensions, and as such, has been an intriguing topic for scholars. Many have delved on the subject and have construed theoretical schemes with divergent explanations of the Court's influence in changing the legal facia of the Union. A comprehensive review of the theoretical body of work dedicated to studying European legal integration is way beyond the scope of this study. Nevertheless, we will briefly outline major features of the two dominant schools in the field, neofunctionalism and intergovernmentalism, followed by an introduction of a more compatible theoretical take on the subject, namely the theory of new institutionalism.

### **2.1 Neofunctionalism**

Theoretical school of neofunctionalism constitutes the most ambitious, as well as the most criticized theoretical approach deliberating on regional integration. The theory's major claim has characterized regional integration of Western Europe as a process limiting states' sovereignty, although, allowing its members to establish cooperative arrangements fostered to resolving common problems more efficiently (Armstrong 1998:162). In the European laboratory, neofunctionalists assert, supranational institutions play an integral role (1998:162). In fact,

supranationality is seen as a solution to preventing future conflicts, and ultimately furthering European integration (1998:162). Integration process per se proceeds in stages, according to neofunctionalists, where as integration in low politics creates functional pressures for integration in related areas—the process labelled as ‘spill-over’ (1998:162). Indeed, as anticipated by these scholars, initial stages of integration resembled the pattern of a spill over; nevertheless, as the general sentiments toward the project changed and integration process slowed down, credibility of the theory was injured (1998:163). Although often regarded as flawed and obsolete, especially at times of integrationist’ stagnation, the theory still remains an important reference point for the contemporary scholarly work. Particularly, the work of Mattli, Slaughter and Burley has provided an interesting take on the legal dimension of European integration. We consider some of their arguments later in the discussion.

## **2.2 Intergovernmentalism**

Intergovernmentalism has sprung out of the realist state-centric school of thought that has regarded nation states as autonomous entities scarcely delegating their authority to supranational institutions (Selck 2007:189). Authority of these institutions, in fact, is seen being considerably constrained and conditioned on the member states consent. The most prominent thinker of the intergovernmentalist thought, Andrew Moravcsik offered a liberal version of intergovernmental basics, arguing that European integration has been driven by forces of interstate bargaining over treaty revisions (Moravcsik 1993). This scholar denies possibility of supranational autonomy and, in particular, reduces the role of the ECJ to that of an ‘anomaly’ (1993). Essentially, intergovernmentalists characterize supranational institutions as the servants of nation states’ interests whose authority is conditioned on the will of the same. The ECJ and the legal system established, thus, reflect preferences of the major member states. The ECJ is mainly regarded as complacent body strictly applying and interpreting principles embedded in the Treaties; although, it has also been recognized as a body that ensures a uniform application of EC law by all members (1998:158). Just as neofunctionalism, intergovernmentalism and its liberal particular have not been immune to criticism. In particular, scholars have argued that European integration



cannot be confined only to economic furthering; rather, politics and economics embody an inseparable bond (Saleck 2007: 193). Essentially, LI is often regarded incomplete and being narrowly limited to formal treaty amendments, thus, inadequate for explaining a more complex environment of day to day politics in the EU (2007:193).

## **2.3 Neo-Institutionalism**

Considering that neither of the above theories have generated testable hypothesis regarding the conditions under which supranational institutions exert independent causal influence, we have turned to theorizing about Europe from a perspective of a historical and sociological neo-institutionalism. In general, the theory of neo-institutionalism has entered the debate on European integration with an assertion that institutional setting, comprised of normative, regulatory and organizational networks, influences political process and outcomes. In particular, this analysis primarily borrows from historical institutionalism that stresses the unfolding nature of political developments—processes embedded in political institutions. Ideas of path dependence and the production of unintended consequences constitute the theoretical core of historical institutionalism (2005:44). The first notion explains that restrictive pool of options available to actors results from the re-enforcement of institutional set ups (Barani 2005:44). Similarly, the second notion explains that actors, initially driven by interest maximization, embark on institutional and policy reforms that, in turn, reform their own positions in unexpected and undesired ways (2005:44). Such being the case, there is a great deal of uncertainty, neo-institutionalists assert, as there is no reference linkage between agents, actions and outcomes (2005:44). The theory foresees institutional building, in the legal context, creating path-dependence that makes actors' control over law challenging (Armstrong 1998:161). Complex social processes, historical institutionalists argue, involve a large number of actors that generate feedback and create effects that decision makers cannot comprehend. The Court is perceived as an important player that not only shapes agenda of other players but also receives feedback from the same (Barani 2005:45). Additionally, sociological institutionalism includes informal norms and conventions and formal rules in the definition of institutions (Wiener& Diez 2004:139). These theorists argue that the latter serve as social lenses through which the world is being

observed. Agents are guided in their actions by the logic of appropriateness, as they consider their institutional environment in guiding preference construction and shaping behaviour in accordance to institutional environment (2004:139). In relation to the European Union, sociological institutionalism examines influence of institutional norms on the preference formation and behavioural guidance (2004:139).

Institutionalists opt out from labelling supranational institutions as either ‘servants’ or the ‘masters’ guiding European integration. Instead they look at the legal structure of the Union and its influence on the decision making and behaviour of other actors. They remind the audience that masters of the Treaties did not envision a strong Court that we witness today. Unintended by the states, the Court expended its jurisdiction, changing the legal edifice of the Union (2005:45). The ECJ is an institutional actor, manoeuvring in the European Union—a political system of a cooperative nature where institutional competences are intertwined. As a supranational institution claiming legal authority, the Court can predetermine pathways along which particular actors move. It also limits options for action available to different agents, ultimately steering the process in a particular direction.

