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By

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# Winners and losers in Luxembourg: A statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001–2005)

Takis Tridimas and Gabriel Gari\*

*LT* Actions for annulment; Admissibility criteria; Appeals; Court of First Instance; EU law; European Court of Justice; Failure to act; Preliminary rulings

*This article provides a statistical analysis of actions for the judicial review of Community measures between 2001 and 2005. It addresses, among others, the following questions: What is the rate of success of judicial review applications? What percentage of cases fails on admissibility and what percentage on merits? Which grounds of review are more likely to succeed? Does the rate of success differ depending on the type of applicant, the subject matter of the case or the court formation? Far from being merely a quantitative exercise, the determination of the rate of success of judicial review applications provides a measure of the effectiveness of judicial review, enables us to identify the “values gap” between the judiciary and the other branches of government, and reflects a constitutional equilibrium within a given polity.*

## Introduction: Scope and methodology

This article seeks to provide a statistical analysis of actions for the judicial review of Community measures in the period 2001–2005. Although a number of previous studies<sup>1</sup> have provided statistical information on the case law of the European Court of Justice (ECJ) and the Court of First Instance (CFI),<sup>2</sup> the present study focuses specifically on

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<sup>1</sup> See, in particular, A. Stone Sweet and T.L. Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary References* (1961–95), available at <http://www.jeanmonnetprogram.org/papers/97/97-14-.html> [Accessed February 3, 2010]; A. Stone Sweet, T. Brunell and C. Harlow, *Litigating EU-Law, New Modes of Governance Project*, available at [http://www.eu-newgov.org/datalists/deliverables\\_detail.asp?Project\\_ID=26](http://www.eu-newgov.org/datalists/deliverables_detail.asp?Project_ID=26) [Accessed February 3, 2010]; C. Turner and A. Munoz, “Revising the Judicial Architecture of the European Union” (1999–2000) 19 Y.E.L. 1; Note also that statistical data of a more general nature are provided in the annual reports of the ECJ available at [http://curia.europa.eu/jcms/jcms/Jo2\\_7000/](http://curia.europa.eu/jcms/jcms/Jo2_7000/) [Accessed February 3, 2010].

<sup>2</sup> The Treaty of Lisbon renames the CFI to the General Court of the European Union: see art.19 TEU as amended by the Treaty of Lisbon. Since this study refers to pre-Lisbon case law, the abbreviation CFI will

judicial review and enters into a much greater level of detail. The article has a twofold objective. First, it aims at providing detailed statistical data on rulings delivered by the ECJ and the CFI in actions seeking the annulment of Community measures between 2001 and 2005. Secondly, it seeks to make a critical evaluation of the statistical results and draw conclusions concerning access to justice where the legality of EU action is challenged. It addresses, among others, the following questions: what proportion of the ECJ and the CFI case law relates to judicial review of Community acts? What is the rate of success of judicial review applications? What percentage of cases fails on admissibility and what percentage on merits? Which grounds of review are more likely to succeed? Is the rate of success higher in direct actions than in actions where the validity of a Community measure is contested in preliminary reference proceedings? Does the rate of success differ depending on the type of applicant, the subject matter of the case or the court formation which hears the case? What is the rate of successful appeals to the ECJ against judgments of the CFI?

The basic principles of our methodology are as follows. The study examines rulings, namely both judgments and orders, delivered by the ECJ and the CFI in the period under review on the validity of measures adopted by the Community institutions.<sup>3</sup> It includes both direct actions under art.263 TFEU (ex 230 EC) and preliminary rulings on validity. The study also includes actions for failure to act under art.265 TFEU (ex 232 EC). By contrast, it does not examine as a separate category indirect challenges via the plea of illegality under art.277 TFEU (ex 241 EC). The study discusses, furthermore, appeals to the ECJ from judgments of the CFI. For practical reasons, it excludes staff cases and also trademark disputes, i.e. appeals to the CFI against decisions of the Office for Harmonisation in the Internal Market (OHIM).<sup>4</sup> It also includes cases brought under the ECSC and Euratom Treaties but these cases are not separately identified. The data have been collated from primary sources, namely, by examining the rulings of the Community courts which have been accessed either through the official European Law Reports or the electronic database of the case law available on the official website of the ECJ. A form containing detailed information on each case has been completed and all data have been inserted into a Microsoft Access database. The information collated is presented here in table or graph format or, in some cases, in both formats. The article is part of an ongoing project in which the authors hope to provide and evaluate on a continuing basis detailed data on

be used throughout the text. For the same reason, reference will be made to “EC” or “Community” law and “EC” or “Community” measures even though the EC has formally ceased to exist following the entry into force of the Lisbon Treaty on December 1, 2009. The term ECJ refers to the Court of Justice of the European Union.

<sup>3</sup>This study is concerned only with the case law of the Community courts since it is an established principle of Community law that only the ECJ and, at first instance, the CFI have jurisdiction to annul measures adopted by the Community institutions. National courts, by contrast, do not have such jurisdiction: see *Firma Foto Frost v Hauptzollamt Lübeck-Ost* (314/85) [1987] E.C.R. 4199; [1988] 3 C.M.L.R. 57; *Gaston Schul Douane-expéditeur* (C-461/03) [2005] E.C.R. I-10513. This principle is based on the need to ensure the uniform application of Community law and the unity of the Community legal order and, although it is conceptually separate from the principle of primacy, it serves as its bedrock. Note that national supreme courts have not accepted that *competenz kompetenz* belongs to the ECJ and in extremis reserve to themselves ultimate power to determine the compatibility of Community legislation with their domestic constitutions. For a recent reminder of this, see, inter alia, the Lisbon Treaty judgment of the German Constitutional Court delivered on June 30, 2009, available at [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html) [Accessed February 3, 2010].

<sup>4</sup>Such actions are only discussed in the “Overview of ECJ and CFI rulings” section where the allocation of judicial workload among different types of proceedings is given.

the case law of the Community courts beginning from 2001.<sup>5</sup> The 2001–2005 period was chosen as the assessment period for the first part of the project. At a later stage, the data collated for that period will be compared with data from subsequent periods with a view to identifying trends and litigation patterns. It will be interesting to monitor, for example, whether the Member States which acceded in 2003 will prove to be active litigants. It will also be interesting to assess, as the European Union becomes more active in legislating in the area of freedom, security and justice, to what extent measures in that area will be challenged. Thus, the 2001–2005 period gives essentially a snapshot of litigation patterns in the pre-accession era<sup>6</sup> in areas which fall within the traditional fields of Community law.

### **Aims and objectives: Why should lawyers care about statistics of judicial review?**

Although the power of judicial review is an integral part of the rule of law and an essential component of the system of checks and balances laid down by the EC, and now the Lisbon Treaty, the rate of success of judicial review actions is something that has rarely occupied lawyers. It is, after all, a maxim of justice that each case should be decided on its merits. It is a truism to say that the application of the law is not a mechanical process and no court operates quotas. It would be fanciful to suggest that a court should annul the contested measure only in, say, 10 per cent of judicial review applications in which it gives judgment within a judicial year and that, if this figure is reached half way during the year, any remaining applications should be dismissed. Courts are in the business of applying the law. They do not administer justice by numbers nor do they think in terms of statistics, at least not where it comes to the success of the action.<sup>7</sup> Still, statistics should matter both to constitutional scholars and, more widely, to citizens and do so for a number of reasons.

First, the rate of success of judicial review actions has political significance. It makes a difference whether a court which has ultimate authority to determine the outer bounds of political power trumps the government's choices frequently, sometimes, or rarely. It tells us something about the gap between political and judicial values, namely the differential between, on the one hand, political wisdom (the outcomes of the balancing exercises drawn by the ruling majority) and, on the other hand, the judges' own internalised

<sup>5</sup>The authors express their gratitude to the Nuffield Foundation for providing generous support for the continuation of this project beyond the period 2001–2005 and for supplementing the existing database for that period.

<sup>6</sup>Although the new Member States acceded as of May 1, 2003, i.e. in the middle of the assessment period, and, as privileged applicants could challenge Community measures immediately upon accession, any judgments on such actions would not be delivered for a period of at least 18 months, i.e. after the assessment period. For the same reason and a fortiori rulings on preliminary references from courts of new Member States pertaining to the validity of Community measures would not be delivered by the end of the assessment period.

<sup>7</sup>Courts, by contrast, do care about their workload, its effects on the duration of proceedings, and its wider consequences on the administration of justice. The ECJ itself has been acutely aware of its growing case law already since the 1980s. Indeed, the main reason for the establishment of the CFI in 1989 was to alleviate the ECJ from its growing case law. In the 1990s and 2000s further changes were made to the EU judicature with a view to streamlining the proceedings and making the administration of justice more efficient. Among those developments have been the establishment of the EU Civil Service Tribunal to hear staff cases, the transfer of more jurisdiction to the CFI, and amendments to the rules of procedure which, in some categories of cases, enable the ECJ to dispose of the case by order, do away with an oral hearing, and proceed to judgment without an Advocate General's opinion.

conception of justice: the larger this “value gap”, the greater the competition between the branches of government, the less predictable the standing and effect of rule-making, and the greater the temptation to use courts as a means of influencing the decision-making process. For the same reason, it is important to know the rate of success of judicial review of administrative action, namely how often a court annuls measures of an administrative, as opposed to a legislative, nature.

Secondly, it is important for the citizen to know not only the rate of success of judicial review actions but also the gravity of infringements established by the courts and the importance of the rule that has been infringed. From the point of view of the rule of law, it matters whether and how often a judicial review application succeeds because of a technical procedural error on the part of the executive or an egregious violation of an important principle of law. Both then in quantitative and qualitative terms, a statistical analysis is capable of providing a measure of constitutionalism, namely the extent and degree to which the executive and the legislature comply with the constitution within a legal system.

Thirdly, the rate of success of judicial review matters because, far from being a random number, it is the outcome of a constitutional equilibrium. This point is worthy of further investigation. A very high success rate signals a serious value divergence between the branches of government and appears, at least in the medium to long term, unsustainable. If a court annulled the contested measure, say, in 80 per cent of judicial review applications, one would expect that the political authorities which are at the receiving end of the court’s dislike would adjust their behaviour accordingly. They would adapt their decision-making processes or substantive outcomes with a view to avoiding being overturned or, in extreme cases where the court’s activism revealed an unbridgeable split in values, seek to change the powers of the judiciary or appoint friendlier judges. In short, steps would be taken for the system to reach a more sustainable equilibrium. There is another reason why a very high level of success is likely to prove unsustainable. Such a rate will encourage more litigation and, inevitably, lead lawyers to make riskier claims. But the riskier the claim, the less likely for it to succeed. Thus, an increase in demand for judicial review would in itself be a force towards a lower rate of success. This is reflected in recent rulings of the EU courts on financial sanctions against terrorism. In a number of cases, the ECJ and the CFI annulled Community measures freezing the assets of suspected terrorists.<sup>8</sup> In some cases, the contested measures implemented sanctions lists prescribed by United Nations Security Council resolutions adopted in the aftermath of September 11. In others, the contested measures were adopted in the exercise of discretion enjoyed by the Community institutions. In both categories, the ECJ and the CFI identified important procedural shortcomings which led to annulment. In fact, this is an area characterised by an unusually high rate of success.<sup>9</sup> Notably, the CFI annulled successive measures of the Council adopted in the aftermath of judgments annulling

<sup>8</sup> See, for a discussion, T. Tridimas, “Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order” (2009) 34 E.L. Rev. 103.

<sup>9</sup> For UN-prescribed sanctions lists, see *Kadi v Council* (C-402/05 P & C-415/05 P) [2008] E.C.R. I-6351; [2008] 3 C.M.L.R. 41; *Othman v Council* (T-318/01) [2009] All E.R. (EC) 873. For EU sanctions lists, see, among others, *Stichting Al-Aqsa, established in Heerlen (Netherlands) v Council* (T-327/03) July 11, 2007; *Sison v Council* (T-47/03) [2007] 3 C.M.L.R. 39 and the cases referred in the next footnote. See also *Kurdistan Workers Party (PKK) v Council* (C-229/05 P) [2007] All E.R. (EC) 875.

previous measures and purporting to rectify the illegality identified therein.<sup>10</sup> But, more recently, following the first waves of successful actions, the ECJ has begun to reject new actions illustrating that the initial high rate of success encouraged riskier claims.<sup>11</sup>

The above discussion suggests that, in the longer term, it would be difficult to sustain a very high rate of success of judicial review applications. Would pressures towards upwards equilibrium also make it difficult for a very low rate of success to be maintained? The answer appears to be in the affirmative although upwards pressures would, perhaps, be less intense. If actions for judicial review succeeded only in, say, 2 per cent of the cases, one would expect that the following might happen. Applicants would place less reliance on the judicial process and seek alternative ways to protect their interests, e.g. via intense lobbying of politicians. At the same time, the expectations of low success would filter out claims unlikely to succeed so that, on average, the claims would become more meritorious as lawyers adjusted their arguments to fit the court's expectations. Furthermore, encouraged by a self-restrained court, the political branches of government would be more likely to make riskier choices in the exercise of their discretion which might in turn increase the likelihood of success of a judicial review action. In effect, therefore, the rate of success would reach an equilibrium which is determined by a mix of parameters. This mix is not the same in every polity, nor would it be easy to predict in the abstract the equilibrium rate within a given legal system. But the discussion serves to illustrate that the overall level of annulments is not a random result but predicated by a number of identifiable forces.

Thus, the rate of success of judicial review applications is, on the one hand, an important measure of the value gap between the judiciary and the other branches of government and, on the other hand, a reflection of the constitutional equilibrium within a given legal system. In the context of the European Union, determining the rate of success becomes important also against a backdrop of controversy over the role of the ECJ and CFI. The EU courts have been criticised for following a pro-integration agenda and augmenting the competences of the Community at the expense of national sovereignty.<sup>12</sup> In the words of a figure no less important than Roman Herzog, the former President of Germany, the ECJ, through its activist case law, "has squandered a great deal of trust that it used to enjoy".<sup>13</sup> But are such accusations justified? A more specific criticism

<sup>10</sup> See the following line of cases: *Organisation des Modjahedines du peuple d'Iran v Council* (T-228/02) [2007] 1 C.M.L.R. 34; *People's Mojahedin Organisation of Iran v Council (OMPI II)* (T-256/07) [2008] E.C.R. II-3019; *People's Mojahedin Organization of Iran v Council (OMPI III)* (T-284/08) [2008] E.C.R. II-3487; [2009] 1 C.M.L.R. 44. See also *Othman v Council* [2009] All E.R. (EC) 873.

<sup>11</sup> See *Melli Bank Plc* (T-246/08 & T-332/08) July 9, 2009.

<sup>12</sup> For one of the main exponents of that criticism, see H. Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff, 1986). For the wider debate whether the ECJ engages in unwarranted judicial activism, see, among others, M. Cappelletti, "Is the ECJ running wild?" (1987) 12 E.L. Rev 3; P. Neill, *The European Court of Justice: A Case Study in Judicial Activism, evidence submitted to the House of Lords Select Committee on the European Communities, Subcommittee on the 1996 Inter-Governmental Conference, Minutes of Evidence, House of Lords, 18th Report* (Session 1994-95), p.218; E. David, "Judicial Activism—Myth or Reality?" in *Legal Reasoning and Judicial Interpretation in European Law—Essays in honour of Lord Mackenzie Stuart* (1996); T.C. Hartley, "The ECJ, Judicial Objectivity and the Constitution of the EU" (1996) 112 L.Q.R. 95; A. Arnall, "The European Court and Judicial Objectivity: A reply to Professor Hartley" (1996) 112 L.Q.R. 411; T. Tridimas, "The Court of Justice and Judicial Activism" (1996) 21 E.L. Rev. 199.

