JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

17 June 1998 *

In Case T-135/96,

Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME), an association formed under Belgian law, established in Brussels, represented by Francis Herbert and Daniel Tomasevic, of the Brussels Bar, and Geneviève Tuts, of the Liège Bar, with an address for service in Luxembourg at the Chambers of Carlos Zeyen, 67 Rue Ermesinde,

applicant,

supported by

Confédération Générale des Petites et Moyennes Entreprises et du Patronat Réel (CGPME), an association formed under French law, established in Puteaux (France),

Union Professionnelle Artisanale (UPA), an association formed under French law, established in Paris,

* Language of the case: French.

Nationaal Christelijk Middenstandsverbond (NCMV), an association formed under Belgian law, established in Brussels,

Koninklijke Vereniging MKB-Nederland, an association formed under Netherlands law, established in Delft (Netherlands),

Fédération des Artisans, an association formed under Luxembourg law, established in Luxembourg,

Confederazione Generale Italiana del Artigianato (Confartigianato), an association formed under Italian law, established in Rome,

Wirtschaftskammer Österreich, an organisation governed by Austrian public law, established in Vienna,

Bundesvereinigung der Fachverbände des Deutschen Handwerks eV (BFH), an association formed under German law, established in Bonn (Germany),

represented by Paul Beghin, of the Luxembourg Bar, with an address for service at his Chambers, 67 Rue Ermesinde,

interveners,

Council of the European Union, represented by Frédéric Anton, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Maria Patakia, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

APPLICATION for annulment of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by the Union des Confédérations de l'Industrie et des Employeurs d'Europe (UNICE), the Centre Européen de l'Entreprise Publique (CEEP) and the Confédération Européenne des Syndicats (ETUC) (OJ 1996 L 145, p. 4),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of: P. Lindh, President, R. García-Valdecasas, K. Lenaerts, J. D. Cooke and M. Jaeger, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 11 March 1998,

gives the following

Judgment

Facts and procedure

1 The Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME; hereinafter 'the applicant') is a European association which represents and defends at European level the interests of small and medium-sized undertakings (hereinafter 'SMUs').

2 On 3 June 1996, on the basis of Article 4(2) of the Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland (hereinafter 'the Agreement'), annexed to Protocol (No 14) on social policy, annexed to

the Treaty establishing the European Community, the Council adopted Directive 96/34/EC on the framework agreement on parental leave concluded by the Union des Confédérations de l'Industrie et des Employeurs d'Europe (UNICE), the Centre Européen de l'Entreprise Publique (CEEP) and the Confédération Européenne des Syndicats (ETUC) (OJ 1996 L 145, p. 4).

3 Directive 96/34 constitutes the first legislative act adopted on the basis of Articles 3 and 4 of the Agreement, which provide as follows:

'Article 3

1. The Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.

2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action.

3. If, after such consultation, the Commission considers Community action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.

4. On the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided for in Article 4. The

duration of the procedure shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article 4

1. Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.

2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 2, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

The Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas referred to in Article 2(3), in which case it shall act unanimously.'

4 In its Communication concerning the application of the Agreement on social policy (COM/93/600 Final; hereinafter 'the Communication'), the Commission describes the applicant as an employers' federation or association which is 'very representative' for specific categories of enterprises or specific aspects of their activities, within the category of cross-industry organisations representing certain categories of workers or undertakings. As such, the applicant is included in the list, set out in Annex 2 to the Communication, of organisations which comply with the criteria set out in paragraph 24 thereof with a view to ensuring the proper functioning of the consultation process provided for in Article 3 of the Agreement. Among those listed are general cross-industry organisations and cross-industry organisations representing certain categories of workers or undertakings. At para-

graph 49 of the Communication, the Commission states that it 'feels that [the] Communication lays down the ground rules for the implementation of the new procedures so that business can be conducted efficiently and openly'.

5 In 1983 the Commission had drafted a proposal for a directive on parental leave and leave for family reasons, which the Council never adopted. On 21 January 1995 the Commission decided, in accordance with Article 3(2) of the Agreement, to consult management and labour on the possible direction of Community action with regard to reconciling working and family life.

6 On 6 April 1995 the applicant and some of the other representative associations consulted addressed to the Commission a document stating a common position. The signatories to that document urged the Commission to do everything in its power to ensure that certain important issues and certain representatives of management and labour were not excluded from the negotiations.

7 In June 1995, considering Community action to be advisable, the Commission once again consulted management and labour on the content of the envisaged proposal, in accordance with Article 3(3) of the Agreement. On 5 July 1995 the applicant and the other associations mentioned above once again submitted a statement of a common position.

8 On the same day, UNICE, CEEP and the ETUC informed the Commission, in accordance with Article 3(4) of the Agreement, of their desire to exercise the option available under Article 4(1) of opening negotiations on parental leave.