In the research analysis that follows, neo-institutionalism is regarded as the theory of principal importance. We utilize its theoretical template to explain the role the ECJ has played in the evolution of integration process. That is to say, the transformation and consolidation of the European legal system, initiated by the Court, properly fits within the theoretical framework proposed by historical institutionalism and some of the assertions of its social variant.

### **3 The Legal Order of European Union**

Characterizing the nature of influence of the European Court of Justice on European Integration primarily requires discerning available tools at the Court's disposal that enable it to impact the course of the European integration project. As introduced in the Sweet's analysis, the judicial power largely depends on the degree of discretion delegated to a court (Sweet 2004). In particular, in the European context, the Treaty of Rome defines essential features of the Court and the extent of its authority. That is to say, contracting parties to the European Union had constructed a market-building project with a judicial body as the authoritative interpreter and enforcer of the Community's law (Carrubba 2008:435). Today, the Court primarily adjudicates disputes arising within institutions and disputes between the institutions and member states (2008:440). Besides the dispute settlement, the Court ensures uniform application and interpretation of the EU law across the Union (2008:430). Ultimately, the Court allows for the private parties to raise cases of rights infringements committed by the States or the institutions (2008:440). For executing the mentioned duties and actualizing its roles, the Court has had at its disposal various tools for the effective performance. The Treaty itself, not only outlined the Court's jurisdiction, but also provided the Court with the leverage for the normative clarifications of the indeterminate and ambiguous statutes. Considering the inexactness of commitment by the States, the Treaty of Rome left enough space for the prospective development and evolution of the Union (Sweet 2004). Consequently, the legal order of the Union, as we know it today, has been a project in the making, with the ECJ continuously refining its boundaries and clarifying any normative ambiguities. In the section to follow, we briefly identify legal bases that gear the Court to exercise its authority efficiently.

### **3.1 Legal Opportunities for Judicial Activism**

Conveying importance of the ECJ in the integration process necessitate considering legal bases available for initiating suites before the Court. The Court itself cannot take an initiative; although, a variety of agents are able to challenge EU law and actions of non-compliance with it, providing ECJ with a broad spectrum of opportunities for exercising its authority.

Primarily, we consider cases initiated under Articles 226 and 227 of the EC Treaty, in which the Court decides whether Member States actions are in accordance to the Treaty provisions. Proceedings based on these articles are brought before the Court either by the action of a Commission or by member states when a plaintiff is under a suspicion/charge that an agent in question has failed to fulfill an obligation under the Treaty (Steiner, Woods & Twigg-Flesner 2006:232).

Additionally, under Article 230, the annulment action, the Court evaluates compatibility of various institutional acts with the Community law—the acts adopted by the Council and the Commission—ensuring that issued legislations by these institutions are valid (2006:245). Essentially, the Court checks on the institutions' activities and inactivates (Article 232) for that manner (2006:246). Similarly to the previous acts, the Court reviews acts brought to it by other Union's institutions, member states or private individuals, given that particular conditions are satisfied. If the Court finds that the facts presented before it are legally grounded, it can declare any act void (2006:246).

Many scholars would agree that preliminary ruling procedure, under Article 234, has been very influential in shaping the legal order of the Union as we know it today. In fact, the procedure has played an integral role in bridging the gap between the Community and national legal systems. The preliminary ruling procedure is instigated under Article 234 when parties to a case raise a question concerning Community law in front of national courts (2006:194). National courts decide whether the EU law is pertinent to the proposed facts, and request from the Court clarification/interpretation of the law if such is needed (2006:194). The ECJ provides an insight on the raised issue—it does not decide the case as such, but rather clarifies the meaning of the EU law.

Preliminary ruling is considered as the most influential tool used for furthering European integration. Indeed, groundbreaking decisions that the Court has passed over the years came out of the proceedings initiated by national courts for preliminary rulings. The procedure brought to bear fundamental principles of the EC law and promoted uniformity in application and interpretation of the same. In particular, issues raised and resolved in the state that initiates proceeding will have the same interpretation in the subsequent cases across the Union (2006:201). The procedure has essentially broadened the opportunity for the ECJ to interpret law in a way that has further fostered its agenda in deepening integration.

Preliminary ruling procedure has been extensively used by private parties, as it legally allows challenging of national acts in breach of the EC law (2006:202). Although Article 234 presents an array of opportunities for damaged parties to reassert their rights, the full effectiveness of the procedure largely depends on the willingness of national courts to cooperate. A litigant per se cannot challenge a domestic law directly in front of the Court; rather, the litigant must rely on the national court and its cooperative spirit. Once the reference was made, and an opinion was given, the national court must apply the ruling, and so do courts of any other state encountering the same issue (2006:202). Considering the close relationship between the ECJ and the national courts, this collaborative bond per se has been integral for the preliminary proceeding and its effectiveness. The more elaborative analysis of this relationship will be presented further in the project.

Legally, the Court has been accorded other opportunities for manoeuvre; although, we have mentioned the most relevant for our project. Further, we proceed with discussing legal means available to the Court for furthering its agenda.