<sup>13</sup> Herzog and Gerken, *Stop the European Court of Justice* (Centre for European Policy), available at <http://euobserver.com/9/26714> [Accessed February 3, 2010]. The reasoning of the ECJ has also been

levelled against the Court is that it applies a high degree of judicial scrutiny when it assesses the compatibility of Member State action with Community law but a more deferential standard when it assesses the compatibility of EC institutions action with the EC Treaty.<sup>14</sup> This differential standard facilitates a transfer of power from the national governments to the Community by protecting the decision-making competence of the Community institutions and increasing the scope and effectiveness of Community law. Where it comes to judicial review of Community action, the influence of pro-integration policies in the Court's decision making is manifested not by way of judicial activism but by way of self-restraint. It is the passive approach to the review of the legality of measures adopted by Community institutions and the conservative criteria on standing which function as instruments of federalism.<sup>15</sup> Determining the rate of success of judicial review applications is helpful in assessing the correctness of such claims although the present article does not purport to reach any specific conclusions in this respect.

### Overview of ECJ and CFI Rulings

Table 1: Number of rulings issued by the ECJ and CFI by type of action and year<sup>15a</sup>

	Enforcement actions <sup>16</sup>	Preliminary rulings on interpretation <sup>17</sup>	Actions for annulment <sup>18</sup>	Actions for failure to act <sup>19</sup>	Appeals on annulment / Failure to act (including IP and staff cases)	Preliminary rulings on validity	Contractual liability (including appeals)	Non contractual liability (including appeals)	Staff cases (excluding appeals)	IP (excluding appeals)	Others	Total
2001	81	138	122	0	35	10	5	12	62	26	67	558
2002	96	161	140	2	30	13	2	11	75	28	26	584

criticised. T.C. Hartley has claimed that “occasionally the Court will ignore the clear words of the Treaty in order to attain a policy objective”. See T.C. Hartley, *The Foundations of European Community Law*, 5th edn (Oxford: Oxford University Press), p.80. For Hartley, the policies influencing the ECJ's decision-making are the following: strengthening the Community (and especially the federal elements in it), increasing the scope and effectiveness of Community law, and enlarging the powers of Community institutions.

<sup>14</sup>This is the case, for example, in relation to the application of the principle of proportionality: see T. Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford University Press), pp.138 and 193–4.

<sup>15</sup>As one commentator has noted: “Although the flexibility of the grounds of review confer European Courts a wide scope of discretion to supervise the activity of Community institutions, the judicial bodies have made surprisingly little use of this power, being especially reluctant to engage in heavy handed review in those areas of economic law in which the treaty has given the Community institutions a lot of discretionary power.” See Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Harlow: Longman, 2002), p.376.

<sup>15a</sup>In table 1, joined cases are counted separately.

<sup>16</sup>TFEU art.258 (ex 226 EC).

<sup>17</sup>TFEU art.267 (ex 234 EC).

<sup>18</sup>TFEU art.263 (ex 230 EC).

<sup>19</sup>TFEU art.265 (ex 232 EC).



*(continued)*

	Enforcement actions <sup>16</sup>	Preliminary rulings on interpretation <sup>17</sup>	Actions for annulment <sup>18</sup>	Actions for failure to act <sup>19</sup>	Appeals on annulment / Failure to act (including IP and staff cases)	Preliminary rulings on validity	Contractual liability (including appeals)	Non contractual liability (including appeals)	Staff cases (excluding appeals)	IP (excluding appeals)	Others	Total
2003	89	180	119	5	34	7	8	14	80	31	42	609
2004	162	203	89	6	62	24	11	11	78	55	72	773
2005	207	228	131	3	41	13	8	21	83	76	262 <sup>20</sup>	1073
Total	635	910	601	16	202	67	34	69	378	216	469	3597

*Table 2: Number of rulings issued by the ECJ and CFI by type of action and year (percentages)*

	Enforcement actions	Preliminary rulings on interpretation	Action for annulment	Action for failure to act	Appeals on annulment / Failure to act / IP / Staff regulation	Ref preim ruling on validity	Contractual liability (including appeals)	Non contractual liability (including appeals)	Staff regulations (excluding appeals)	Intellectual property (excluding appeals)	Others	Total
2001	14.5%	24.7%	21.9%	0.0%	6.3%	1.8%	0.9%	2.2%	11.1%	4.7%	12.0%	100%
2002	16.4%	27.6%	24.0%	0.3%	5.1%	2.2%	0.3%	1.9%	12.8%	4.8%	4.5%	100%
2003	14.6%	29.6%	19.5%	0.8%	5.6%	1.1%	1.3%	2.3%	13.1%	5.1%	6.9%	100%
2004	21.0%	26.3%	11.5%	0.8%	8.0%	3.1%	1.4%	1.4%	10.1%	7.1%	9.3%	100%
2005	19.3%	21.2%	12.2%	0.3%	3.8%	1.2%	0.7%	2.0%	7.7%	7.1%	24.4%	100%
Total	17.7%	25.3%	16.7%	0.4%	5.6%	1.9%	0.9%	1.9%	10.5%	6.0%	13.0%	100%

As appears from tables 1 and 2, in the period between 2001 and 2005, the ECJ and the CFI issued 3,597 judgments and orders, which makes for an average of almost 720 rulings per year. These rulings are allocated as follows. The largest proportion corresponds to preliminary references on the interpretation of Community law: 910 rulings, i.e. 25.3 per cent, belong to this category. This is followed by enforcement actions brought by the Commission under art.258 TFEU (ex 226 EC) which account for 17.7 per cent of the total

<sup>20</sup> The extraordinary high number of “other” rulings in 2005 is explained by the fact that in December 2005 the CFI issued circa 120 orders forwarding staff regulations cases initiated before the CFI to the recently created Civil Service Tribunal.

number of rulings.<sup>21</sup> Actions for judicial review of Community measures are allocated as follows: actions for annulment under art.263 TFEU (ex 230 EC) account for 16.7 per cent of the case law. This figure includes both applications for judicial review initiated directly before the ECJ and applications initiated before the CFI in accordance with the division of jurisdiction between the two courts. Actions for failure to act under art.265 TFEU (ex 232 EC) represent 0.4 per cent,<sup>22</sup> whilst preliminary references on the validity of Community acts represent 1.9 per cent of the case law. To obtain a complete picture of judicial review activity, it is necessary to add to the above figures the number of ECJ rulings delivered on appeal from the CFI in actions for annulment and actions for failure to act which corresponds to 5.6 per cent of the case law.<sup>23</sup> The remaining rulings correspond to first instance staff cases (10.5 per cent), rulings on intellectual property cases (OHIM) (6.0 per cent) cases on the contractual (0.9 per cent) and non-contractual (1.9 per cent) liability of the Community and other rulings (13 per cent), which include interim measures orders and other orders on procedural matters delivered by the two courts.<sup>24</sup>

These data are telling of the distribution of judicial activity. Preliminary references on the interpretation of Community law and enforcement actions against Member States may be grouped together in that they both pertain to the compatibility of national action with Community law and can therefore be seen as a form of controlling, directly or indirectly, the “constitutionality” of Member State action.<sup>25</sup> Taken together, these rulings account for 43 per cent of the Court’s case law in the period under examination. By contrast, actions for judicial review of Community measures, which include, actions for annulment, actions for failure to act, staff and OHIM cases, appeals in the above categories, and preliminary references on validity represent 41.1 per cent of the case law. If one were to add to these categories actions for the non-contractual liability of the Community, which is a form of controlling the legality of Community action, the total percentage of ECJ and CFI cases which pertain to the constitutionality of Community action is 43 per cent. This suggests that, during the period under examination, the percentage of cases which, broadly speaking, involved the compatibility of Member States action with Community law is equal to the percentage of cases which involved the compatibility of Community action with Community law. This result may be slightly surprising. One may have expected that more judgments would relate to the legality of national law rather than the legality of Community action since EU law is implemented in the legal orders of numerous

<sup>21</sup> Note that there were no enforcement proceedings initiated by a Member States under art.259 TFEU (ex 227 EC) within the period under review.

<sup>22</sup> This figure includes both applications for failure to act initiated directly before the ECJ and those initiated before the CFI in accordance with the division of jurisdiction between the two courts.

<sup>23</sup> Note that this percentage includes also appeals on staff cases and intellectual property (OHIM) cases. The analysis of these cases is beyond the scope of the article. The numbers and percentages of such cases at first instance, i.e. before the CFI, is shown in separate columns in tables 1 and 2.

<sup>24</sup> For the high number of CFI orders in 2005, see fn.20 above.

<sup>25</sup> It is of course the case that the ECJ may not annul national provisions so preliminary references are not a form of judicial review of national measures strictly understood. It is also the case that not all preliminary references on the interpretation of Community law necessarily arise in proceedings where the referring court has jurisdiction to declare national law invalid. A preliminary reference may, for example, be made in the context of contractual proceedings or may be sought in order to determine the interpretation of national law or ascertain the proper powers of a national court under EU law: see, e.g. *Unibet (London) Ltd v Justitiekanslern* (C-432/05) [2007] E.C.R. I-2271; [2007] 2 C.M.L.R. 30. In any case, however, the underlying purpose of the reference would be to check the compatibility of national law with EC law and thus all references pertaining to interpretation can be viewed as an indirect form of “constitutional review”.

Member States and, in quantitative terms, national action is much greater than action by the Community institutions. Still, the high number of cases involving the Community institutions is explained by the volume of staff cases and OHIM cases. If one were to exclude those two categories, the picture would indeed suggest that a greater percentage of the work of the ECJ and the CFI taken together relates to “review” of national measures rather than to “review” of Community action. The data makes it clear that the growth of the European Union as an administrative organisation increases the volume of litigation and makes it all the more important to establish specialist courts or expand the resources and jurisdiction of the CFI if the ECJ is not to be swamped by administrative litigation.

Tables 1 and 2 also provide some interesting conclusions on the various forms of judicial review of Community measures. On average, the ECJ and the CFI issued 120 rulings a year on annulment actions. Out of a total of 3,597 rulings for the whole period, 601 (16.7 per cent) correspond to annulment actions. The two other possible actions for seeking the judicial review of a Community measure, namely actions for failure to act and preliminary rulings on validity,<sup>26</sup> represent 2.3 per cent of the rulings. The figures confirm that the intra-judicial conversation which takes place via the preliminary reference procedure pertains in its overwhelming majority to the interpretation of Community law and the compatibility of national action with it rather than the constitutionality of Community action.

### Overview of actions on judicial review

*Table 3: Type of action by year (absolute numbers)<sup>25(a)</sup>*

	2001	2002	2003	2004	2005
Actions for annulment CFI	56	84	73	52	79
Actions for annulment ECJ	28	26	28	25	34
Actions for failure to act		2	4	4	3
Preliminary rulings on validity	6	11	7	12	8
Total	90	123	112	93	124

*Table 4: Type of action by year (percentages)*

	2001	2002	2003	2004	2005
Actions for annulment CFI	62.2%	68.3%	65.2%	55.9%	63.7%
Actions for annulment ECJ	31.1%	21.1%	25.0%	26.9%	27.4%

<sup>25a</sup>In this and all subsequent tables and graphs, joined cases are counted as a single ruling, regardless of the number of cases that have been joined.

<sup>26</sup>Actions based on the plea of illegality (art.241 EC (now 277 TFEU)) are not discussed separately in this study. However, all such actions are brought incidentally in direct actions which seek to question the compatibility of Community law with the Treaty and are therefore embodied in the data of direct actions provided in the above tables.

*(continued)*

	2001	2002	2003	2004	2005
Actions for failure to act	0.0%	1.6%	3.6%	4.3%	2.4%
Preliminary rulings on validity	6.7%	8.9%	6.3%	12.9%	6.5%
Total	100%	100%	100%	100%	100%

The above tables show that, in quantitative terms, actions for annulment before the CFI are the most important type of action for judicial review. In each of the years under investigation, they accounted for well above 50 per cent of the total number actions for judicial review and every year, apart from 2004, they represented more than 60 per cent of such actions. Direct actions for annulment before the ECJ are the second most important category in numerical terms. Interestingly, it appears from table 3 that, whilst the annual number of such actions remained stable during the period studied with a minimum of 25 in 2004 and a maximum of 34 in 2005, the annual number of actions before the CFI showed considerable variations.<sup>27</sup>

The ECJ issued few preliminary rulings on the validity of Community measures with a minimum of six in 2001 and a maximum of 12 in 2004. As expected, the number of actions for failure to act was extremely low with a total number of 13 actions over the five year period under investigation. This figure illustrates how difficult it is for applicants to succeed using the procedure of art.265 TFEU (ex 232 EC) and, in fact, none of the actions brought was successful.

*Graph 1: Type of ruling (i.e. judgment or order) by type of action (2001–2005)*

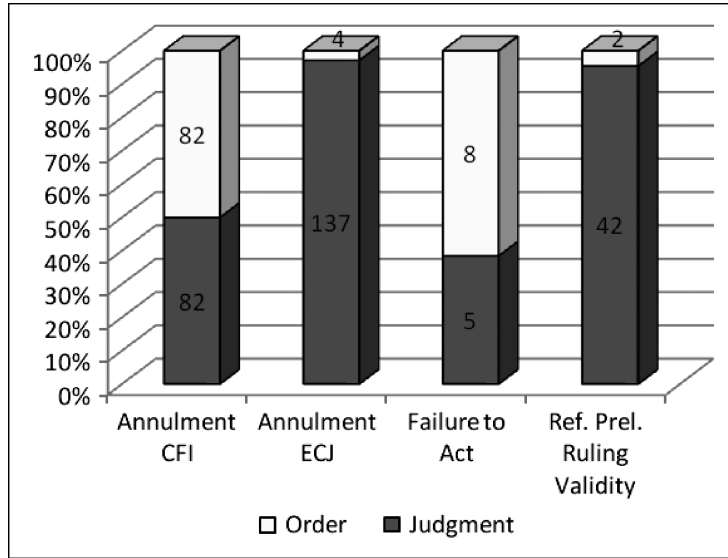
The figures below reveal a marked difference in the judgment/orders ratio between the CFI the ECJ. Whilst the vast majority of rulings issued by the ECJ are judgments (97 per cent), the rulings issued by the CFI include a much higher proportion of orders.<sup>28</sup> This can be explained, amongst other factors, by the fact that access to the ECJ is open only to privileged applicants, where locus standi is not an issue. In the CFI, by contrast, a good proportion of orders accounts for cases where the CFI dismissed the action as inadmissible for lack of standing.

*Graph 2: Court formation by type of action (2001–2005)*

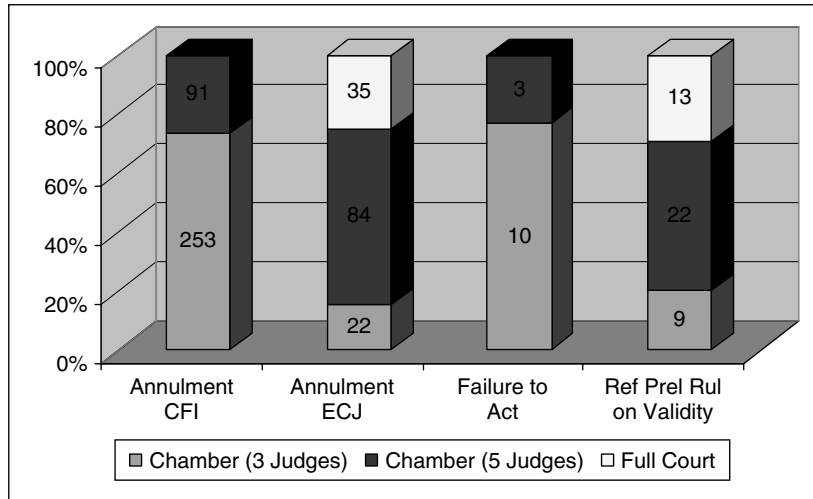
The CFI formation to hear actions for annulment was as follows: 253 cases (74 per cent) were heard by a three-member chamber and 91 cases (26 per cent) were heard

<sup>27</sup> It started with 54 actions in 2001, rising to 82 actions in 2002 (52% rise). In 2003, the number of actions was slightly reduced to 73 actions. In 2004, the number of actions fell down again to 52 actions and finally, in 2005 it raised again up to 79 actions.

<sup>28</sup> The CFI issued a total of 344 rulings on actions for annulment, consisting of 262 (76%) judgments and 82 (24%) orders. It also issued a total of 13 judgments on actions for failure to act, consisting on five (38%) judgments and eight (62%) orders. In its turn, the ECJ issued a total of 141 rulings on actions for annulment, consisting of 137 (97%) judgments and four (3%) orders. It also issued 44 rulings on references for a preliminary ruling concerning the validity of community actions, consisting on 42 judgments (95%) and two (5%) orders.