9 On 6 November 1995 UNICE, CEEP and the ETUC agreed on a proposal for a framework agreement. On 14 December 1995 they concluded the framework agreement on parental leave (hereinafter 'the framework agreement'), which they submitted to the Commission with the request that it be implemented by a Council decision on a proposal from the Commission, in accordance with Article 4(2) of the Agreement. Meanwhile, by communications of 30 November and 13 December 1995, the applicant informed the Commission of its regret at having been unable to take part in the dialogue between management and labour, and submitted its criticisms of the proposed framework agreement.

10 On 20 December 1995 the Commission forwarded a copy of the framework agreement to those organisations which, like the applicant, it had consulted or informed beforehand but which were not signatories, inviting them to a meeting on 5 January 1996 for information and discussion. The applicant attended that meeting.

11 It was in those circumstances that Directive 96/34, giving effect to the framework agreement, was adopted by the Council on 3 June 1996.

12 By an application lodged at the Registry of the Court of First Instance on 5 September 1996, the applicant brought an action under Article 173 of the EC Treaty for annulment of Directive 96/34.

13 By separate document, lodged at the Registry in accordance with Article 114(1) of the Rules of Procedure of the Court of First Instance on 21 November 1996, the Council raised a plea of inadmissibility. The applicant submitted observations on that plea by document of 30 January 1997, lodged at the Registry on 31 January 1997. By order of 18 March 1997 the Court of First Instance (Fourth Chamber) decided to reserve its decision in that regard for the final judgment.

14 By application lodged on 20 January 1997 the Commission applied, pursuant to Article 115 of the Rules of Procedure of the Court of First Instance and Article 37, first paragraph, of the EC Statute of the Court of Justice, for leave to intervene in support of the form of order sought by the Council. By order of 18 March 1997 the President of the Fourth Chamber of the Court of First Instance granted the Commission leave to intervene. On 17 June 1997 the Commission lodged a statement in intervention, on which the applicant submitted its observations on 9 September 1997.

15 By application lodged on 24 January 1997 the Confédération Générale des Petites et Moyennes Entreprises et du Patronat Réel (CGPME), an association formed under French law, established in Puteaux (France), the Union Professionnelle Artisanale (UPA), an association formed under French law, established in Paris, the Nationaal Christelijk Middenstandsverbond (NCMV), an association formed under Belgian law, established in Brussels, the Koninklijke Vereniging MKB-Nederland, an association formed under Netherlands law, established in Delft (Netherlands), the Fédération des Artisans, an association formed under Luxembourg law, established in Luxembourg, the Confederazione Generale Italiana del Artigianato (Confartigianato), an association formed under Italian law, established in Rome, the Wirtschaftskammer Österreich, an organisation governed by Austrian public law, established in Vienna, and the Bundesvereinigung der Fachverbände des Deutschen Handwerks eV (BFH), an association formed under German law, established in Bonn, applied, pursuant to Article 115 of the Rules of Procedure of the Court of First Instance and Article 37, second paragraph, of the Statute of the Court of Justice, for leave to intervene in support of the form of order sought by the applicant. By order of 18 March 1997 the President of the Fourth Chamber of the Court of First Instance granted them leave to intervene (Case T-135/96 *UEAPME* v *Council* [1997] ECR II-373). On 18 June 1997 the above bodies lodged a statement in intervention, on which the Council submitted its observations on 8 September 1997.

16 By decision of the Court of First Instance of 18 April 1997, the case was assigned to the Fourth Chamber, Extended Composition. The original parties to the proceedings agreed to that procedural measure.

17 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. By way of measures of organisation of pro-

cedure, however, it called on the parties to submit written replies to a number of questions prior to the hearing, and asked the Council to lodge copies of certain documents. Those requests were met within the time-limits respectively set.

18 At the hearing in open court on 11 March 1998, the parties presented oral argument and replied to questions put to them by the Court.

Forms of order sought

19 The applicant claims that the Court should:

— annul, pursuant to Article 173 of the Treaty, Directive 96/34;

— in the alternative, annul, pursuant to Article 173 of the Treaty, Directive 96/34 with respect solely to its application to SMUs, referred to in Article 2(2) of the Agreement;

— order the Council to pay the costs.

20 The Council contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant and the parties which have intervened in support of the form of order sought by the applicant to pay the costs.

21 The parties intervening in support of the form of order sought by the applicant claim that the Court should:

— take formal note of the fact that they are acting in support of the form of order sought by the applicant;

— annul, pursuant to Article 173 of the Treaty, Directive 96/34 and, in the alternative, annul, pursuant to Article 173 of the Treaty, Directive 96/34 with respect solely to its application to SMUs, referred to in Article 2(2) of the Agreement;

— order the Council to pay all costs and expenses, including the costs and expenses occasioned by their intervention.

22 The Commission, intervening in support of the form of order sought by the Council, contends that the Court should:

— dismiss the action as inadmissible;

— dismiss the action as unfounded;

— order the applicant and the parties which have intervened in support of the form of order sought by the applicant to pay the costs.

23 The applicant puts forward five pleas in law in support of its action: (i) infringement of Articles 3(1) and 4(1) of the Agreement; (ii) breach of the principle *patere legem quam ipse fecisti*; (iii) discrimination as between the various representative organisations; (iv) infringement of Article 2(2) of the Agreement; and (v) breach of the principles of subsidiarity and proportionality.