## **3.2 Legal Means for Exercising Judicial Activism by the European Court of Justice**

### **3.2.1 Judicial Activism and Case Laws**

Establishment of the fundamental principles of the EU legal order and ultimate constitutionalization of the same were consolidated in the proceedings initiated in the Court's case laws. Through this medium, the Court has transformed the legal character of the Union and furthered integrative tide to unanticipated level. The Court has developed a normative framework within which the boundaries of integrative project have expanded. It has established a revolutionary legal order that has evoked a lot of criticism from scholars. Charges against the Court have been a response to the transformed character of the Union's legal order and established principles contributing to this change. The ground breaking decisions have introduced into the system the fundamental principles of direct effect, supremacy and state liability. Not only has the Court founded principles not inherent in the Community legal order; but, also it has expanded their meanings and scope, without an official consent by the member states (Bobek 2008:1613).

In the section to follow we provide the reader with a technical background by defining the main principles of the EU law that have changed the European legal framework and have contributed to the furthering of the European project.

### **3.2.2 Principles of the EU Law**

#### **3.2.2.1 Principle of Direct Effect**

Regarded as the foundation of the European Community law, the principle of direct effect demands particular attention from scholars examining the Court and its influence on integration. The basic working definition of a 'direct effect' signifies the capacity of an individual to enforce rights and obligations conferred by provisions of law (Steiner et al. 2006:94). Thus, a directly effective EC law can be invoked in front of national courts by private agents. The Treaties are

silent on the legality of direct effect and the conditions under which Treaty provisions are directly effective. Instead, the doctrine was established by the ECJ in the Case-law. The provision was first brought up in the proceeding of the *Van Gend en Loos* Case—the ground breaking case that allowed individuals to enforce rights guaranteed by the Treaty (2006:95) . The case dealt with Article 12 of the EEC Treaty (25 of EC) on which occasion the Court, for the first time, asserted that directly effective provision create individual rights which national courts must protect (2006:95). This has had an enormous impact on the prospective course of the Community, as the Court had recognized individuals, beside states, as constitutive agents of the Community legal order. Not only has the European citizen been included in the European legal framework, but also this decision has paved way for the prospective uniform application of Community rules across the Community itself. In number of prospective cases relating to provisional direct effectiveness, the Court has specified conditions under which provisions have legal standing before the Court. In fact, each subsequent case has expanded the boundaries of the provision, gradually reformulating it, stretching its contours and adding new dimensions. Today, national courts recognize regulations as directly effective if certain conditions are satisfied. In the case of *Van Duyn v. Home Office* the Court stated the criteria making a case legally grounded in front of the Court (2006:95). To be exact, a directly effective provision will be precise, clearly stated, and unconditional so that its effect will not be conditioned on subsequent actions by Community or national authorities (2006:95). In the judgment of the case it was stated that

[...] the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community

[http://eurlex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61974J0041&lg=en](http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61974J0041&lg=en).

With the latter judgement the Court established the principle of direct effect and empowered individuals with a tool for observing and protecting the EC law. Prior to this doctrine, the Commission was exclusively entrusted with the role of a Treaty guardian; nevertheless, with *Van Gend en Loos* a new era was launched—the era of EU citizens protecting the rules that are

enshrined in the legal order of the Union (Costa 2007:742). Also, a direct engagement of nationals in the Community affairs was practically non-existent at that time (2007:743). The new era of civic engagement has prompted consolidation of the EC law, as the power for preserving the same was diffused to additional players—namely, the EU citizens and national judges (Selck 2007:188). Not only has the Court empowered citizenry to enforce rules of the game, it has also paved the way for national courts to be increasingly more engaged in the Community affairs, applying and enshrining the main principles of the Community law. These legal bodies have also become the guardians of the Community's legal system, constraining the power of national politicians in disregarding Community law (2007:189). Creating a cooperative bond with the national courts, the ECJ bridged the gap between the supranational and national legal systems and the supranationality and nationality as such (Costa 2003:745). The Court has created an enforcement mechanism that has prompted the states into compliance with the agreed provisions. The normative framework of the Union has been consolidated with transposition of the Community's rules into national legal systems.

Essentially, the doctrine of direct effect was created by the Court's creative take on the Treaty's provisions. The Court had gone beyond the literal meaning of the text, capturing what it perceived the essential intention of the creators of the Europe's integration project. The Court has envisioned the Union as machinery with its constitutive parts extensively cooperating toward the closer union; consequently, it aimed at establishing the tools for achieving that end. In fact, the Court saw it necessary for rules and regulations at both supranational and national level being consistent and in concert with each other. The Treaty has been an inspirational source for the Court to creatively use power at its disposal to facilitate movement of the project towards a more united European Community.

### **3.2.2.2 The Principle of Supremacy**

The doctrine of direct effect was not the only important principle that transformed the legal system of the Community. In fact, the principle of direct effect, itself, would not have been as effective if national law took precedence over the Community law. If that were the case, member states would have disregarded the Community rules that were not in accordance to the national law (Brown 2009). In order to avoid such inconsistencies compromising building of the legal



foundation and furtherance of integration, the Court put into effect the principle of *supremacy*—the next core concept of the Community law (2009). Essentially, the rule of supremacy commands that Community law takes precedence over and is superior to the national law when they are conflicting (Steiner et al. 2006:71). In other words, the principle guarantees a full effectiveness of the doctrine of direct effect in ensuring uniform applicability of the EC law among member states (2006:71). Considering that all Treaties are silent on this matter, the Court has used case laws to establish superiority of the Community law.

The principle of superiority was introduced in the case *Costa v. Enel*, while it was refined and expanded in the Court's subsequent case laws (2006:72). Essential cases that had contributed to the development of the meaning of supremacy include the case of *Simmenthal* and *Factortame* (2006:72).

Particularly, in the in the *Costa v. Enel* case where the principle emerged, the Court stated that

The integration into the laws of each member state of provisions which derive from the Community and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964J0006:EN:HTML>).