(Graph 1)

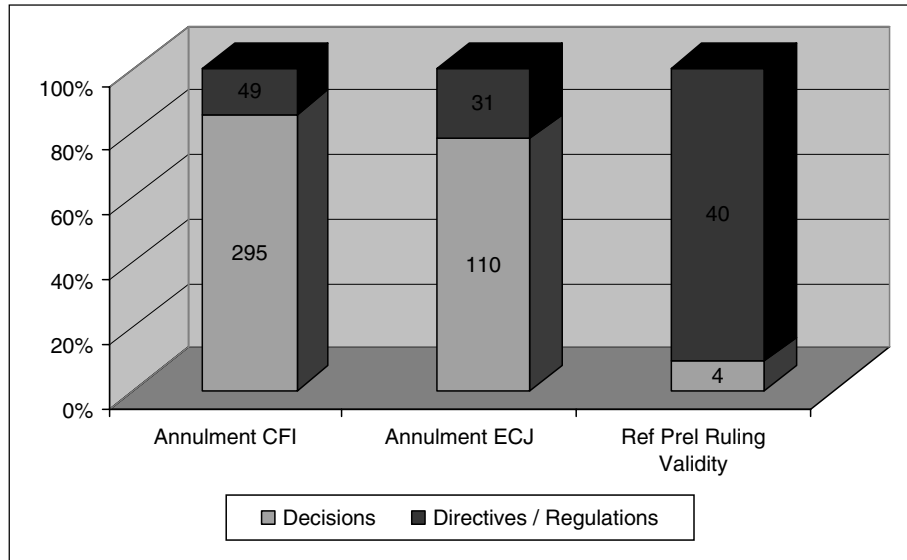


(Graph 2)

by a five-member chamber. A comparable court formation applied to cases for failure to act with 10 cases (77 per cent) having been heard by a three-member chamber and three cases (23 per cent) by a five-judge chamber. By contrast, the ECJ formation was as follows: only 22 cases (16 per cent) were heard by a three-member chamber, whilst 84 cases (60 per cent) were heard by a five-member bench and 35 cases (25 per cent) were heard by the full Court. A comparable breakdown applies to preliminary references concerning the validity of Community acts: nine cases (20 per cent) were heard by a three-member chamber, 22 cases (50 per cent) by a five-member chamber and 13 cases (30 per cent) by the full court. The figures reveal very different court-formation patterns.

Whilst the CFI heard three out of four cases in a three-member chamber formation the ECJ heard only one out of five cases in that formation.

*Graph 3: Type of measure challenged by type of action (2001–2005)*



Out of the total number of judicial review rulings delivered by the CFI, 86 per cent (295 rulings) related to the validity of decisions, whereas 14 per cent (49 rulings) related to the validity of measures of general application such as directives or regulations. The breakdown of direct actions before the ECJ was as follows: 78 per cent (110 rulings) were issued in actions challenging the validity of decisions whereas 22 per cent (31 rulings) were issued in actions contesting the validity of measures of general application. The higher number of ECJ cases involving the validity of measures of general application is understandable for two reasons. First, the restrictive locus standi of individuals under art.263(4) TFEU (ex 230(4) EC) makes it more difficult for them to challenge directly such measures. Litigation before the CFI therefore concentrates on review of administrative action. Secondly, direct actions before the ECJ are initiated by the Community institutions or governments. These categories of applicant pursue litigation to protect public rather than private interests and are therefore more likely to take issue with the exercise of policy discretion than private applicants. Still, the difference between CFI and ECJ rulings by type of contested measure is perhaps not as high as one might expect. It is still the case that the great majority of direct actions initiated before the ECJ involve Community decisions rather than regulations or directives.

The opposite is true in relation to preliminary rulings. Far more rulings concerned the validity of measures of general application (91 per cent) than the validity of decisions

(9 per cent). This is explained by two reasons. First, given the restrictive locus standi requirement imposed on private applicants by art.263(4) TFEU (ex 230(4) EC), the preliminary reference procedure is the main way for them to challenge the validity of Community measures of general application.<sup>29</sup> Secondly, Community measures of general application are more likely than Community decisions to need implementation at national level and therefore more likely to be the legal basis of the contested act in the national proceedings leading to the reference.

Table 5: Subject matter by type of action (2001–2005)

	Annulment CFI	Annulment ECJ	Failure to act	Ref prel ruling validity
Agriculture	42	60	2	18
Competition	98	2	1	
State aid	58	32	3	1
Law governing the institutions	27	2	1	
Commercial policy	21	8		2
Environment and consumers	15	4	2	
Approximation of laws	5	5		7
External relations	8	5		2
Fisheries policies	6	6	1	
Custom union	9	2		1
ECSC	9	1	1	
Social policy	6	2		3
Transport	4	2		2
Regional policy	4	3	1	
Common customs tariff	3			4

<sup>29</sup> Note also that, under the rule of exclusivity laid down in *TWD Textilwerke Deggendorf GmbH v Germany* (C-188/92) [1994] E.C.R. I-833; [1995] 2 C.M.L.R. 145, an individual who clearly has direct and individual concern may only challenge an act under art.263(4) TFEU (ex 230(4)) and not indirectly via the preliminary reference procedure. This rule therefore excludes challenge by individuals against decisions addressed to them via the preliminary reference procedure.

*(continued)*

	Annulment CFI	Annulment ECJ	Failure to act	Ref prel ruling validity
Association over- seas territories	6			
Common foreign and security policy	6			
Free movement of goods	6			
Justice and home affairs	2	1		
Law relating to undertakings	3			
Other	6	6	1	4
Total	344	141	13	44

Judicial review applications are concentrated on three main areas: agriculture, state aid and competition. Out of a total of 542 rulings on, 317 (58.5 per cent) were issued in actions challenging the validity of Community measures in those areas. The high percentage of cases on agriculture and state aid can be explained by the fact that Community institutions play a particularly active role in these areas, for example, by allocating about 40 per cent of the EU budget on the common agricultural policy. The concentration of competition cases on actions for annulment before the CFI is explained by jurisdictional reasons. It should be remembered that this study did not take into consideration actions for annulment against Community measures concerning staff regulations or intellectual property, which in quantitative terms are significant.<sup>30</sup>

*Table 6: Length of action in months by type of action (2001–2005)*

	Annulment CFI	Annulment ECJ	Appeal	Failure to act (ECJ and CFI)	Preliminary reference
<6	3		1	1	2
6>12	38	3	14	4	2
12<18	32	1	27	1	6

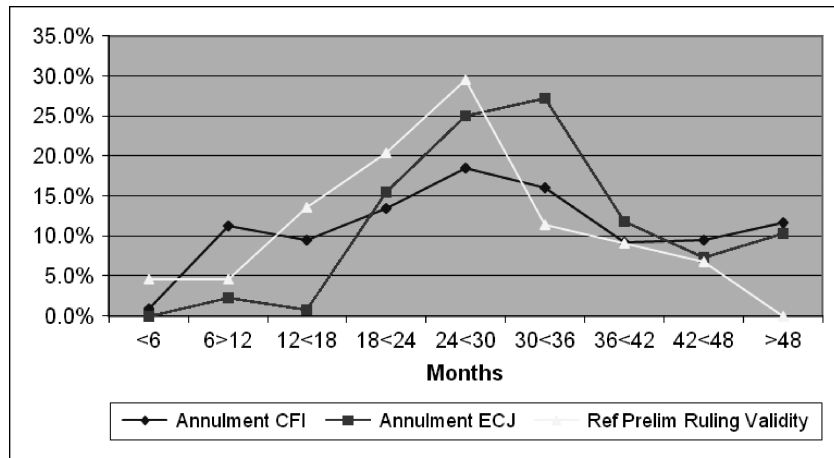
<sup>30</sup> See above table 1. Out of a total of 1,195 rulings on actions for annulment, 378 (32%) were issued on staff regulation cases, 216 (18%) on IP cases and the remaining 50% on cases concerning other subject matters.



*(continued)*

	Annulment CFI	Annulment ECJ	Appeal	Failure to act (ECJ and CFI)	Preliminary reference
18<24	45	21	42		9
24<30	62	34	33	5	13
30<36	54	37	15	1	5
36<42	31	16	10	1	4
42<48	32	10	4		3
>48	39	14	10		
No data	8	5	5		
Total	344	141	161	13	44

Graph 4: Length of action in months by type of action (2001–2005)



The above table suggests that 48 per cent of actions for annulment lodged before the CFI, 67.6 per cent of actions for annulment lodged before the ECJ and 61.4 per cent of preliminary references on validity lasted between 18 and 36 months. Only 12.2 per cent of actions before the CFI, 2.2 per cent of actions before the ECJ and 9 per cent of references were settled in less than 12 months. The majority of those actions were rejected as manifestly inadmissible. At the other end, 11.6 per cent of actions before the CFI and 10.3 per cent of direct actions before the ECJ lasted more than 48 months.

**Direct actions for annulment before the ECJ under article 263 TFEU (ex 230 EC)***Table 7: Results of actions for annulment before the ECJ*

	Total	%
Measure annulled	24	17.1
Measure partially annulled	19	13.6
Action dismissed on merits	88	62.9
Action inadmissible (judgment)	5	3.6
Action inadmissible (order)	4	2.9
Total	140	100

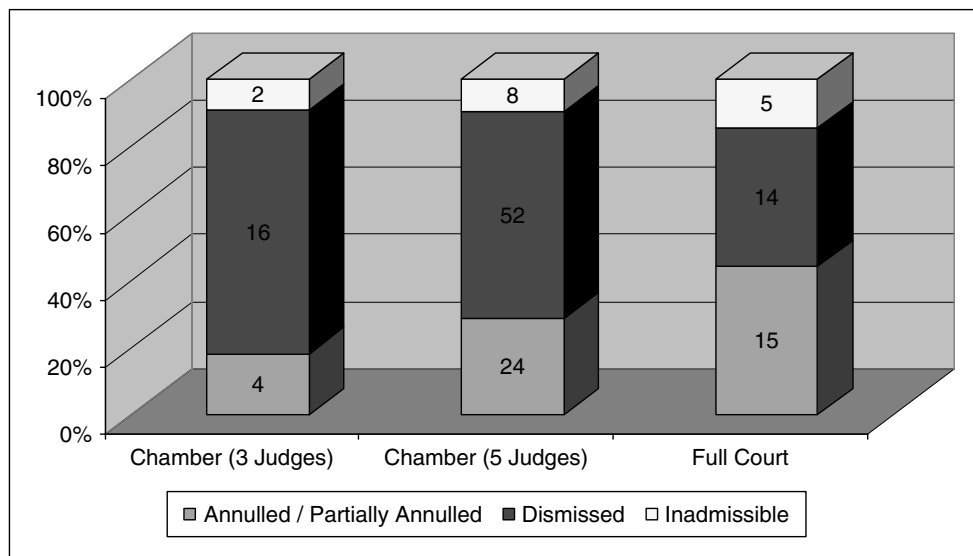
In the period under examination, 140 annulment actions were initiated before the ECJ under art.263 TFEU (ex 230 EC). Out of them, 43 (30.7 per cent) actions resulted in the annulment or partial annulment of the contested measure, 82 actions (62.9 per cent) were dismissed on substantive grounds, and nine actions (6.5 per cent) were dismissed as inadmissible. The low number of inadmissible actions is explained by the fact direct actions before the ECJ are initiated by Member States and Community institutions which, by contrast to private applicants, do not have to meet any specific standing requirements. The ECJ's control of admissibility is typically limited to verifying that the application has been lodged on time,<sup>31</sup> and that the contested act produces legal effects vis-à-vis the applicant.<sup>32</sup> This latter requirement serves to avoid the Court being confronted with purely hypothetical issues. The ECJ will not intervene where the contested measure, and

<sup>31</sup> For an example of an application which was dismissed for being brought after the expiry of the time limit laid down in art.263(5) TFEU (ex 230(5) EC), see *Germany v Council and Parliament* (C-406/01) [2002] E.C.R. I-4561. Note however that the ECJ subsequently had the opportunity to consider, and reject, objections to the validity of the same measure in *R. (on the application of British American Tobacco (Investments) Ltd v Secretary of State for Health* (C-491/01) [2002] E.C.R. I-11453; [2003] 1 C.M.L.R. 14.

<sup>32</sup> See, e.g. *Portugal v Commission* (C-208/99) [2001] E.C.R. I-9183 (finding that Portugal's designation as the addressee of three Commission decisions, cancelling the assistance previously granted to three Portuguese undertakings and ordering the repayment of amounts already paid, did not produce any legal effects but only confirmed an obligation directly binding by virtue of art.256 EC); *Germany v Commission* (C-242/00) [2002] E.C.R. I-5603 (holding that, in the absence of a purpose or effect which adversely affected the interests of the applicant, a Community measure could not be challenged); *Netherlands v Commission* (C-164/02) [2004] E.C.R. I-1177 (holding that only the operative part of a Community decision is capable of producing legal effects and adversely affecting the interests of the applicant. By contrast, the assessments made in the recitals to a decision are not in themselves capable of forming the subject of an application for annulment and can be subject to judicial review only to the extent that they form the essential basis for the operative part); *Commission v Council* (C-27/04) [2004] E.C.R. I-6649 (holding that the Commission could not challenge under art.263 TFEU (ex 230 EC) the Council's failure to adopt the formal instrument contained in the applicant's recommendation pursuant to arts 104(8) EC and 9 EC. Instead, the Commission should have initiated proceedings under art.265 TFEU (ex 232 EC); *Italy v Commission* (C-301/03) [2005] E.C.R. I-10217 (holding that a Commission document presented in a Committee for the Development and Conversion of the Regions did not produce any legal effects but had merely an internal institutional character).

therefore the ECJ's ruling, will have no effect on the legal position of the applicant. The only case where the ECJ applies the strict standing rules laid down in art.263(4) TFEU (ex 230(4) EC) when it adjudicates in a non appellate capacity is where actions brought by privileged and non-privileged applicants are joined and the CFI declines jurisdiction in favour of the ECJ.<sup>33</sup>

Graph 5: Results of actions of annulment before the ECJ by court formation



The above graph shows that the court formation is of material importance to the outcome of the action. The higher the number of judges hearing the case, the higher the likelihood for the action to be successful. Out of the total number of actions heard by a three-member chamber, the contested measure was annulled or partially annulled in 18.2 per cent of the cases. The rate of success rose to 28.6 per cent for cases heard by a five-member chamber and rose even higher to 44.1 per cent for cases heard by the full Court. If the type of contested measure is also factored in, one finds that the rate of success of actions challenging decisions (as opposed to directives or regulations) which were heard by the full Court rose to a staggering 50 per cent.

<sup>33</sup> See art.54 of the Statute of the ECJ and art.80 of the Rules of Procedure of the CFI. For such cases during the period under examination, see *Antillean Rice Mills NV v Council of the European Union* (C-451/98) [2001] E.C.R. I-8949 (holding that the applicant was not individually concerned). See also *Nederlandse Antillen v Council* (C-452/98) [2001] E.C.R. I-8973 (holding that, despite the fact that the Dutch Constitution bestowed the Netherlands Antilles with the power to defend its own interests, the applicant could not enjoy a "semi-privileged" status and, consequently, it was subjected to the strict locus standi requirements of art.230(4) EC, which it failed to meet).

This correlation between rate of success and court formation could be explained on a purely mathematical basis: since, ultimately, the judges decide by majority, the higher the court formation the lower the percentage of judges that the applicant must persuade to succeed in its action.<sup>34</sup> However, the correlation between court formation and rate of success could be explained also by substantive considerations.