The judgment stressed member states' obligation to recognize superiority of the Community law—the law that will always take precedence over the national. Not only did the Court emphasize the inferiority of domestic provisions to Community laws in conflictual situations, but it also reiterated provisions of direct effect clause and importance of uniform application of Community law across member states (73:2006). The very ideational foundation of the Treaties would be undermined in case of a non-uniform application of Community law. The Court reminded that effective functioning of the Community is conditioned on treating Community's legal system as superior. This would lend itself in facilitating the reach of the ultimate end of the Community, as a more unified cooperation, deeper integration and enhanced legitimacy is brought to bear.

Adopting the principle of supremacy implied relinquishing of state sovereignty, in favour of a strong supranational legal order. Also, it signified subjugation of national legal systems to the Community's, obliging member states to comply with EC provisions unexceptionally. Member states have been discouraged from introducing provisions incompatible with the EC law, and as such have implicitly delegated their authority to the Court in areas concerning the Community. In its ruling in *Simmenthal* case, the Court asserted:

[...] in accordance with the principle of precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member states on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but-in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States- also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions[...]

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61978J0243:EN:HTML>

In this judgment, the Court asserted important role of national courts in acknowledging superiority of Community provisions by rendering inapplicable incompatible national provisions (Steiner et al. 2006:96). National courts were delegated responsibility in preserving Community order by denying legality of conflicting state laws, practicing the so-called 'duty to disapply' (Craig 1997:251). The new responsibility delegated to national courts essentially empowered lower ranking legal bodies by prompting them to apply Community law automatically, without referring cases to higher courts (Bobek 2008:1620). The cases of *Von Colson and Kamann* and *Marleasing* further built on the meaning of this provision, extending the group of Community's legal principles that claim supremacy over national laws (Steiner et al 2006:97). Essentially, development of the doctrine of supremacy proceeded in stages, where each additional case contributed to refinement of its meaning.

It is important to acknowledge that the Treaty of Rome makes no mention of the supremacy clause; rather, the principle itself was introduced by the ECJ. The duty of adherence to the principle of supremacy has been a breakthrough in the international community. It has been a radical innovation that has curtailed states sovereign rights in proportions that has had no precedence in traditional international law (Witte, in Craig, 1997:220). The principle of supremacy commands enforcement of EC law—a duty that clearly introduces new meaning to

traditional international obligations that states did not encounter before (Witte, in Craig, 1997:220). The Court reminded the Member States of their inherent obligations as signatories of the Treaty and members of the Community—the obligations that have a supremacy clause as a logical extension of the Community’s ideational foundation.

Many scholars often characterize principles of supremacy, direct effect and preliminary ruling procedure as elements typical of federal constitutions (Douglas-Scott 2002:255). While the principle of supremacy has made the Community legal order supreme, direct effect doctrine consolidated its legitimacy and efficiency (2002: 256). In turn, the preliminary ruling mechanism has established a link between national and supranational orders, a relationship often seen in federal states (2002:256). Many scholars consider the mentioned provisions as fundamental elements for the Court’s effective functioning as a guardian of a Community order. They have established a legal foundation for constitutionalizing Community legal order and furthering of declared and implicit goals of the Community.

### **3.2.2.3 State Liability**

On its road to making EC law effective, the ECJ worked on establishing a mechanism that would enable individuals to access rights derived from EC law in their national courts. Besides direct effect, one of the most significant legal doctrines introduced towards serving this end has been the development of the principle of State Liability (Steiner et al. 2006:155). The principle imposes particular obligations on the national legal systems, sanctioning states in breach of the Community law. Although Article 10 of the Treaty commands that States should take appropriate measures to ensure fulfilment of their obligations, it was unclear whether individuals can claim compensation in instances when states fail in their duties (2006:156). Such a question was addressed in the case of *Francovich*, followed by the case of *Miret*, when the Court established the principle of state liability. On these occasions, the ECJ asserted that extending access to substantive rights is pointless without a possibility to access national court system to get remedy

for violation of rights (2006:156). In fact, the principle was considered as a logical extension of the notion of direct effect and supremacy (2006:156). It has obliged Member States to pay liability as a compensation for damages caused by violating Community law (2006:156). In *Francovich* the Court stated that failure to apply Community rules creates liabilities, with the state infringing a particular right being obliged to pay compensation (2006:157). Each subsequent case contributed to the refinement and extension of the scope of this principle. In particular, the case *Miret* pushed the hitherto established boundaries of the principle, including under its wing not only cases of improper application of Community law, but also cases of inappropriate interpretation of national law (2006:159). Ultimately, the Court expanded applicability of the principle to include breaches with respect to all Community law.

Introduction of the principle of state liability has put into effect a mechanism for sanctioning non-compliant states that ignore laws of the Community. The Court has established criteria that must be met for a standing before the Court. Once the conditions are fulfilled, the compensation is distributed by national authorities according to the national law (2006:160). Prior to the establishment of the principle of state liability national courts could have given remedies to individuals whose rights were breached, but under very limited circumstances (2006:160). Such law deprived private parties of the rights guaranteed by the EC law and no claims of compensation were possible in national courts. With the new principle, however, individuals were given an opportunity to get compensated when their right were breached. Introduction of the principle of state liability has provided another avenue that the Court could use for guarding legal system of the Union. The states have been more inclined to comply with EU rules for the sake of avoiding liability. Moreover, the principle has also empowered the EU nationals in protecting their rights, making them the new guardians of the EU law.

### **3.2.3 General Principles of Law**

Beside the principles of direct effect and the rule of supremacy, another major contribution of the ECJ has been the introduction of general principles of law into the body of EC law. General principles constitute the unwritten law of the Community, tailored to aiding interpretation of law, challenging Community actions or those of the member states (Steiner et al. 2006:115). In the chapter to follow, we exclusively examine fundamental human rights, as the full survey of the substantive rights currently recognized exceeds the scope of the essay.

#### **3.2.3.1 Fundamental Human Rights**

Contemporary legal order of the European Union encompasses protection of human rights as one of its fundamental element that is commonly recognized in constitutional documents of the members (2006:117). All Member States are signatories of the ECHR while most of them have incorporated the Convention into their domestic law (2006:122). Once the Convention was incorporated, its provisions could be enforced before national courts, in instances of a breach by national rules (2006:122). Even if the mentioned provisions were not transposed into national system, the Member States would be bound by its terms while nationals could appeal to the European Court of Human Rights (2006:122). The ECJ has been very active in protecting human rights when applying Community law; although, the scope of protection has been limited as ECHR has not yet become a part of Community law (2006:123). Nonetheless, the Court has made express references to ECHR in many judgments. The idea of the EU Charter of Fundamental Rights has been present on the Community's agenda for some time, with an aim of granting legal status to the rights the ECJ was already referring to in its judgments. The idea was actualized in Nice in 2000 when the Charter was proclaimed; although, technically, it still does not have legal force (2006:123). Even though the significance of the Charter has been debated, the ECJ has made a number of references to EUCFR in its judgments.

Prior to declaration of the Charter, the ECJ promoted protection of fundamental rights through the case law. It initiated the doctrine's establishment, deriving its basic elements from Member States' constitutional traditions now applied within Community's context. To illustrate the Court's advancement of human rights principles, specific case laws consolidate the claims.

In the dispute between *Stauder v. City of Ulm* one of the Community's schemes was challenged on the grounds of fundamental human rights violation (2006:128). On that occasion, the Court explicitly declared that fundamental rights are, in fact, embodied in Community law, while the respect, protection and observance of the same will be guaranteed by the Court itself (2006:128). Similarly, in the *Warchauf* case the Court stated that one of the Community's goals aim at protecting rights already constitutionally consolidated in the Member States. In fact, certain values, the Court added, should not be undermined for the sake of furthering the principal goal of creating a common market. Also, in *Internationale Handelsgesellschaft* the Court ruled that:

[...] In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community[...]

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61970J0011:EN:HTML>

Essentially, the Court stated that common constitutional traditions that are in accordance with pivotal Community goals will be regarded as fundamental rights under the Community law (Douglas-Scott 2002:446). The Court recognized a number of different rights being under its jurisprudence; nevertheless, granting certain rights under peculiar conditions has proven to be challenging and controversial (2002:226). The *Grogan* case exemplifies such difficulty. When confronted with cases of irreconcilable differences in morality across the States, the Court concedes in passing judgments, leaving it to each Member State to take appropriate action (Hartley 1994:146).

As mentioned at the start of the human rights discussion, the Court had recognized importance of observing and protecting fundamental human rights long before the creation of the EU Bill of Rights. As the Treaties spoke nothing on this matter, the Court advancement of human rights in case laws is sometimes considered as an important specimen of its progressive work in interpreting legal texts and translating goals of the signatories into practicalities. The Court's

activism in this area has greatly contributed to the establishment of the EU legal order and incorporating protection of fundamental human rights under the Europe's legal wing.

## **4 Integration Partners: The ECJ in collaboration with other agents**

Construction of the EU legal order has not occurred independently of other EU constitutive agents. In fact, when speaking of the Court's influence, the principal polemic revolves around the extent to which the Court has had the power to manoeuvre alone. One is for certain; the effectiveness of the Court's doctrinal factory was contingent on interactive dynamics established with other political and legal actors. In the section to follow, analysis focuses on the interaction between the Court and different agents of the European Union.

### **4.1 The ECJ and the Commission**

The European Commission was created as a cohesive mechanism intended for steering the integration process further. Its functions have been threefold, as it has acted as an initiator of Community actions, a Treaty guardian ensuring that any infringements are halted and rectified, and a body implementing policy decisions taken by the Council (Steiner et al.<sup>32</sup>). Bearing in mind that its major roles have been tailored to fostering integration, many scholars have regarded the Commission as the most suited partner to the ECJ in deepening integration. As asserted by Burley and Mattli, both institutions have been pro-integrative agents actively working toward



constructing a more efficient system (1993). In fact, several initiatives taken by the Commission have been tailored toward supporting the ECJ in its quest. The Citizens First Initiative and the Robert Schuman Project faithfully portray the cooperative spirit that has been established between the two institutions (Tallberg 2003:621). These projects were initiated with the purpose of raising awareness of Community's rules, rights and obligations among citizens, businesses and legal professionals (2003:622). The Commission aimed at adopting a legislation that would encourage different EU agents of acquiring knowledge that would allow them to challenge actions before their national courts (2003:623). By bringing awareness to their rights, any infringement of the same could be rectified once brought before national legal bodies. The Citizens First initiative has had an enormous informative influence on the Community agents, greatly contributing to enhancing efficiency and consolidation of the legal system (2003:623). Similarly, the Robert Schuman Project contributed to enhancing hitherto inadequate knowledge of the EU law among the Union's legal practitioners aka judges, prosecutors and lawyers. The Commission saw the later project as a logical extension of the Citizens First Initiative, as it would have brought to bear a uniform application of the Union's rules within the system (2003:625). Essentially, many scholars consider the Commission and the ECJ as the motors of the European integration that have been actively promoting deepening of the project within the limits of their jurisdiction. Together, the two institutions have been complementing each other towards establishment of the common goal. Having in mind the collaborative nature of these institutions, factoring the same into the deliberation on the Court's agency was essential.