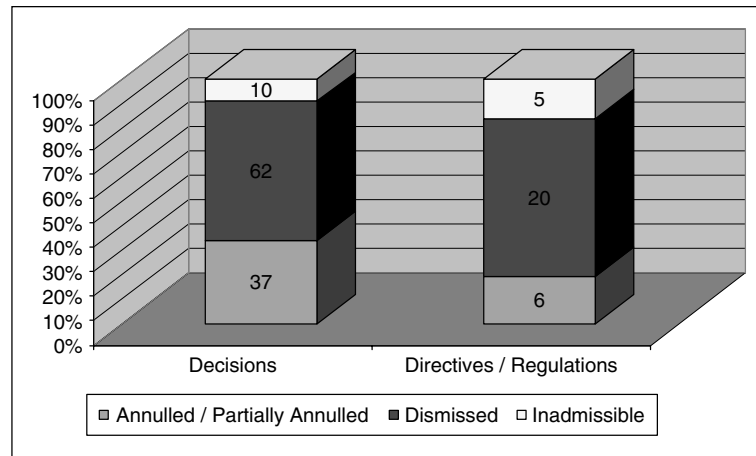
First, there is a public interest argument. The ECJ decides in which formation it will hear a case at the administrative meeting (*reunion administratif*) which takes place upon the end of the written procedure. The decision is taken upon the recommendation of the *juge rapporteur* and after consultation with the advocate general responsible for the case on the basis of its perceived importance. Cases which appear to be more difficult to resolve or to raise issues of importance for the EU legal order as a whole will be referred to the plenum. It is therefore understandable that cases in which the legality of Community action appears to be in serious doubt should be referred to a higher court formation. For one thing, invalidity is rarely so manifest as to justify the attention of only a small chamber. For another thing, legislative and administrative measures enjoy the presumption of validity and are the outcome of a political process which deserves to be safeguarded. Where therefore the court considers that a case raises a serious issue of validity, it is most likely to refer it to a higher formation. In fact, it could be argued that because of the importance of the public interest involved, a legislative measure should only in very exceptional cases be annulled by a three-member chamber. Indeed, all applications contesting the validity of a regulation or a directive during the period under investigation were heard by the full court. The fact therefore that a higher proportion of actions heard by the plenum lead to annulment than in the case of actions heard by chambers proves that the ECJ respects the public interest rationale and also that, when it allocates cases to a Court formation in the *reunion administratif* it gets it right since the most difficult cases end up reaching the plenum.

A second consideration which may explain the correlation between a high rate of success and high court formation is the judicial confidence—legitimacy argument: the plenum, being the highest court formation, is more likely to be confident to take on the other branches of government and feel greater legitimacy in doing so than a low court formation.

#### *Graph 6: Result of ECJ actions by type of measure*

As expected, the figures show that the rate of success of actions contesting the validity of decisions (33.9 per cent) is higher than that of actions seeking the annulment of

<sup>34</sup> Thus, where a case is heard by a three-member court, the applicant must satisfy two thirds of the members that it has a good claim; where a case is heard by a five-member chamber, three-fifths of the court must be persuaded, whilst where the case is heard by 13 judges (a possible formation of the plenum at the time under investigation) it suffices if seven out of the 13 judges agree. For the composition of the full court at the time under investigation (2001–2005), the following could be noted briefly: Before the entry into force of the Treaty of Nice, the ECJ could sit in plenary session as a *petit plenum*, with nine judges, or as a *grand plenum*, where all the 15 judges took part. The *grand plenum* was reserved for cases of exceptional importance. Under the Treaty of Nice, the Grand Chamber consisted of 13 judges and required a quorum of nine judges.



(Graph 6)

directives or regulations (19.4 per cent). Indeed, only one directive and five regulations were annulled by the ECJ during the 2001–2005 period. More specifically, the annulled measures were a Commission directive,<sup>35</sup> a regulation adopted by the Commission,<sup>36</sup> three regulations adopted by the Council<sup>37</sup> and a regulation adopted jointly by the Parliament and the Council.<sup>38</sup> The grounds of review in the cases where directives or regulations were successfully challenged were as follows. In three of the cases, the contested measure was found to run counter to enabling Council legislation<sup>39</sup>; one case involved breach of enabling legislation and incorrect legal basis<sup>40</sup>; in one case, the contested act was found to violate a rule of primary Community law,<sup>41</sup> and the final case involved a breach of the requirement to state reasons.<sup>42</sup> Thus, in a high proportion of cases the issue before the Court was whether Community delegated legislation was ultra vires. A principle which appears to arise prominently from the case law in the period under investigation is that enabling clauses in Council measures must be interpreted

<sup>35</sup> *Netherlands v Commission* (C-314/99) [2002] E.C.R. I-5521 (pertaining to Directive 1999/51 adapting to technical progress Directive 76/769 on the approximation of national laws relating to restrictions on the marketing of dangerous substances [1999] OJ L142/22).

<sup>36</sup> *Germany v Commission* (C-239/01) [2003] E.C.R. I-10333 (pertaining to Regulation 690/2001 on special market support measures in the beef sector [2001] OJ L95/8).

<sup>37</sup> *Parliament v Council* (C-93/00) [2001] E.C.R. I-10119 (pertaining to Regulation 2772/1999 on the general rules for a compulsory beef labelling system [1999] OJ L334/1); *Spain v Council* (C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 & C-22/01) [2002] E.C.R. I-3439 (pertaining to a series of Council regulations fixing annual allowable catches for certain types of fish); *Austria v Council* (C-445/00) [2003] E.C.R. I-8549 (pertaining to Regulation 2012/2000 amending Annex 4 to Protocol No.9 to the 1994 Act of Accession and Regulation 3298/94 with regard to the system of ecopoints for heavy goods vehicles transiting through Austria [2000] OJ L241/18).

<sup>38</sup> *Commission v Parliament* (C-378/00) [2003] E.C.R. I-937 (pertaining to Regulation 1655/2000 concerning the Financial Instrument for the Environment (LIFE) [2000] OJ L192/1).

<sup>39</sup> *Netherlands v Commission* (C-314/99) [2002] E.C.R. I-5521; *Germany v Commission* (C-239/01) [2003] E.C.R. I-10333; *Spain v Council* (C-61/96) [2002] E.C.R. I-3439.

<sup>40</sup> *Parliament v Council* (C-93/00) [2001] E.C.R. I-10119.

<sup>41</sup> *Austria v Council* (C-445/00) [2003] E.C.R. I-8549; the ECJ found the contested regulation to be contrary to a Protocol to the Act of Accession of Austria, Finland and Sweden [1994] OJ C241/21 and [1995] OJ L1/1.

<sup>42</sup> *Commission v Parliament* (C-378/00) [2003] E.C.R. I-937.

strictly. Delegated powers granted by the Council may not alter the temporal scope<sup>43</sup> or essential principles of the basic legislation<sup>44</sup> and may only be used under the conditions laid down therein. Likewise, arguments based on the necessity of adopting extreme measures to face extraordinary situations do not appear to impress the Court.<sup>45</sup> Nor do measures adopted for “practical purposes”.<sup>46</sup>

Notably, the ECJ restricted the retroactive effect of its ruling in three out of the five cases where it was asked to do so.<sup>47</sup> This is a very high proportion of cases and illustrates that, where the Court proceeded to annulment, it did so on procedural and not substantive grounds.

*Table 8: Result of actions by type of defendant*

	Commission	Commission and Council	Council	Council and Parliament	European Central Bank	European Investment Bank
Measure annulled	16		6		1	1
Measure partially annulled	16		2	1		
Action unfounded	68	1	10	3		
Inadmissible (judgment)	7		3	1		
Inadmissible (order)	3			1		
Total	110	1	21	6	1	1

Out of 140 measures challenged before the ECJ between 2001 and 2005, 110 measures (79 per cent) were adopted by the Commission, (100 decisions and 10 regulations). This

<sup>43</sup> *Parliament v Council* (C-93/00) [2001] E.C.R. I-10119 (where the ECJ held that from the fact that the Council was empowered to adopt general rules for the adoption of a new labelling system replacing the old one, it does not follow that it may alter the temporal scope of the basic legislation. Such amendment can only take place on a legal basis equivalent to that on which the basic legislation was adopted).

<sup>44</sup> *Spain v Council* (C-61/96) [2002] E.C.R. I-3439 (holding that since the parent Council regulation laid down the principle of “relative stability”, delegated Community measures adopted on its basis cannot violate it); See also *Germany v Commission* (C-239/01) [2003] E.C.R. I-10333, (holding that, since the basic legislation had established the principle of exclusive financing by the Community, when adopting implementing measures, the Commission could not require compulsory co-financing).

<sup>45</sup> *Austria v Council* (C-445/00) [2003] E.C.R. I-8549 (holding that the Council could not avoid complying with the annual reduction of NOx emissions as provided by the Act of Accession of Austria, by arguing that compliance would entail the blockage of transalpine commercial transit).

<sup>46</sup> *Netherlands v Commission* (C-314/99) [2002] E.C.R. I-5521 (rejecting the defendant’s argument, pursuant to which it would be contrary to the principle of sound administration to comply with old basic legislation, when the Community would introduce before long an new basic regime consistent with the already existent implementing measures).

<sup>47</sup> *Commission v Parliament* (C-378/00) [2003] E.C.R. I-937; *Austria v Council* (C-445/00) [2003] E.C.R. I-8549; *Parliament v Council* (C-93/00) [2001] E.C.R. I-10119; the ECJ refused to limit the temporal scope of its ruling in *Netherlands v Commission* (C-314/99) [2002] E.C.R. I-5521, and also in *Germany v Commission* (C-239/01) [2003] E.C.R. I-10333 (despite the fact that in the latter case it was asked to do so also by the applicant state). No such request was made to the Court in *Spain v Council* (C-61/96) [2002] E.C.R. I-3439.

figure clearly indicates that the overwhelming majority of actions for judicial review initiated before the ECJ were aimed at controlling the validity of measures adopted by the Commission, in particular, Commission decisions.

*Table 9: Results of actions by type of plaintiff*

	Member States	Community institutions	Legal persons	Legal persons and Member States
Measure annulled	17	7		
Measure partially annulled	16	2		1
Dismissed	80	2		
Inadmissible (judgment)	9	1	1	
Inadmissible (order)	3		1	
Total	125	12	2	1

Member States are by far the most active applicants. Out of 140 actions, 125 actions (89 per cent) were initiated by Member States, while 12 actions (8.6 per cent) were initiated by Community institutions. Notably, however, the rate of success of actions initiated by the institutions (75 per cent) was much higher than the rate of success of actions initiated by the Member States (26.4 per cent).

The Commission was the applicant in 11 out of the 12 actions initiated by the institutions, the remaining actions having been filed by the Parliament. The Commission experienced a high rate of success, being successful in 8 of 10 cases.<sup>48</sup> The European Parliament

<sup>48</sup> See *Commission v Council* (C-29/99) [2002] E.C.R. I-11221 (ruling that the Council decision approving the accession of the EAEC to the Nuclear Safety Convention excessively limited the powers of the Community in the area of nuclear safety); *Commission v Council* (C-281/01) [2002] E.C.R. I-12049; [2003] 1 C.M.L.R. 15 (stating that the Council had erred in choosing the legal basis for the conclusion of an EU-US agreement on the co-ordination of energy-efficient labelling programs for office equipment); *Commission v Parliament and Council* (C-378/00) [2003] E.C.R. I-937 (holding that, though art.5 of the Second Comitology Decision is not binding, a departure from the criteria laid down thereof calls for a special obligation to state reasons in pursuance with art.253 EC); *Commission v European Central Bank* (C-11/00) [2003] E.C.R. I-7147; *Commission v European Investment Bank* (C-15/00) [2003] E.C.R. I-728 (where the ECJ ruled that, though the EC Treaty guarantees the independence of the ECB and of the EIB, this does not imply that the ECB and the EIB are shielded from any legislative Community action. In accordance with art.280 EC, combating fraud is entrusted to the Community as a whole. Furthermore, since OLAF enjoys independence from the Commission and is committed to respecting the strict rules of Community law, the independence of neither the ECB nor the EIB appeared to be threatened); *Commission v Council* (C-211/01) [2003] E.C.R. I-8913 (holding that the Council had erred in choosing the legal basis when adopting a decision concerning the conclusion of two international agreements establishing certain conditions for the carriage of goods by road and the promotion of combined transport); *Commission v Council* (C-110/02) [2004] E.C.R. I-6333; [2004] 2 C.M.L.R. 58 (ruling that, since the powers of the Council under art.88(2) EC have an exceptional character, they must be interpreted restrictively and subjected to the two limitations laid down in art.88(3) EC, namely: (1) application by a Member State to the Council suspends examination in progress only for a

was successful in the only application it lodged.<sup>49</sup> Conversely, the Council, which never filed an action, was the defendant in 10 of the 12 cases initiated by other institutions, including one case where the Parliament was co-defendant. In the other two cases, the defendants were respectively the European Central Bank and the European Investment Bank. By contrast to previous years where the Parliament was an active litigant, the decrease in its presence as an applicant may be explained by its legislative empowerment under successive Treaty amendments. Clearly, the greater the political influence an institution has in the legislative process, the less the need for it to seek the annulment of the resulting legislation. Since the co-decision procedure has become the rule rather than the exception, Parliament has experienced a reversal of fortunes and finds itself much more frequently in the position of the defendant than in the position of the applicant.

Unsurprisingly, the inter-institutional debate held before the ECJ often centred on whether the legal basis chosen by the Council was correct. Pursuing an interests-based analysis, one sees that the Commission promoted the expansive interpretation of Treaty provisions lying down a qualified majority procedure,<sup>50</sup> safeguarded its monopoly over legislative proposals,<sup>51</sup> and sought to vest upon itself special implementing policy powers.<sup>52</sup> The Council, by contrast, resisted the transfer of powers from the Member States to the Community.<sup>53</sup> Moreover, as the first *Criminal penalties case* shows, the inter-institutional juxtaposition moved from Community to Union law with the Commission opening a new front and successfully pursuing the “imperialism” of the first pillar.

*Graph 7: Result of actions for annulment before the ECJ by plaintiff with 10 or more actions*

The most active Member States as applicants were Spain, Italy, Netherlands, Greece and Germany. Out of 125 applications for annulment lodged by Member States during the

period of three months; and (2) where that period has expired, the Council is no longer competent to adopt any decision); *Commission v Council (Criminal penalties case)* (C-176/03) [2005] E.C.R. I-7879; [2005] 3 C.M.L.R. 20 (ruling that the Council had erred in choosing the legal basis when adopting a Framework Decision on the protection of the environment through criminal law).

<sup>49</sup> *Parliament v Council* (C-93/00) [2001] E.C.R. I-10119.

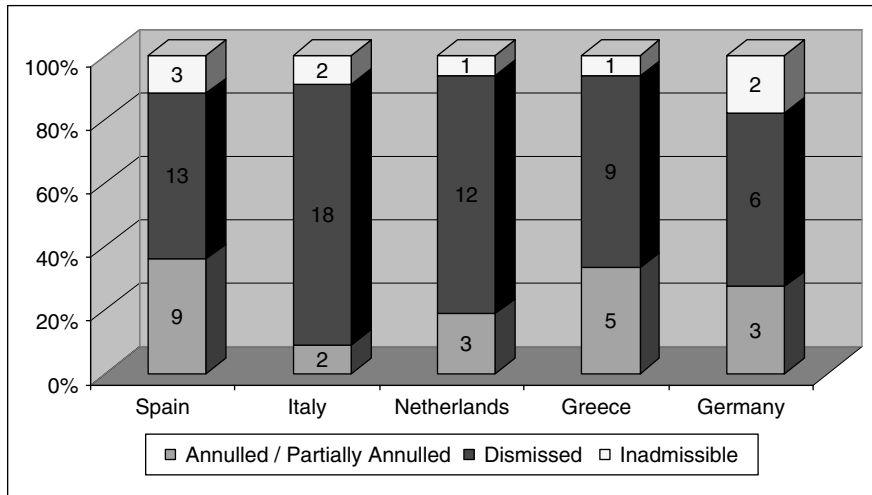
<sup>50</sup> *Commission v Council* (C-211/01) [2003] E.C.R. I-8913 at [46]–[50] (where the ECJ held that, when adopting Community measures in the field of transport, art.71 EC must be interpreted broadly so that it may also include related provisions concerning other areas of law. To this effect, the mere presence of incidental elements requiring the harmonisation of indirect taxation is not sufficient to replace art.71 EC as a legal basis by art.93 EC). See also *Criminal penalties case* (C-176/03) [2005] E.C.R. I-7879 at [47]–[48] (holding that where the adoption of criminal penalties is necessary to ensure that Community environmental legislation is effective, art.175(1), and not art.34 TEU, should be relied upon).

<sup>51</sup> *Criminal penalties case* (C-176/03) [2005] E.C.R. I-7879 at [2]. In this case the contested measure was the result of a proposal submitted by Denmark. Therefore, the Commission saw its monopoly over legislative proposals as being under threat.

<sup>52</sup> *Commission v Council* (C-110/02) [2004] E.C.R. I-6333 at [36]–[37] (where the ECJ upheld the Commission’s opposition to the late validation by the Council of a state aid measure previously declared incompatible with the common market).

<sup>53</sup> *Commission v Council* (C-29/99) [2002] E.C.R. I-11221 at [65] (where the Council argued that the opening and operation of nuclear facilities remain within the competence of the Member States). *Commission v Council* (C-281/01) [2002] E.C.R. I-12049 at [31] (where the Council contended that, owing to the fact that the Community enjoys exclusive competences under art.133 EC, its adoption as a legal basis would imply that the Member States would be deprived from adopting any measure in the field occupied by Community legislation). *Criminal penalties case* (C-176/03) [2005] E.C.R. I-7879 at [27] (where the Council argued that adoption of criminal penalties remains within the realm of national sovereignty).





(Graph 7)

period studied, 89 applications (71.2 per cent), were lodged by these five Member States. The most active applicant was Spain, lodging 25 applications (20 per cent), followed by Italy, which lodged 22 applications (17.6 per cent). One factor that can explain the concentration of actions in a small group of States is the way Community funds are allocated. Spain, Italy and Greece, who are the most active Member States in lodging applications are, at the same time, among the main recipients countries of Community funds and thus, the most likely to complain the way funds are allocated.

The Member States' rate of success varies significantly. Spain is the state with the highest rate of success (36 per cent), followed by Greece (33.3 per cent), Germany (27.3 per cent), Netherlands (18.8 per cent) and Italy (8.7 per cent). The secret of the Spanish success may lie in that it often relied on highly technical arguments: mastering the nuances and complexities of Community sector-specific legislation often pays off. In state aid cases, for instance, the ECJ sided with Spain when the latter disagreed with the Commission on the application of the *di minimis* rule,<sup>54</sup> the length of the notification period pursuant to art.88 EC<sup>55</sup> or the appraisal of the facts.<sup>56</sup> Likewise, in agricultural cases, Spain was successful when arguing that the Commission had misinterpreted secondary legislation governing the clearance of accounts presented by the Member States.<sup>57</sup> Italy, by contrast, appears to have based most of its arguments invoking the violations of general principles.<sup>58</sup>

<sup>54</sup> See *Spain v Commission* (C-351/98) [2002] E.C.R. I-8031; *Spain v Commission* (C-409/00) [2003] E.C.R. I-1487; [2003] 2 C.M.L.R. 24.

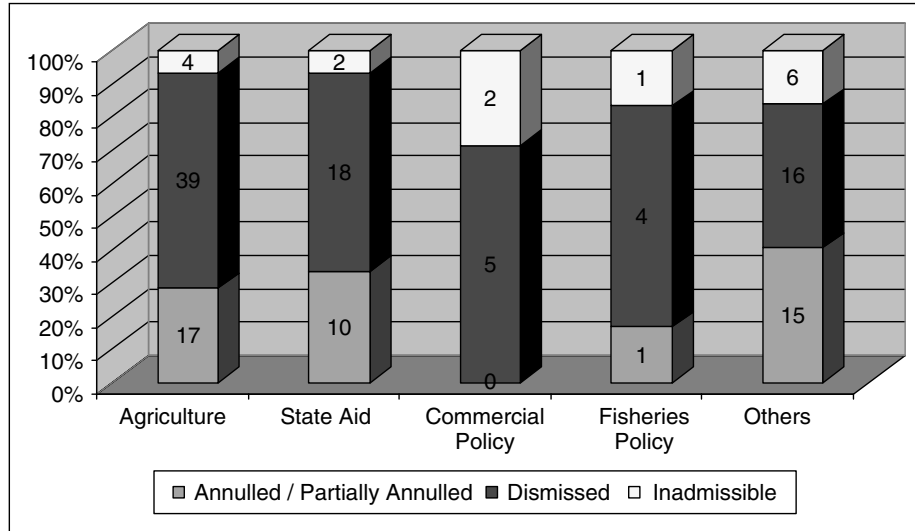
<sup>55</sup> *Spain v Commission* (C-398/00) [2002] E.C.R. I-5643.

<sup>56</sup> *Spain v Commission* (C-276/02) [2004] E.C.R. I-8091.

<sup>57</sup> *Spain v Commission* (C-130/99) [2002] E.C.R. I-3005; *Spain v Commission* (C-349/97) [2003] E.C.R. I-3851; *Spain v Commission* (C-153/01) [2004] E.C.R. I-9009; *Spain v Commission* (C-287/02) [2005] E.C.R. I-5093.

<sup>58</sup> The following general principles of EC law were invoked by Italy unsuccessfully: proportionality (*Italy v Commission* (C-361/98) [2001] E.C.R. I-385; *Italy v Commission* (C-372/97) [2004] E.C.R. I-3679);

Graph 8: Result of actions for annulment before the ECJ by subject matter



Actions were primarily aimed at challenging the validity of agricultural measures. Out of 140 actions lodged before the ECJ, 60 actions (43 per cent) were initiated against acts pertaining to agriculture, followed by 30 actions (21.4 per cent) initiated against state aid measures. The figures show a considerable variation in the rate of success depending on subject matter. The rate of success of actions against state-aid measures (33.3 per cent) and agricultural measures (28.3 per cent) is considerably higher than that of actions against fisheries policy (16.7 per cent) and commercial policy measures (12.5 per cent). However, the underlying factor explaining those differences seems to lie not on the subject matter itself but the type of measure challenged. Almost 90 per cent of agricultural measures and 94 per cent of state aid measures are Commission decisions, whereas 100 per cent of commercial and fishery policy measures are acts of general application and therefore less amenable to judicial review by non-state actors.

statement of reasons (*Italy v Council* (C-120/99) [2001] E.C.R. I-7997; *Italy v Commission* (C-310/99) [2002] E.C.R. I-2289; *Italy v Commission* (C-372/97) [2004] E.C.R. I-3679; *Italy v Commission* (C-138/03, C-324/03 & C-431/03) [2005] E.C.R. I-10043); non-discrimination and equal treatment (*Italy v Commission* (C-403/99) [2001] E.C.R. I-6883; *Italy v Council* (C-340/98) [2002] E.C.R. I-2663); legitimate expectations and legal certainty (*Italy v Commission* (C-372/97) [2004] E.C.R. I-3679; *Italy v Commission* (C-91/01) [2004] E.C.R. I-4355); right to a fair hearing (*Italy v Commission* (C-66/02) [2005] E.C.R. I-10901). The cases where Italy was successful are: *Italy v Commission* (C-107/99) [2002] E.C.R. I-1091 (where the Court held that, by failing to authenticate the contested act, the Commission had infringed an essential procedural requirement), *Italy v Commission* (C-400/99) [2005] E.C.R. I-3657; [2005] 3 C.M.L.R. 22 (holding that the Commission should have given to Italy the opportunity to express its views, before classifying Italian tax subsidies as new aid), *Italy v Commission* (C-328/99 & C-399/99) [2003] E.C.R. I-4035; [2005] 2 C.M.L.R. 48 (ruling that the Commission failed to state adequately the reasons why the purchase of shares in a private company constituted aid, even though Italy seemed to have acquired them at a market price).

**Actions for annulment—Court of First Instance***Table 10: Results of actions of annulment before the CFI (2001–2005)*

	Total	%
Measure annulled	61	17.9%
Measure partially annulled	47	13.8%
Action dismissed on merits	119	35%
Inadmissible (judgment)	33	9.7%
Inadmissible (order)	80	23.5%
<b>Total</b>	<b>340<sup>59</sup></b>	<b>100.0%</b>

Out of the total number of actions initiated before the CFI, 108 (31.7 per cent) resulted in the annulment or partial annulment of the contested act, 119 actions (35 per cent) were dismissed on the merits and 113 actions (33.2 per cent) were dismissed as inadmissible.

As stated above, the number of judicial review judgments showed considerable variations on an annual basis. Fifty-four judgments were delivered in 2001, 82 judgments in 2002 (52 per cent rise), 73 judgments in 2003, 52 judgments in 2004, and 79 in 2005. The rate of success also showed variation ranging from 24.7 per cent in 2003 to 40.2 per cent in 2002.

*Graph 9: Results of CFI actions of annulment by court formation (2001–2005)*

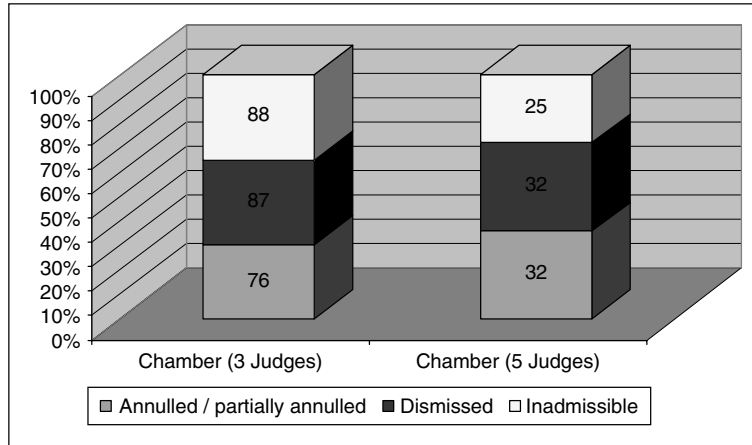
The CFI formation patterns differ from those of the ECJ. Out of the total number of judgments delivered by the CFI during the period under investigation, 251 cases (74 per cent) were heard by a three-member chamber whilst 89 cases (26 per cent) were heard by a five-member bench. The rate of success of actions heard by a three-member chamber was 30.3 per cent, whereas that of actions heard by a five-member chamber was slightly higher (36 per cent).<sup>60</sup>

*Graph 10: Results of CFI judgments by type of measure*

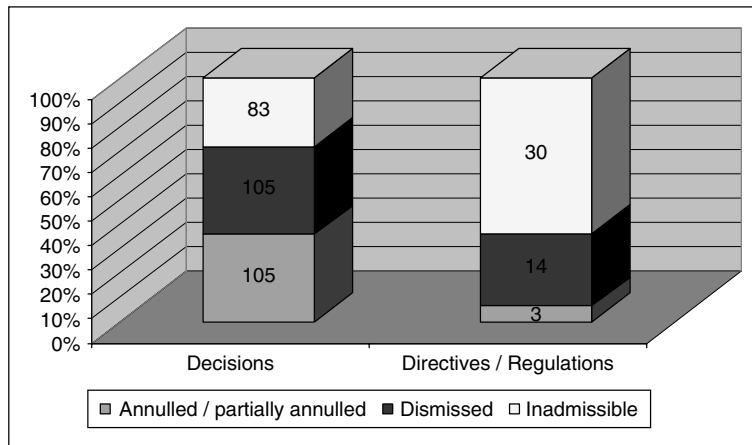
Unsurprisingly, the data shows that the chances for an action to be dismissed as inadmissible are much higher where it is aimed at contesting a measure of general

<sup>59</sup>There are four additional cases where the CFI issued interlocutory orders: in *Elder and Elder v Commission* (T-36/00) [2001] E.C.R. II-607 and *British American Tobacco International (Investments) Ltd v Commission* (T-111/00) [2001] E.C.R. II-2997; [2001] 3 C.M.L.R. 60, the CFI ordered the Commission to produce to the Court the minutes of the Advisory Committee on Value Added Tax access to which had been refused to the applicants; in *Aktionsgemeinschaft Recht und Eigentum v Commission* (T-114/00) [2002] E.C.R. II-5121 and *Jégo-Quééré et Cie SA v Commission* (T-177/01) [2002] E.C.R. II-2365; [2002] 2 C.M.L.R. 44, the CFI dismissed the objection of inadmissibility and allowed the case to proceed to the examination of the merits.

<sup>60</sup>Data on the allocation of cases to different court formations depending on the type of the contested measure are provided at pp.157–158 below.



(Graph 9)



(Graph 10)

application, i.e. a directive or a regulation (63.8 per cent), than where it is aimed at contesting a decision (28.3 per cent). Indeed, all actions challenging the validity of directives were dismissed as inadmissible.<sup>61</sup> Actions seeking the annulment of regulations were held admissible in 17 out of 39 cases (43.5 per cent). The composition of these cases is as follows: eight cases related to regulations imposing antidumping duties,<sup>62</sup>

<sup>61</sup> *Association contre l'horaire d'été (ACHE) v Council* (T-84/01) [2002] E.C.R. II-99; *Japan Tobacco Inc and JT International SA v Parliament* (T-223/01) [2002] E.C.R. II-3259; *Établissements Toulorge v Parliament* (T-167/02) [2003] E.C.R. II-1111; *Villiger Söhne GmbH v Council* (T-154/02) [2003] E.C.R. II-1921; *Paul Vannieuwenhuyze-Morin v Council* (T-321/02) [2003] E.C.R. II-1997; *SNF SA v Commission* (T-213/02) [2004] E.C.R. II-3047; *European Federation for Cosmetic Ingredients (EFfCI) v Parliament* (T-196/03) [2004] E.C.R. II-4263; *European Environmental Bureau (EEB) v Commission* (T-94/04) [2005] E.C.R. II-4919.

<sup>62</sup> *BIC SA v Council* (T-82/00) [2001] E.C.R. II-1241; *Mukand Ltd v Council* (T-58/99) [2001] E.C.R. II-2521; [2002] 3 C.M.L.R. 13; *Arne Mathisen AS v Council* (T-340/99) [2002] E.C.R. II-2905; *Europe Chemi-Con (Deutschland) GmbH v Council* (T-89/00) [2002] E.C.R. II-3651; *Kundan Industries Ltd and*

three cases related to regulations withdrawing authorisations to market antibiotics<sup>63</sup> and two cases related to regulations imposing economic sanctions on private parties<sup>64</sup>; the remaining cases related to a regulation fixing minimum mesh sizes,<sup>65</sup> a regulation granting an allowance when the price of tuna fell below a triggering threshold,<sup>66</sup> a custom tariff regulation classifying the PlayStation®2 as a video game<sup>67</sup> and, a regulation imposing safeguard measures against imports from OCT countries.<sup>68</sup>

The results are in accordance with the general stance of the case law. Challenges to the validity of directives by individuals are highly unlikely to succeed since directives typically require implementation and the applicant is likely to lack direct concern. As far as regulations are concerned, whilst the rate of admissibility in relation to anti-dumping measures reaches a high 80 per cent, it drops to 32.1 per cent in relation to other types of regulations.

The type of the contested measure affects not only the chances of admissibility but also the chances of success on the merits. The rate of success of actions seeking the annulment of decisions (35.8 per cent) is much higher than that of actions challenging measures of general application, i.e. Directives or Regulations (6.4 per cent).<sup>69</sup>

Out of the total number of actions contesting decisions, 215 (73.4 per cent) were heard by a three-member chamber whilst 78 (26.7 per cent) were heard by a five-member

*Tata International Ltd v Council* (T-88/98) [2002] E.C.R. II-4897; *Changzhou Hailong Electronics v Council* (T-255/01) [2003] E.C.R. II-4741; *Shanghai Teraoka Electronic Co Ltd v Council* (T-35/01) [2004] E.C.R. II-3663; *Koninklijke Philips Electronics NV v Council* (T-177/00) [2005] E.C.R. II-5.

<sup>63</sup> *Pfizer Animal Health SA v Council* (T-13/99) [2002] E.C.R. II-3305; [1999] 3 C.M.L.R. 79; *Alpharma Inc v Council* (T-70/99) [2002] E.C.R. II-3495; *Solvay Pharmaceuticals BV v Council* (T-392/02) [2003] E.C.R. II-4555 (holding that the plaintiffs had standing, not because each one of them was respectively the only manufacturer of the antibiotic to be withdrawn from the market, but owing to the fact that, by introducing a system of previous authorisation, Community legislation had rendered the plaintiffs responsible for putting the antibiotics into circulation).