## **4.2 The ECJ and National Courts**

Just as discussion on politics usually incorporates elements of law, the discourse on the ECJ and integration inevitably incorporates consideration of the role of national judiciaries. Although the nature of this relationship has been contentiously debated among scholars, all theoretical camps recognize the same as crucial in grasping the role of the Court in the European integration.

Essentially, the nature of the bond between the two legal systems has proven integral for implementing ECJ jurisprudence and consolidating legal order of the European Union. The central scholarly polemic, instead, questions the underlying logic for creating cooperative bond between the two. Do national judiciaries function as the Court's allies or, in fact, represent an obstacle to the Court's agency in penetrating national legal order? All exclusivist argumentations interpreting this relationship are often too simplistic and provide inadequate account of all potential influences. Given the limited scope of the project at hand, our analysis would avoid extensive theoretical bargaining and favouritism. Instead, we would initially examine the issue technically, looking at structural bonds between the ECJ and national judiciaries. These structural considerations will be followed by theoretical explanation of the bonds that suggests potential contributors to the established dynamics.

#### **4.2.1 Legal/Structural Bond between the Two Legal Orders**

As previously indicated national courts have been given an important responsibility of reviewing compatibility of domestic acts with EC law; together with implementing Community law into domestic systems. The Court has engaged national judiciary in legal discourse of the Union, establishing judicial dialogue and cooperation between the national and supranational legal systems. The Court, essentially, increased the power and influence of national courts that were given responsibility to assess operational compatibility of acts adopted by legislative and executive governmental branches. Ultimately, the Court has created associates in guarding Community's order from the in-side-out.

The relationship between national judiciary and legal order of the Community is established with the enactment of the principles of supremacy and direct effect. As previously asserted, the principle of supremacy established a legal hierarchy, whereas Community law takes precedence over national legislations in case of a conflict (Shaw 1996: 260). In essence, the doctrine renders automatically inapplicable incompatible provisions of national law and it prevents enactment of

new provisions potentially undermining or in conflict with Community law. National judiciaries are responsible for the faithful application of the rule of supremacy. In fact, judges are obliged to give full effect to Community law, and as commanded by the law, render inapplicable conflicting national legislations (1996:260). The extent to which national courts fulfill their responsibilities is a subject to debate and a source of theoretical polemic later described.

The principle of direct effect has also bridged the two levels of judiciaries. With the direct effect the ECJ created a duty for national courts to uphold rights guaranteed by the Treaties. The Court explicitly formulated a collaborative bond representing an integral tie that enables efficient functioning of the Community legal system.

Further, the preliminary ruling represents additional legal provision connecting national judiciary with the Community's (Obradovic & Lavranos 2007). The basic idea of the procedure recognizes Court's jurisdiction in providing preliminary rulings on the meaning and interpretation of particular legislative provisions. References made to the Court originate from the national legal sphere and the two judicial systems cooperate for the sake of ensuring unified application of the EC law (2007). The ECJ has constructed a hierarchical order with the legacy of the EC law at the top of the ladder; although it has recognized the autonomous functioning of national judiciaries, allowing for independent decision making when making referrals to the Court (Bobek, 2008: 1623). In other words, the Court established a cooperative sentiment with national judiciaries, in order to bring to bear uniform application of Community law in all Member States. Article 234 has also facilitated legal penetration of the EC law into national systems by advancing transposition of principles of law into national legal orders. In the contemporary order, lower courts directly communicate with the Court; even if their legacy were subjected to authority of higher courts (2008:1630).

## 4.2.2 Theoretical Debate

Relationship between national judiciaries and the Court is way too complex to be solely observed through formal bonds created to advance Community's agenda. Technical features of the EC legal order paved the way for cooperative interaction between the ECJ and national judiciaries; nevertheless, whether the potential for collaboration has been actualized to the fullest is subject to a theoretical debate. Many political scientists recognize multidimensional character of this interaction, emphasizing different factors to be studied for understanding complexity between interactive fields of the two legal orders. Still, the main scholarly dilemma investigates motives behind domestic judiciary support of the Court and expansion of its jurisdiction.

Primarily, we consider neo realist accounts. Particularly prominent scholars of the thought, Geoffrey Garrett and his followers, forward an assertion that places national interests at the core of the Court's consideration in decision-making (Garrett et al. 1998:162). In fact, they theorize that the Court's judgments are often a reflection of the dominant political sentiments of each nation state and as such predisposed to national government and the support of the courts (1998:162). Similar analysis was proposed by Mary Volcansek who considers national interests decisive in the Court's decision making. In fact, this scholar juxtaposes groundbreaking decisions of the Court to the general shift in political will and reasons this concurrence for the greater acceptance of legal integration (1998). As the euro-sceptical sentiments gradually dissipated, a new era of acceptance emerged, as national courts began assimilating decisions brought to bear by the ECJ. In essence, national interests were considered integral for shaping political behaviour of all agents involved in the integration project.

Although providing a valuable theoretical reasoning for certain European affairs, this theory's generic applicability has been compromised by empirical examples that are poorly explained by the latter school. Particularly, scholars in question have not considered variegated interests represented by national courts and national governments (Alter 2001). Such being the case, decisions taken by the courts will often contradict interests promoted by the governments (Alter 2001). In an attempt to rectify this theoretical weakness other theories have proposed differing assumptions regarding this relationship.