<sup>64</sup> *Kadi v Council* (T-315/01) [2005] E.C.R. II-3649; *Yusuf v Council* (T-306/01) [2005] E.C.R. II-3533; [2005] 3 C.M.L.R. 49.

<sup>65</sup> *Jégo-Quéré* (T-177/01) [2002] E.C.R. II-2365 (reversed by the ECJ in *Commission v Jégo-Quéré & Cie SA* (T-263/02 P) [2004] E.C.R. I-3425; [2004] 2 C.M.L.R. 12).

<sup>66</sup> *OPTUC v Commission* (T-142/01 & T-283/01) [2004] E.C.R. II-329. (The only admissibility issue discussed in this case was whether the application had been lodged on time.)

<sup>67</sup> *Sony Computer Entertainment Europe Ltd v Commission* (T-243/01) [2003] E.C.R. II-4189. (The CFI opined that, though in the contested regulation the Commission had described exhaustively the hardware and software components of the PlayStation®2 and even included its picture therein, the contested measure was truly a regulation. To that end, the Court stated that, owing to the fact that it was binding upon all customs authorities and applicable in relation to all products of the type described, the contested regulation was of general application. The Court went then on to put forward four reasons holding that the applicant was individually concerned. First, the adoption of the contested regulation was triggered by the binding tariff information submitted by the applicant to the UK custom authorities. Secondly, when adopting the contested regulation, the Court noted that no other similar or identical product had been taken into consideration. Thirdly, the Court affirmed that, in despite of the wording of the contested regulation being framed in general and abstract terms, it was particularly focussed on the product of the applicant. Lastly, although it is not sufficient in itself to consider an applicant as individually concerned, the fact that, when the contested regulation entered into force, the applicant was the sole importer of the PlayStation®2 into the Community, contributed to differentiating the applicant from the rest of all other persons. As a result, the Court concluded that the application was admissible.)

<sup>68</sup> *Rica Foods v Commission* (T-94, 110 & 159/00) [2002] E.C.R. II-4677 (holding that the applicants had standing since, on the one hand, the Commission was required to pay due regard to undertakings adversely affected when adopting the contested measures and, on the other hand, the applicants had engaged into contractual agreements with third parties before the commission regulation was adopted).

<sup>69</sup> As stated above, all actions against directives were dismissed.

chamber. A similar allocation occurred in relation to directives and regulations. Out of the total number of actions contesting measures of general application, 36 (76.6 per cent) were heard by a three-member chamber, whilst 11 (23.4 per cent) were heard by a five-member chamber. This contrasts sharply with the formation of the ECJ, where all actions against measures of general application were heard by a full court.

In total, the CFI annulled three regulations during the period under investigation. Two Council's Regulations were partially annulled by a five-member chamber,<sup>70</sup> and one Commission regulation was annulled by a three-member chamber.<sup>71</sup> Whilst a detailed examination of these cases is beyond the scope of this article, it may be appropriate to make here some comments in relation to the standard of review followed by the CFI. According to the established formula of the case law, in matters involving complex economic assessments, the Community institutions enjoy a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether that exercise discloses manifest error or constitutes a misuse of powers or a clear disregard of the limits of its discretion.<sup>72</sup> In fact, a closer examination of the case law suggests that the standard of review employed is not always as deferential as the "manifest error of assessment" model suggests. The CFI appears to supervise closely the Council and the Commission when interpreting secondary legislation. This is the case, for example, in anti-dumping,<sup>73</sup> customs classification cases<sup>74</sup> and competition cases.<sup>75</sup> The same flexibility in the standard of scrutiny is also apparent in more recent cases pertaining to review of economic sanctions imposed for the prevention of terrorism.<sup>76</sup>

Table 11: Results of CFI actions by type of defendant

	Commission	Council	Council and Parliament	Parliament	Commission and Council	Others
Measure annulled	55	4		2		

<sup>70</sup> See *Kundan v Council* (T-88/98) [2002] E.C.R. II-4897 and *Mukand v Council* (T-58/99) [2001] E.C.R. II-2521.

<sup>71</sup> See *Sony v Commission* (T-243/01) [2003] E.C.R. II-4189.

<sup>72</sup> See, e.g. *Astipescas v Commission* (T-180/00) [2002] E.C.R. II-3985 at [79]; *Omega Air* (C-36/02) [2004] E.C.R. I-9609 at [64]; *SAM Schiffahrt and Stapf v Germany* (C-248-9/95) [1997] E.C.R. I-4475 at [23]. For a recent discussion of the standard of review of economic policy measures, see T. Tridimas, "Community Agencies, Competition Law and ECB Initiatives on Securities Settlement" (2009) 28 *Yearbook of European Law* 216, 275 et seq.

<sup>73</sup> For instance, in *Mukand v Council* (T-58/99) [2001] E.C.R. II-2521, the CFI held that, before imposing antidumping duties, the Council was required to determine whether the causation link between the material injury to a Community industry and subsidies imports might be interrupted by the actions of Community undertakings themselves.

<sup>74</sup> In *Sony v Commission* (T-243/01) [2003] E.C.R. II-4189, after acknowledging that the respondent enjoys a wide margin of discretion when classifying a particular object as a "video game" or as a "data processing machine", the CFI held that the legal basis relied upon for adopting the contested regulation did not support the respondent's conclusions.

<sup>75</sup> See the following line of cases where the CFI annulled Commission decisions finding mergers to be incompatible with the common market on the ground that the Commission had committed serious failures in its economic analysis. Although the cases refer to the annulment of individual decisions rather than measures of general application, they serve to illustrate the CFI's readiness to question the Commission's discretion in economic policy matters. *Airtours Plc v Commission* (T-342/99) [2002] E.C.R. II-2585; [2002] 5 C.M.L.R. 7; *Schneider Electric SA v Commission* (T-310/01 & T-77/02) [2002] E.C.R. II-4071; [2003] 4 C.M.L.R. 17; *Tetra Laval BV v Commission* (T-5/02 & T-80/02) [2002] E.C.R. II-4519; [2002] 5 C.M.L.R. 29.

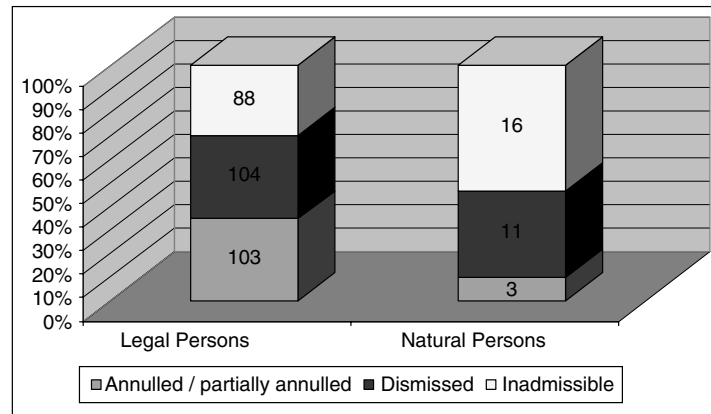
<sup>76</sup> See *OMPI II* (T-256/07) [2008] E.C.R. II-3019 and *OMPI III* (T-284/08) [2008] E.C.R. II-3487.

(continued)

	Commission	Council	Council and Parliament	Parliament	Commission and Council	Others
Measure partially annulled	45	2				
Dismissed	105	10		1	3	
Inadmissible (judgment)	26	3		2		2
Inadmissible (order)	60	7	8	2	1	2
Other	4					
Total	291	26	8	7	4	4

The most popular defendant was the Commission, illustrating that litigation before the CFI overwhelmingly concerns review of administrative action. Out of 340 measures challenged, 291 measures (85.6 per cent) were adopted by the Commission, the vast majority of them being decisions.

Graph 11: Results of CFI actions by type of plaintiff



Out of a total of 340 actions, 295 (87 per cent) were lodged by legal persons, whilst 30 actions (9 per cent) were lodged by natural persons.<sup>77</sup> The rate of success of actions lodged by legal persons (35 per cent) was considerably higher than that of natural persons (10 per cent). Similarly, the percentage of actions dismissed as inadmissible was considerably higher amongst those lodged by natural persons (50 per cent) than those lodged by legal

<sup>77</sup> The rest of the actions include 11 actions lodged by natural and legal persons and four actions lodged by Member States.

persons (30 per cent). In other words, the figures show that it is particularly difficult for natural persons to succeed in challenging the validity of a Community measure. Based on the period studied, the chances are that one out of two measures lodged by individuals will be dismissed as inadmissible and, even if they make it through the admissibility test, only 1 in 10 actions will succeed in annulling or partially annulling a Community measure.

In the two cases where natural persons succeeded, the applicants were respectively a scholar, who sought the annulment of a Council decision refusing to disclose certain reports dealing with the human rights situation of third countries from which asylum seekers to the Community originated or resided,<sup>78</sup> and a former MEP, who sought the annulment of a Parliament decision ordering the repayment of expenses and allowances unduly paid to him by way of compensation.<sup>79</sup> Therefore, successful applicants were persons having a strong interest or experience with the European Union and pursuing non commercial interests.

*Graph 12: Results of CFI actions by subject matter*

Actions lodged before the CFI were primarily aimed at challenging the validity of competition law measures. Out of 340 actions, 98 (28.8 per cent) targeted competition acts, 57 (16.8 per cent) contested state-aid measures, and 42 (12.4 per cent) contested agricultural measures. Though significant, the degree of concentration of actions according to subject matter is not as high as that applicable to actions lodged before the ECJ. Indeed, 60 per cent of actions lodged before the CFI were grouped into three subject matters (competition, state aid and agriculture),<sup>80</sup> whilst 61.7 per cent of actions lodged before the ECJ were grouped into two subject matters (agriculture and state aid). Taking the combined figures of the two courts, agricultural and state aid measures appear to be the primary targets of judicial review.

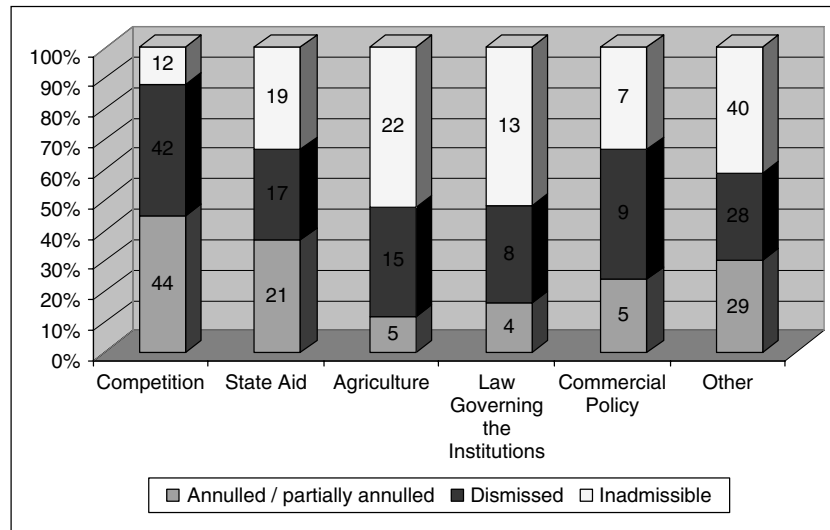
The figures show a considerable variation on the rate of success of the actions according to the subject matter. Actions lodged against competition measures are the most likely to succeed with a rate of success of 44.9 per cent. However, “success” here means, in

<sup>78</sup> *Kuijer v Council* (T-211/00) [2002] E.C.R. II-485; [2002] 1 C.M.L.R. 42. This case is in fact the result of the Council’s failure to comply with a previous ruling of the CFI, namely *Kuijer v Council* (T-188/98) [2000] E.C.R. II-1959; [2000] 2 C.M.L.R. 400. While recognising that, in order to protect the public interest of the Community, access to documents may be limited, the CFI held that an absolute ban is extremely exceptional. Instead, the Community institutions are required to grant, as far as possible, partial access to documents. Further, refusal cannot be justified in abstracto, but the Community institutions are required to justify their decisions on individual and contextual grounds. Consequently, taking the view that the Council had failed to comply with the foregoing, the Court decided to annul the contested decision.

<sup>79</sup> *Koldo Gorostiaga Atxalandabaso v Parliament* (T-146/04) [2005] E.C.R. II-5889. (Contrary to the Parliament’s view, the Court ruled that, in accordance with art.27 of the rules on expenses and allowances of the MEPs, it is for the Bureau of the EP, and not for its Secretary, to order the repayment of expenses and allowances unduly paid by way of compensation. This interpretation stems from the principle of proportionality which obliges Community Institutions to interpret the law in the least intrusive possible way to private liberties. Accordingly, owing to the fact that the Bureau is a collective body offering more guarantees to protect the legislative autonomy of MEPs, it was for the latter to adopt the contested measure.)

<sup>80</sup> The study did not consider actions for annulment against staff regulations and intellectual property measures.





(Graph 12)

the absolute majority of cases, the partial annulment of the measure (e.g. a reduction in the amount of the fine imposed on the applicant) rather than the total annulment of the measure challenged. It will be recalled that, in reviewing competition decisions, the CFI does not exercise merely review of legality but plenary jurisdiction which enables it to adjust the level of the fine imposed by the Commission.<sup>81</sup> By contrast, actions aimed at challenging agricultural measures are the less likely to succeed with a lower 11.9 per cent rate of success. However, one must take into account that almost 50 per cent of the agricultural measures were measures of general application, more specifically, Council regulations, whilst all competition measures were Commission decisions. It is thus the type of measure rather than the subject matter which accounts for the different rate of success in each category.

### Actions for failure to act

In view of their low number, it is not necessary to examine actions for failure to act in detail. It suffices to point out that, during the period under examination, there were 13 applications before the CFI under art.265 TFEU (ex 232 EC). All of them were against the Commission and none of them succeeded. In the overwhelming majority of cases, the CFI either dismissed the application as inadmissible or held that there was no need to adjudicate because the Commission had defined its position. Notably, in one case pertaining to veterinary medicinal products,<sup>82</sup> the CFI rejected the application for failure to act on the ground that the Commission had defined its position after the commencement of proceedings but found that the Commission's inaction was a clear and serious breach of the principle of sound administration which gave rise to liability in

<sup>81</sup> See art.229 EC (now 261 TFEU).

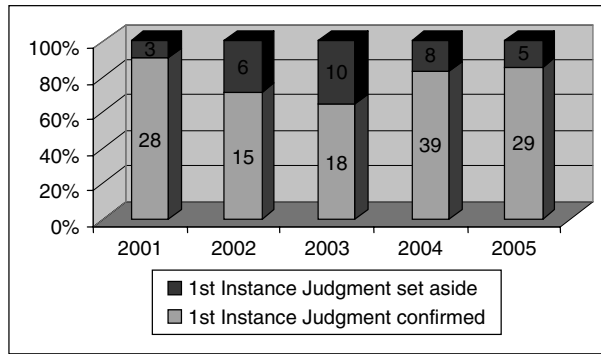
<sup>82</sup> *CEVA v Commission* (T-344/00 & T-345/00) February 26, 2003.

damages. It could be argued that the low number of applications for failure to act makes it difficult for any concrete conclusions to be drawn. It is submitted however that the low number in combination with the fact that none of the actions succeeded illustrates that the functionality of this procedure as a mechanism for controlling the legality of Community action is highly limited.

The above findings illustrate that the action for failure to act is an ineffective remedy and reinforce the “negative” character of judicial review: the adjudication process is much better suited to questioning the way the legislative and administrative branch have exercised their discretion rather than as a means of initiating public action.

**Appeals**

*Graph 13: Results of appeal (2001–2005)*

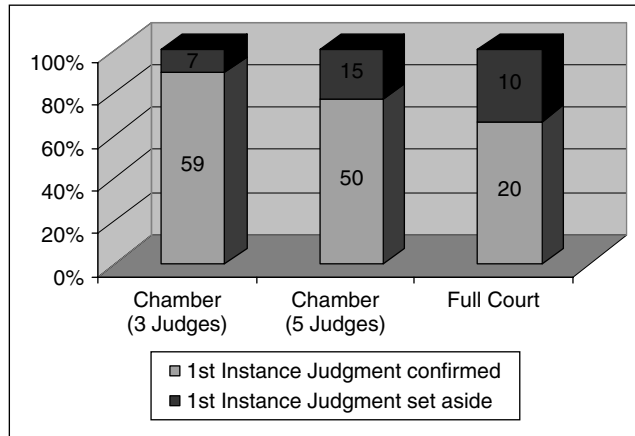


In the period under investigation, the ECJ heard 161 appeals against CFI rulings on actions of annulment and actions for failure to act.<sup>83</sup> It confirmed the CFI judgment in 129 cases (80 per cent) and set it aside in 32 cases (20 per cent). It follows that one in every five CFI rulings on actions for annulment were set aside by the ECJ. However, on a yearly basis, the rate of success showed some variations, ranging from 10 per cent in 2001 to 36 per cent in 2003.

*Graph 14: Results of appeal by court formation (2001–2005)*

The ECJ formation for hearing appeals was as follows: 66 cases (41 per cent) were heard by a three-judges chamber, 65 cases (40 per cent) were heard by a five-judges chamber, and 30 cases (19 per cent) were heard by the full court. The data shows some variations on the rate of success: on appeals heard by a three-judges chamber, 11 per cent of CFI rulings were set aside; on appeals heard by a five-judges bench, 23 per cent of rulings were set aside; and on appeals heard by the full Court, 33 per cent of CFI rulings were set aside. In other words, the data indicate that the higher the formation of the ECJ, the

<sup>83</sup> This excludes OHIM cases and staff cases.



(Graph 14)

more likely for the CFI judgment to be reversed. This correlation can be explained on the same grounds as those accounting for the higher rate of success of annulment actions which are heard by a higher formation of the ECJ.<sup>84</sup>

Table 12: Results of appeal by type of measure (2001–2005)

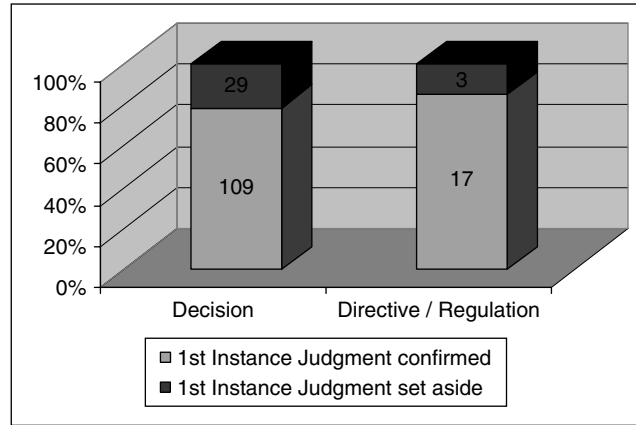
	Decision	Directive / Regulation	Failure to act
CFI judgment confirmed	109	17	3
Appeal successful	29	3	
Total	138	20	3

Graph 15: Results of appeal by type of measure (2001–2005)

We saw above that the rate of success of judicial review applications varies greatly depending on the type of the contested measure with applications for the annulment of decisions having a much higher rate of success than application for annulment of directives and regulations.<sup>85</sup> The type of contested measure also influences the rate of success of appeals but the difference here is much less pronounced. The rate of success of appeals against CFI judgments which relate to review of decisions stands at 21 per

<sup>84</sup> See above, at p.148.

<sup>85</sup> Above, p.148 et seq.



(Graph 15)

cent and is higher than the rate of success of appeals against CFI rulings which relate to measures of general application (directives and regulations) which stands at 15 per cent.<sup>86</sup>

Although individuals were the most active appellants, Member States were the most successful ones. They achieved a success rate of 50 per cent. Community institutions succeeded in 44 per cent of cases, whilst the success rate of legal and natural persons was respectively 28.6 per cent and 14.3 per cent. This indicates that Member States have a higher chance of persuading the ECJ to reverse the CFI.<sup>87</sup>

In relation to appeals brought by the Commission, it is worth noting that the ECJ often favoured the Commission when its appeal relied on the ground of lack of admissibility.<sup>88</sup>

<sup>86</sup>The ECJ set aside the judgment of the CFI in cases concerning the judicial review of measures of general application in three instances. In one case, the ECJ annulled an anti-dumping regulation on procedural grounds although the CFI had upheld its legality. In the other two cases, the ECJ rescued the validity of the contested measure. In particular, in *Petrotub and Republica v Council* (C-76/00 P) [2003] E.C.R. I-79 the ECJ annulled a Council anti-dumping regulation holding, in contrast to the CFI, that when a WTO agreement, such as the 1994 Anti-dumping Code, is transposed into Community law, all of its provisions are binding upon the Community institutions, irrespective of whether there are specific references in the Community implementing legislation. Thus, in accordance with art.2.4.2 of the Anti-dumping Code and art.253 EC, the Court held that, before relying on the asymmetrical method to calculate the dumping margin, the Council should have stated the reasons why a symmetrical method could not be used. In *Commission v Boehringer Ingelheim Vetmedica* (C-32/00 P) [2003] E.C.R. I-12069, the ECJ held that, in implementing the basic legislation, the Commission had not exceeded the powers conferred to it. Finally, in *Commission v Jégo-Quéré* (C-263/02 P) [2004] E.C.R. I-3425 the ECJ rejected the CFI's more liberal interpretation of locus standi under art.263(4) TFEU (ex 230(4) EC). The CFI had suggested that, where a Community regulation does not need any implementing measures at national level and there is no alternative way of challenging its validity indirectly before a national court, a natural or legal person is individually concerned "if the measure in question affects his legal position, in a manner which is both definite and immediate". Instead, the ECJ followed the traditional *Plaumann* formula ((25/62) [1963] E.C.R. 95), placing on the legal systems of the Member States the responsibility of providing measures at national level which would facilitate an indirect challenge against Community legislation. Note that the CFI solution has now been endorsed by the Treaty of Lisbon: see art.263(4) TFEU.

<sup>87</sup>Note also that, under art.56(3) of the ECJ Statute, Member States and EU institutions are privileged appellants in that, with the exception of staff cases, they can bring an appeal even if they did not intervene in the proceedings at first instance.

<sup>88</sup>*Commission v Camar & Tico* (C-321/00 P) [2002] E.C.R. I-11355 (holding that, when challenging a Regulation on the common organisation of bananas fixing a tariff quota on imports from Somalia, the fact

More specifically, the Commission was successful in convincing the ECJ to follow a stricter approach on the notion of “individual concern” than that endorsed by the CFI. By contrast, when the Commission relied on substantive arguments, the ECJ tended to dismiss them and reversed the CFI only in one case. Even in that case, the ECJ corrected the legal reasoning of the CFI but not its outcome, so that the Commission’s success was not complete.<sup>89</sup>

When the appeal was brought by legal or natural persons, appellants were more successful in questioning the ruling of the CFI on procedural grounds.<sup>90</sup>

that the applicant is the major importer of bananas from Somalia is not sufficient in itself to consider it as individually concerned), *Commission v Jégo-Quéré & Cie SA* (C-263/02 P) [2004] E.C.R. I-3425 (setting aside the new interpretation of “individual concern” followed by the CFI); *Commission v Greencore Group Plc* (C-123/03 P) [2004] E.C.R. I-11647; [2005] 4 C.M.L.R. 1. (The Commission asked the Court to set aside the judgment of the CFI, in which it had declared admissible an action for annulment against a Commission letter. At first instance, the Commission had unsuccessfully argued that its letter refusing to pay the default interest to Greencore was a confirmatory act and consequently, it produced no legal effects. In its opinion, Greencore should have claimed the default interest when the principal was refunded. On appeal, the ECJ agreed. It ruled that, by failing to consider whether the Commission’s payment of the principal without explicitly taking a position on the request for payment of interest could be interpreted as an implied refusal, the CFI had erred in law. As a result, the ECJ set aside the judgment of the CFI. Nevertheless, when reviewing this point, it answered in the negative). *Commission v Aktionsgemeinschaft Recht und Eigentum eV* (C-78/03 P) [2005] E.C.R. I-10737; [2006] 2 C.M.L.R. 48 (holding that, in order to have standing, it is not sufficient for an organisation of undertakings to rely merely on the procedural rights laid down in art.88(2) EC); *Commission v T-Mobile Austria GmbH (formerly Max.Mobil Telekommunikation Service GmbH)* (C-141/02 P) [2005] E.C.R. I-1283; [2005] 4 C.M.L.R. 12 (holding that the Commission may reject a complaint that a State has infringed arts 82 and 86(1) EC by issuing a decision that is not a reviewable act.

<sup>89</sup> See *Commission v CEMR* (C-87/01 P) [2003] E.C.R. I-7617 (The Commission entered into three technical assistance contracts with CEMR. The contracts were governed by Belgian law and submitted to the jurisdiction of Belgian courts. Later on, the Commission found that there had been a contractual breach and ordered the recovery of the amounts owed by setting off their mutual claims. CEMR initiated proceedings before the Belgian Courts and the CFI. The latter annulled the Commission decision holding that, in accordance with the principle of effectiveness, before setting off, the Commission should have assessed whether the set off would pose a risk for the use of Community funds for the purpose for which they were intended. On appeal, the ECJ held that such requirement was not imposed by Community law. Nevertheless, when deciding on the substance, the ECJ held that, since the contracts were governed by Belgian law, the validity of setting off had to comply with both legal orders. Since the Commission had failed to comply with Belgian law, the ECJ annulled the contested decision).

<sup>90</sup> See for example, *Limburgse Vinyl Maatschappij NV v Commission (PVC-II)* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P & C-254/99 P) [2002] E.C.R. I-8375; [2003] 4 C.M.L.R. 10. Since the applicant had failed to raise a new plea regarding access to the Commission’s file, the CFI refused to allow the appellant to rely on new documents of whose existence the appellant only became aware after judicial proceedings were brought. However, the ECJ took a different view. It held that the appellant had raised this issue by way of a new plea in law. Thus, the ECJ partially set aside the judgment of the CFI. However, on the merits, it dismissed this claim holding that the new documents could not have successfully sustained its defence); *Pitsiorlas v Council and ECB* (C-193/01 P) [2003] E.C.R. I-4837 (ruling that the CFI had constructed the concept of “excusable error” too restrictively); *Arbed SA v Commission* (C-176/99 P) [2003] E.C.R. I-10687; [2005] 4 C.M.L.R. 6 (where, contrary to the view sustained by the CFI, the ECJ held that a statement of objections not addressed to the appellant, denying it access to the file and not specifying that fines might be imposed, violated the appellant’s right of defence); *Aristrain v Commission* (C-196/99P) [2003] E.C.R. I-11005 (holding that, when an infringement is attributed to two companies in an equal measure, but the fine is only imposed to one of them, the Commission must provide specific reasons to justify its decision); *Mattila v Council and Commission* (C-353/01 P) [2004] E.C.R. I-1073; [2004] 1 C.M.L.R. 32 (holding that the fact that the defendants explained for the first time before the CFI why partial access to the documents requested was not possible, was not sufficient to comply with their duty to state reasons); *Hector v Parliament* (C-150/03 P) [2004] E.C.R. I-8691 (holding that a general statement or mere reference to the fact that the recruitment procedure had been properly conducted was not sufficient to comply with the obligation to state reasons when, in spite of being the first in the list of selected candidates, the appellant had been overlooked).

**References for a preliminary ruling concerning validity (RPRV)***Table 13: Results of RPRV (2001–2005)*

	Total	%
Jurisdiction declined	2	4.6%
Measure valid	36	81.8%
Measure annulled	6	13.6%
Total	44	100%

In the period under review, out of 44 references for a preliminary ruling concerning the validity of Community measures, the ECJ made a declaration of invalidity in six cases (13.6 per cent).<sup>91</sup> The rate of success of 13.6 per cent compares unfavourably both with the rate of success of privileged applicants in direct actions before the ECJ (30.7 per cent) and the rate of success of individuals in direct actions before the CFI (31.8 per cent). The reason for such a low rate may be found in the type of measure challenged: the vast majority of preliminary references involved actions against measures of general application. The data appear to suggest that, even where individuals do not face the high hurdle of admissibility imposed by art.263.4 (ex 230(4) EC), their chances of success remain in fact low.

*Results of RPRV by court formation*

The court formation was as follows: nine cases (20.5 per cent) were heard by a three-judge chamber, 22 cases (50 per cent) were heard by a five-judge chamber and 13 cases (29.5 per cent) were heard by the full court. As with direct actions, there appears to be a correlation between the court formation and the chances of success but, oddly, in preliminary references the correlation is the reverse. In cases heard by a three-judge chamber, three measures (33 per cent) were annulled; in cases heard by a five-judge chamber, two measures (9 per cent) were annulled, and in cases heard by the full court only one measure (7.6 per cent) was annulled. It appears that the higher the court formation, the less likely that the court will invalidate the measure. In the only case where the ECJ proceeded to annul a directive, it did so as a full court.<sup>92</sup> Still, the figures

<sup>91</sup> These were the following: *Kloosterboer Rotterdam* (C-317/99) [2001] E.C.R. I-9863; *Cabletron Systems Ltd v Revenue Commissioners* (C-463/98) [2001] E.C.R. I-3495; *Jacob Meijer BV, Eagle International Freight BV v Inspecteur van de Belastingdienst—Douanedistrict Arnhem* (C-304/04 & 305/04) [2005] E.C.R. I-6251; *Duchon v Pensionsversicherungsanstalt der Angestellten* (C-290/00) [2002] E.C.R. I-3567; [2002] 2 C.M.L.R. 23; *R. (on the application of ABNA Ltd) v Secretary of State for Health* (C-453/03, C-11/04, C-12/04 & C-194/04) [2005] E.C.R. I-10423; [2006] 1 C.M.L.R. 48; *Finanzamt Sulingen v Sudholz* (C-17/01) [2004] E.C.R. I-4243; [2004] 2 C.M.L.R. 31.

<sup>92</sup> *ABNA* (C-453/03) [2005] E.C.R. I-10423. The ECJ annulled Directive 2002/2 on the circulation of compound feedingstuffs on grounds of breach of the principle of proportionality. The Directive had been adopted following intense political negotiations in order to increase the protection of public health in the aftermath of the bovine spongiform encephalopathy and the dioxin crises.

confirm that small court formations also have teeth: In one case, a three-member chamber annulled a minor part of a policy measure.<sup>93</sup>

Table 14: Results of RPRV by type of measure

	Decision	Directive / Regulation	Total
Jurisdiction declined		2	2
Measure valid	3	33	36
Measure annulled	1	5	6
Total	4	40	44

The vast majority of references concerned the validity of measures of general application (40 out of 44). Five out of 40 such measures (12.5 per cent) were annulled whereas one out of four decisions (25 per cent) was annulled. In three out of five cases where measures of general application were annulled, the Court was called upon to verify whether implementing Commission regulations complied with their respective parent Council regulation. In other words, the Court sought to determine whether implementing legislation was “ultra vires”.<sup>94</sup> In the other two cases, the ECJ annulled a Council Regulation on the ground that it did not comply with the provisions of the Treaty on free movement of workers<sup>95</sup> and a Council and Parliament Directive for breach of the principle of proportionality.<sup>96</sup> In the remaining case, the ECJ invalidated a decision by which the Council authorised Germany to derogate from the Sixth VAT Directive insofar as it provided authorisation with retroactive effect on the ground that it breached the principle of protection of legitimate expectations.<sup>97</sup> Thus, the successful grounds of review provide a good mix: excess of delegated authority on the part of Commission, breach of the free movement provisions of the Treaty, and breach of general principles (proportionality and protection of legitimate expectations).

<sup>93</sup> *Duchon v Pensionsversicherungsanstalt der Angestellten* (C-290/00) [2002] E.C.R. I-3567 (the ECJ annulled art.9(a) of Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the community [1983] OJ L230/8 on the ground that it ran counter to arts 45(2) and 49 TFEU (ex 48(2) and 51 EC later renumbered arts 39(2) and 43 EC).