Quite differently, neo-functionalists, Marie Burley and Walter Mattli, have asserted that consolidation of European legal system has been by and large influenced by national judiciaries, as their agency in promoting legal integration was driven by prospective expansion of their authority (Burley 1993:43). As the ECJ provided new opportunities to national courts, it has also motivated them in actively participating in consolidation of the legal order while furthering their own interest (1993:43). All neo-functional theorists identify interest driven actors as the motor of active participation in the system; although, recognize different interests as the motivating factors.

Finally, employing neo-institutionalists arguments we assert that the initial institutional set up of the Union has led to empowering of the Court beyond the unanticipated. This has lent itself to further institutional building that has established the bond between the Court and domestic judiciaries. Thus, technical connections between the ECJ and national Courts and the established doctrines have been integral for protecting the EU law. Also, the established normative framework instigated by the Court has created new interests for the national courts. They have transcended the formal forwarding of the national interests, as they were given new authority through which they have acquired supranational identities and new interests. This could be considered a form of social learning in the judicial/legal community that have come to have collective understandings. Although essential for constitutionalization and effective functioning of the legal system, this cooperative machinery has proven far from being self-sufficient. In fact, political scientists identify additional elements required for efficiency in the entire system.

### **4.3 ECJ and Member State Governments**

Properly identifying relationship between member states and ECJ represents the biggest challenge for answering the main question of this project: Has the Court influenced furthering of the integration process of the European Union and, if so, to what extent? We have already established that the Court has got at its disposal the means, motives and opportunities for

furthering its agenda; however, whether the Court actually does so is a matter of scholarly disputes. In addressing the latter debate, our analysis re-embarks on a theoretical polemic.

As we have indicated before, neofunctionalists recognize legal integration of the EU as a product of the Court judicial activism. These scholars see the Court as an agent furthering its agenda independently of the preferences reflecting member states interests. Actualization of the Court's agenda, they argue, is possible, as available mechanisms for constraining Courts agency have been relatively weak (Burley 1993:57). Quite the contrary, scholars endorsing liberal intergovernmentalists' train of thought argue that the Court has, in fact, is politically constrained by the member states governments. Concretely, they identify the threat of override through Treaty emendation, legislative process and the threat of non-compliance as the main constraining mechanisms (Gabel & Hankla 435:2008). Having this in mind, the Court, these scholars have argued, considers government interests and its decisions, in order to avoid non-compliance that would ultimately compromise its legitimacy (2008:435). Finally, institutional obstacles, as proposed by institutionalists, have been important in shaping actors' behaviour.

Essentially, scholars acknowledge potential political repercussions of the Courts judgments; although, they identify different constraining mechanisms as important and consider their effectiveness differently.

### **4.3.1 Credibility of Political constraints imposed by the Member States**

Following the arguments proposed by historical institutionalists, we assert that the argument proposed by intergovernmentalist can run the opposite direction as well. That is to say, member states preferences are shaped by the already established institutional and policy arrangements. One of the most cited political constraints on the agency of the European Court of Justice has been the power of Member States to override the Courts decisions through Treaties revision or adopting secondary legislations (Gabel& Hankla 2008:438). In order to amend a Treaty,

nevertheless, member states require unanimous consent and an approval of national parliaments (Alter 1998:136). Considering the unanimity rule for voting as the institutional barrier to reform, scholars have been assessing credibility of the latter threat while considering the following. Diversity of interests endorsed by each state has always been difficult to accommodate in entirety, thus, introducing changes to an already established system could be potentially challenging (1998:136). Considering the mosaic of preferences in need of accommodation, achieving unanimity is potentially deterring to the idea of using this avenue for overriding Courts decisions. Ultimately, the credibility of the threat itself is questioned. Also, adopting secondary legislation faces similar procedural obstacles. To adopt a secondary legislation, unanimity consent is often required in the Council with around 70 percent of vote casts (1998: 137). Essentially, just as historical institutionalists assert, the rules of the game within the Community, have been designed with the purpose of inhibiting even minor changes. In other words, actors' behaviour has been constrained by particular institutional design. Although actors may change initial institutional arrangements, it can be challenging; thus, the latter have exhibited 'stickiness' and longevity.

Evasion of Court rulings has been identified as another political constraint on the ECJ. In particular, Jonas Tallberg has recognized that introduction of the Court's new principles into domestic system as burdensome and demanding costly adjustments (Costa 2003:63). When such is the case, in order to mitigate or, even, escape new challenges of adjustments, non-compliance is often regarded as a favourable alternative (2003:63). Member state, thus, may either choose to ignore the Courts decisions or pass legislations that are not, in fact, in compliance to the Courts ruling (Garrett 1995:174).

Nevertheless, when such actions are detected, others contend, members may decide to sanction the defecting government by bringing the case to the Court. Compliance with EU obligations and also sanctioning of the non-compliance should be reasonably expected. Sanctioning possibilities are, again, important determining factors of behaviour. Also, Member States expect proper implementations of provisions agreed upon and ultimate committed compliance with the new obligations. In fact, compliance is universally beneficial to the members. If every state cooperated, every state would benefit. Deflection, on the other hand, threatens to undermine such a system and the non-deflecting states would potentially punish the compromising behaviour of

others. The neutral medium established for sanctioning non-compliance, protecting and enforcing rules agreed upon has been the Court itself. Again, institutional arrangements may become internalized and part of states' identity. Thus, institutions become influential in shaping outcomes through institutional design or policy decisions and various moral templates that provide meaning to action.

Arguments proposed by scholars of different theoretical school have provided us with valuable tools for tackling the query concerning the role of the Court in integration process. Independently, these theories provide an inadequate and oversimplified picture of the relationship between member state governments and the Court; although, one must recognize some of the validity in both accounts. While the ECJ has been accorded a shield against political attacks, member states still have enough power to influence, to a certain extent, the course of integration process. This has major implications for further research. Essentially, scholars deliberating on the proposed topic should invest resources into investigating optimum conditions for actualizing the Court's authority and the degree to which the Court has exercised its agency as its assertiveness has been felt among the agents affected by its authority.



## 5 Conclusion

The project of European Union has provoked many discursive debates since the conception of the idea of a unified Europe itself. Many interdisciplinary studies have been conducted over the years, with scholars theorizing about prospective forms the project would ultimately take on, while examining dynamics created among its constructive poles. A variety of research projects have accorded particular importance to supranational institutions and the dynamics created as a result of their agency. In particular, literature on the power of the European Court of Justice and its legacy in construction of the European legal order is available in abundance. While some scholars argue that the ECJ has been the engine of integration, others merely see the Court as a tool furthering Member State interests. Although the ideational division between theoretical camps is evident, none can deny the Court's legacy in the history of European integration. In particular, the study at hand attempts to provide additional support to neo-institutionalists' theoretical camp, recognizing the Court and its institutional contribution to the structural and functional design of the Union as we know it today. The project considers the opportunities, means and motives available to the Court and its functions and relationships established with other constitutive parts of the Union. Various research studies conducted on the Court's influence supplements deliberation on the mentioned elements, assisting the author in making inferences with regards to the role the Court has played in fostering European integration.

As we have demonstrated throughout the body of this research project, the Court has had an important impact on the process of integration itself. We have followed the evolutionary pathway of the Court through time and have observed changes the system has undergone as a result of the Court's judicial activism. In fact, we have identified principles and laws that were non-existent in

the original text of the Treaty but came about as a product of the Court's agency. Through the Case Law, the Court has introduced principles initially unintended to take force by the states. In other words, the Case law was used as a tool for furthering integration, defining the character of the Union's legal system and allowing for penetration and spread of EC law throughout the Union. Principles that revolutionized the Union's legal order, construing a legal architecture of the Union, consist of the principle of direct effect and supremacy, followed by the principle of state liability and general principles of law. Primarily, the principle of direct effect has introduced an innovative character into the system, as it has conferred rights and obligations to individuals—the rights enforceable before national courts. The principle of direct effect introduced a federal element to the Community; with a new layer of agents aka individuals getting recognized as subjects of the Treaties able to enforce their rights.

Beside the principle of direct effect, the Court has established the principle of superiority that has introduced hierarchy in the Union's legal order. The Court's agency is at the focus of discussion when speaking of these principles, considering that the Treaty makes no mention of the same. The Court's innovative interpretation of the official legal text has demonstrated how the influential power of supranational institutions is far-reaching and capable of changing international political character. Together with the preliminary ruling procedure, doctrines of supremacy and direct effect have been exercised efficiently, and have constitutionalized the Union's legal order. Also, when discussing doctrines that changed the legal order of the EU, we have emphasized the principle of state liability that has accorded individuals the right to collect damages when states are in breach of Community law. Finally, while on the quest to prove Court's catalytic effect on the integration process itself, we have discussed another important principle established by the Court, namely the human rights protection. Principally, the Court has established that protection of human rights is inherent in the Union's ideational foundation, and as such declared fundamental human rights as general principles of Community law. This has instigated further constitutionalization of the Treaties and formation of the European human rights legal text; although, the same still does not have a legal force.

A deliberation on the revolutionary principles introduced by the Court was followed by an investigation of the relationship between the Court and other agents in the Union, namely the Commission, national courts and Member States governments. An exclusive focus on the ECJ gives an incomplete and erroneous picture of legal integration in the Union; consequently, the

study has incorporated a discourse on relationships with the mentioned agents. Analysis of the same was complemented with different theoretical accounts, with various explanatory factors considered determinative for the nature of this nexus.

Initially, we considered the Commission as the principal integrative force that has collaborated with the Court to support its agenda and spread awareness among citizens of their rights.

Further, we have considered importance and influence of national courts in establishing Union's legal order and further contributing to the integration process. Several provisions have conferred obligations to national courts to enforce, apply and protect Community's law. Primarily, collaboration between the two legal orders is inherent in the principle of preliminary ruling itself, which has obliged national courts to refer matters concerning Community law to the Court. The nature of the relationship between national courts and ECJ has been a subject of great polemic, with different theorists interpreting cooperation between the two differently.

Finally, we have considered relationship between the Court and the Member State governments. This relationship has been regarded as determining factor that conditions Court's agency in its active participation in integration process. The main issue concerns, on one hand, the extent to which member states are willing to subject their authority to a supranational body; while, on the other, the extent to which the Court has played independently in the arena of European Union. Although sovereign states attempted scrutinizing Court's authority; however, as it proved challenging, the Court resumed on its road to furthering integration.

In the light of the presented facts it is possible to make preliminary predictions with respect to the future moves of the Court. Nevertheless, no assertion could be made as matter-of-factness. The ECJ has had at its disposal the means and opportunities to further push the project in a desired direction. Whether the future prevailing political sentiments will be conducive of such furtherance is a matter of a different discussion. A constant interplay of political forces attaches conditionality on the Courts latitude to perform; nevertheless, the Court's has acted strategically over the years and has revolutionized the system beyond anticipation. The same could be expected in the years to come.

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