<sup>94</sup> *Kloosterboer Rotterdam* (C-317/99) [2001] E.C.R. I-9863 (the ECJ annulled Regulation 1484/95 implementing Regulation 2777/75 [1995] OJ L145/47 on the ground that the Commission had exceeded the bounds of the parent Council regulation which reformed the Community regime on import of poultry meat in the light of WTO law); in *Cabletron Systems Ltd* (C-463/98) [2001] E.C.R. I-3495 and *Jacob Meijer BV* (C-304/04) [2005] E.C.R. I-6251, the ECJ annulled Commission regulations classifying products under the common customs tariff nomenclature on the ground that the Commission had classified the products in issue under the wrong heading.

<sup>95</sup> *Duchon v Pensionsversicherungsanstalt der Angestellten* (C-290/00) [2002] E.C.R. I-3567. The ECJ annulled art.9(a) of Regulation 1408/71 on the ground that it ran counter to arts 45(2) and 49 TFEU (ex 48(2) and 51 EC, later renumbered arts 39(2) and 43 EC).

<sup>96</sup> See *ABNA* (C-453/03) [2005] E.C.R. I-10423.

<sup>97</sup> *Finanzamt Sulingen v Sudholz* (C-17/01) [2004] E.C.R. I-4243.

The success of a claim does not appear to be correlated to the seniority of the court that made the reference or depend on whether it is a specialised court or tribunal. In cases where the ECJ proceeded to annulment, the references came from diverse courts and mostly from courts covered by art.267(2) TFEU (ex 234(2) EC).<sup>98</sup> The ECJ's constituency remains a broad one in terms of geography, seniority, and breadth of jurisdiction.

*Table 15: Results of RPRV by subject matter*

	Agriculture	Approximation of laws	Common customs tariff	Social policy	Others	Total
Jurisdiction declined		1			1	2
Measure valid	17	6	2	2	9	36
Measure annulled	1	2	2	1		6
Total	18	9	4	3	10	44

As appears from the above table, 18 out of 44 references (41 per cent) concerned the validity of agricultural measures, whereas nine references (20.5 per cent) concerned the validity of measures relating to the approximation of laws. Thus, in terms of subject matter, as with direct actions, agricultural measures were the most oft-challenged. In relation to other categories, there appear to be variations. Whilst a substantial proportion of direct actions involved challenges against state-aid and common commercial policy measures, a category which featured prominently in preliminary references was measures for the approximation of laws. The reason for this difference lies in the fact that harmonisation measures require implementation at national level and would be highly unlikely to be susceptible to judicial review by direct action brought by private parties given the restrictive effect of art.263(4) (ex 230(4) EC). In practice, therefore, the only way of challenging them is via national courts.<sup>99</sup>

<sup>98</sup> The referring courts were as follows: Customs Appeal Commissioners, Ireland (*Cabletron Systems Ltd v Revenue Commissioners* (C-463/98) [2001] E.C.R. I-3495); Administrative Court for Trade and Industry, Netherlands (*Kloosterboer* (C-317/99) [2001] E.C.R. I-9863); Supreme Court of Austria (*Duchon* (C-290/00) [2002] E.C.R. I-3567); Federal Finance Court, Germany (*Sulingen* (C-17/01) [2004] E.C.R. I-4243); Regional Court of Appeal, the Netherlands (*Jacob Mejer*); High Court, England and Wales (*ABNA* (C-453/03) [2005] E.C.R. I-10423).

<sup>99</sup> The plea of illegality under art.241 EC (now 277 TFEU) would be unlikely to provide an alternative means of challenge as Community measures for the approximation of laws commonly do not father other Community acts.



*Table 16: Results of RPRV by type of plaintiff*

	Total	%
Legal person	32	72.7%
Legal person and individual	2	4.5%
Individual	6	13.6%
Public authority	4	9.1%
Total	44	100%

*Table 17: Results of RPRV by type of defendant*

	Total	%
Legal person	4	9.1%
Legal person and individual	2	4.5%
Individual	3	6.8%
Public authority	35	79.5%
Total	44	100%

*Table 18: Results of RPRV by type of proceedings*

	Total	%
Legal person v public authority	29	65.9%
Individual v public authority	10	22.7%
Legal person v legal person	4	9.1%
Public authority v public authority	1	2.3%
Total	44	100%

As might be expected, the overwhelming majority of references where the validity of a Community measure was challenged originated from “vertical proceedings”, i.e. litigation between legal or natural persons and public authorities. Thirty nine out of 44 references (88.6 per cent) fell into this category. In four cases, the validity of Community regulations was questioned in proceedings between corporations, including in the context

of a contractual dispute,<sup>100</sup> and, notably, in one case, the main action involved proceedings between public entities.<sup>101</sup>

## Conclusions

In the period under investigation, the most common type of action were preliminary references concerning the interpretation of Community law. One-fourth of the total number of rulings, including judgments and orders, delivered by the ECJ and CFI together fell into this category. Almost one-fifth (19 per cent) of the total number of rulings were actions for judicial review, namely, direct actions for annulment, actions for failure to act, and references for preliminary rulings concerning the validity of Community measures.<sup>102</sup> The vast majority of actions concerning judicial review were direct actions for annulment. The percentage of indirect challenges to validity through preliminary references remained low and that of actions for failure to act almost negligible. The annual number of judicial review actions heard by the ECJ remained relatively stable over the period studied. By contrast, the actions heard by the CFI showed significant variations, alternating low activity years in 2001 and 2004 and high activity years in 2002 and 2005.

As could be expected, the figures reveal differences on court-formation patterns. Whilst before the CFI, 74 per cent of cases were heard by a three-judge chamber and 26 per cent of cases were heard by a five-judge chamber, before the ECJ only 16 per cent of cases were heard by a three-judge chamber, while 84 per cent of cases were heard at least by a five-judge bench. These variations are explained by the following factors. The CFI sits, in principle, in chambers of three or five judges and only in very exceptional circumstances as a grand chamber.<sup>103</sup> It also appears to have a policy of favouring the lowest possible formation for reasons of judicial efficiency, which explains the high percentage of cases heard by a three-judge formation. By contrast, the ECJ hears a higher number of cases in a five-judge formation than in a three judge formation. Furthermore, where the validity of a Community act is challenged before the ECJ by a privileged applicant (i.e. a Member State or a Community institution) the litigation is in a formal sense constitutional in nature and may justify being heard by the ECJ sitting in plenary session.<sup>104</sup>

<sup>100</sup> *Carl Kühne GmbH & Co KG v Jütro Konservenfabrik GmbH & Co KG* (C-269/99) [2001] E.C.R. I-9517 (the defendant pleaded unsuccessfully the invalidity of Regulation 590/1999 [1999] OJ L74/8 on geographical indications of origin in the context of non-contractual proceedings); *Hassle AB v Ratiopharm GmbH* (C-127/00) December 11, 2003 (unsuccessful challenge against the validity of Regulation 1768/92 on medicinal products [1992] OJ L182/1); *Axel Springer AG v Zeitungsverlag Niederrhein GmbH & Co Essen KG* (C-435/02 & C-103/03) September 23, 2004 (unsuccessful challenge against Directive 90/605 on annual accounts [1990] OJ L317/60); *Eridania SpA v Azienda Agricola* (C-160/98) March 12, 2002 (validity of agricultural regulation questioned unsuccessfully in the context of contractual proceedings).

<sup>101</sup> *Regione Autonoma Friuli-Venezia Giulia v Ministero delle le Politiche Agricole e Forestali* (C-347/03) [2005] E.C.R. I-3785 (unsuccessful challenge against the Association Agreement with Hungary in proceedings between an autonomous region and a regional agency).

<sup>102</sup> Many preliminary references where the validity of a Community measure was questioned also raised questions of interpretation but, for the purposes of convenience, in the present study they are classified in the category of actions for judicial review.

<sup>103</sup> See Statute of the ECJ art.50 and Rules of Procedure of the CFI arts 10 and 11(1). Note that references are made here to the versions of the ECJ Statute and the Rules of Procedure of the CFI as currently applicable and available at [http://curia.europa.eu/jcms/jcms/Jo2\\_7040/](http://curia.europa.eu/jcms/jcms/Jo2_7040/) [Accessed February 3, 2010]. Whilst important changes have been made to them since the period under review, those changes are not material to the points made here.

<sup>104</sup> Note that, under art.16(3) of the Statute of the ECJ, the Court sits in a Grand Chamber when a Member State or an institution of the Communities that is party to the proceedings so requests.

Unsurprisingly, most direct actions for annulment sought to challenge the validity of Community decisions. The greatest percentage targeted Commission decisions (77 per cent), followed by Commission regulations (7 per cent) and Council Regulations (5.8 per cent). Directives, by contrast, represented only 3 per cent of the total number of measures challenged during the period studied. The mix was different in the case of preliminary references. The overwhelming majority of references concerned the validity of measures of general application (91 per cent). More specifically, 66 per cent of the rulings dealt with the validity of Council or Commission regulations and 16 per cent dealt with the validity of directives.

A number of conclusions may be drawn in relation to the rate of success of annulment actions. Notably, the rate of success, including both partial and complete annulments, before the CFI (30.7 per cent) was very similar to the rate of success before the ECJ (31.8 per cent). The overall picture therefore suggests that, at least in numerical terms, one court is not more active than the other. The rate of 31–32 per cent is in itself not low: almost one out of three applicants seeking the review of a Community measure will manage to get something out of the litigation. The rate of success however varies considerably depending on the nature of the contested measure. Where the contested measure is a Community decision, the rate of success is 35.8 per cent for actions for annulment lodged before the CFI and 33.9 per cent for actions lodged before the ECJ. Where, however, the contested measure is one of general application, the rate of success drops down to 6.4 per cent for actions lodged before the CFI and 16.1 per cent for actions lodged before the ECJ.

Notably, in most cases where measures of general application were annulled either in direct actions or preliminary reference proceedings, the ECJ was called upon to determine whether measures adopted by the Commission complied with their respective parent Council legislation. They thus fell into the category of review of administrative rule-making rather than review of constitutionality of legislation. Challenges to the policy choices of the Community legislature remain rare and successful challenges even rarer. The control of policy-making remains primarily a matter for the political process, influenced only to a limited extent by the process of adjudication. Furthermore, the very low number of actions for failure to act (13) and the fact that none of them was successful reinforces the “negative character” of judicial review. It has much higher value as a mechanism to contest specific choices of the political institutions than as a mechanism to question their inactivity.

Although in most cases the ECJ annulled on procedural grounds, annulments on the basis of substantive grounds also occurred. General principles, especially proportionality and respect for legitimate expectations continue to be important as grounds of review. By contrast, fundamental rights are not a ground of review which featured prominently or brought any success in actions against the Community institutions. This however should be read subject to the proviso that specific process rights, which derive from the fundamental right of due process, such as the right to give reasons, provide a fruitful and sometimes successful ground of litigation.

Predictably, there are important variations between the two courts as regards admissibility. The CFI dismissed 58.6 per cent of actions as inadmissible. This high percentage indicates how difficult it is for non-privileged applicants to get access to justice. By

contrast, only 10.7 per cent of actions were dismissed as inadmissible by the ECJ. This can be explained by the fact that applicants to the ECJ are privileged applicants whose standing is guaranteed by the Treaty.

In direct actions before the ECJ, Member States proved the most active applicants. Out of 140 actions, 125 actions (89 per cent) were initiated by Member States, while only 12 actions (8.6 per cent) were initiated by Community institutions. The numerically low presence of institutions is the result of a shift in the political balance of powers. In the 1990s, the European Parliament was an active litigant following a tactical litigation policy under which it challenged practically any policy measure which allegedly breached its prerogatives even if it agreed with its substantive provisions. But as successive treaty amendments increased its legislative powers, the need to rely on litigation to influence the legislative process steadily declined and the Parliament now finds itself much more often in the role of the defendant than in the role of the applicant.

The litigation behaviour of the Member States makes for interesting reading. Most actions are attributable to a small cluster of states. Spain, Italy, Netherlands, Greece and Germany lodged 71.2 per cent of all applications initiated by Member States. Spain lodged 25 applications (20 per cent), followed by Italy, which lodged 22 applications (17.6 per cent). A factor which may explain the concentration of actions in such a small number of Member States is the way Community funds are allocated. Spain, Italy and Greece, who are among the most active litigants, are also among the main recipients countries of Community funds and thus, the most likely to complain the way funds are allocated. Moreover, by comparing their rate of success, one could suggest that Member States have better chances of succeeding when relying on violations of technical provisions of secondary legislation, than when invoking infringements of general principles.

Unsurprisingly, legal persons accounted for most of the actions lodged by non-privileged applicants before the CFI. In particular, 295 actions (87 per cent) were lodged by legal persons, whilst only 30 actions (9 per cent) were lodged by natural persons. The rate of success of legal persons (35 per cent) was considerably higher than that of natural persons (10 per cent). Similarly, the percentage of actions dismissed as inadmissible was considerably higher in those lodged by natural persons (50 per cent) than those initiated by legal persons (30 per cent). In other words, the figures show that it is particularly difficult for natural persons to succeed in challenging the validity of a Community measure, let alone a policy one.

The rate of success of actions lodged with the CFI appears not to be affected by the court formation, with similar results whether the case was heard by a three-judge chamber or a five-judge chamber. By contrast, where it comes to direct actions before the ECJ, the figures show that the higher the court formation, the higher the likelihood for the action to be successful. Indeed, out of the total number of actions heard by a three-judge chamber, 18.2 per cent of the contested measures were annulled or partially annulled. The rate of success rose to 28.6 per cent for cases heard by a five-judge chamber and rose again to a staggering 44.1 per cent for cases heard by the court sitting in plenum. It seems that it is in the applicant's interests to have the case heard by a plenary formation.

Preliminary references provide a different picture. The rate of success of 13.6 per cent in preliminary references compares unfavourably both with the rate of success of privileged

applicants in direct actions before the ECJ which is 30.7 per cent and the rate of success of individuals in annulment actions before the CFI which lies at 31.8 per cent. This suggests that an individual's chances of obtaining the annulment of a Community measure in preliminary references proceedings are lower than in direct actions. The data appear to suggest that, even where individuals do not face the high hurdle of admissibility imposed by art.263.4 TFEU (ex 230(4) EC), their chances of success remain in fact low. It may be viewed as a factor in favour of liberalising locus standi in direct actions before the CFI but it is not in itself conclusive. Abandoning a strict interpretation of the requirements of direct and individual concern may not lead to a higher rate of success but it is likely to increase the judicial time dealing with applications by non-privileged applicants.

As with direct actions, there appears to be a correlation between the court formation and the chances of success but, oddly, in preliminary references the correlation is the reverse. In cases heard by a three-judge chamber, three measures (33 per cent) were annulled; in cases heard by a five-judge chamber, two measures (9 per cent) were annulled, and in cases heard by the full court only one measure (7.6 per cent) was annulled. It appears that the higher the court formation, the less likely the court will find issues affecting the validity of the measure. By contrast, the success of a claim does not appear to be correlated to the seniority of the court that made the reference or depend on whether it is a specialised court or tribunal. In cases where the ECJ proceeded to annulment, the references came from diverse courts and mostly from courts covered by art.263.4 (ex 234(2) EC).

Over the period studied, the ECJ heard 161 appeals against CFI rulings on actions of annulment and actions for failure to act. It confirmed the CFI's judgment in 129 cases (80 per cent) and set it aside in 32 cases (20 per cent), i.e. one in five appeals were successful. On a yearly basis, however, the appellate rate of success showed some variations, ranging from 10 per cent in 2001 to 36 per cent in 2003. The rate of success also appeared to be influenced by court formation: in appeals heard by a three-member chamber, 11 per cent of CFI rulings were set aside; in appeals heard by a five-judge chamber 23 per cent of rulings were set aside; and in appeals heard by a full court, 33 per cent of rulings were set aside. In other words, the data seems to indicate that the higher the formation of the ECJ, the more likely for the appeal to be successful. On appeal, Community institutions were more successful in questioning the CFI rulings on admissibility, than in challenging the CFI's holdings on the substance. Finally, legal and natural persons were more successful in invoking the breach of procedural rights to set aside a ruling of the CFI than in contesting its interpretation of substantive provisions.