Admissibility

Arguments of the parties

24 By its plea of inadmissibility, the Council submits that the action is inadmissible by reason of the nature of the measure contested and, in the alternative, by reason of the fact that Directive 96/34 is of neither direct nor individual concern to the applicant.

25 The Council argues that Directive 96/34 is a legislative measure and as such, pursuant to the Article 173, fourth paragraph, of the Treaty, cannot be challenged in proceedings for annulment by a legal person such as the applicant. Where an action for annulment is brought by an individual, its admissibility is subject to the requirement that the contested measure, irrespective of its form or legislative designation, constitute in reality a decision within the meaning of Article 189 of the Treaty (Case 307/81 *Alusuisse* v *Council and Commission* [1982] ECR 3463, Case 147/83 *Binderer* v *Commission* [1985] ECR 257, Case 26/86 *Deutz and Geldermann* v *Council* [1987] ECR 941, paragraph 6, and Joined Cases 250/86 and 11/87 *RAR* v *Council and Commission* [1989] ECR 2045). In the present case the contested measure clearly exhibits all the characteristics which distinguish a directive. In the Council's submission, it is not possible to ascertain with any degree of precision the number or even the identity of those to whom Directive 96/34 applies. Nor is the applicant mentioned therein. Furthermore, since Directive 96/34 is framed in particularly general terms, it has no application until it has been trans-

posed into domestic law by the Member States, in which connection they enjoy a very broad discretion.

26 In the alternative, the Council maintains that the contested measure is of neither direct nor individual concern to the applicant. Directive 96/34 cannot be of direct concern to the applicant since it is intended to create, not rights for individuals, but only obligations for the Member States, which are recognised as enjoying a broad discretion in the way they discharge their obligation to ensure its transposition. Secondly, the Council emphasises that the applicant has failed to establish either the existence of certain attributes which are peculiar to it or a factual situation which differentiates it from all other persons, such that it must be regarded as individually concerned by Directive 96/34. The Council sets out the various factors which lead it to those conclusions.

27 The Council points out that the applicant cannot establish that its action for annulment is admissible simply by showing that it took part in the procedure for the adoption of the directive, since the fact remains that Directive 96/34 is a legislative measure, drafted in general and abstract terms, and is not addressed to the applicant (see the order of 23 November 1995 in Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 40; orders of 20 October 1994 in Case T-99/94 *Asocarne* v *Council* [1994] ECR II-871 and in Case T-116/94 *Cassa Nazionale di Previdenza ed Assistenza a favore degli Avvocati e Procuratori* v *Council* [1995] ECR II-1).

28 Nor are the judgments in Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219 and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, which concern, respectively, decisions prohibiting aid or refusing to open the procedure provided for in Article 93(2) of the Treaty, of any relevance. The Council maintains that an association which is not the addressee of the contested measure has a right of action only if it has acted in the place of one or more of its members who would themselves have been in a position to bring an admissible action (Joined Cases T-447/93, T-448/93 and T-449/93

AITEC and Others v *Commission* [1995] ECR II-1971, paragraph 60), or if it is able to establish a sufficient interest in bringing proceedings on its own account (*Van der Kooy* v *Commission*, paragraphs 17 to 25).

29 In this case, according to the Council, the applicant cannot claim that, in bringing these proceedings, it acted in the place of one or more of its members to whom Directive 96/34 is of individual concern: none of the applicant's members possesses such a right of action.

30 Equally, the applicant cannot claim that Directive 96/34 affected its right to take part in the negotiation of agreements concluded between management and labour in accordance with Article 4 of the Agreement, since the directive gives effect to an agreement in whose conclusion the applicant did not participate, despite being involved in the consultations preceding its negotiation.

31 Accordingly, the Council seeks to show that the applicant cannot have an interest in bringing the present proceedings simply because it is acknowledged as representing certain interests. It submits that the fact that, having regard to the scope of the contested measure, the applicant is not sufficiently representative prevents its action from being admissible. Since the applicant represents only certain categories of undertakings, it cannot be recognised as having a right of action against a measure which concerns all undertakings. Significantly, the applicant does not object to being listed in Annex 2 to the Communication as one of the 'cross-industry organisations representing certain categories of workers or undertakings'. Furthermore, it possesses no right to negotiate any social legislation at European level; nor is that its natural role. In any event, even if the applicant were to be recognised as representative, having regard to the scope of the contested measure, it would still not have a sufficient interest in bringing proceedings, since Directive 96/34 does not affect it by reason of circumstances which differentiate it from all other per-

sons. In order to be so regarded, the applicant must first show that the representativity which it claims is exclusive to itself. That, however, it has failed to do.

32 The Council also contends that, for the purposes of establishing an interest in bringing proceedings, the applicant cannot claim that it possesses the status of a negotiator or that it has a right to negotiate; nor can it rely on the right to an effective judicial remedy.

33 First, in the Council's submission the applicant is wrong in claiming that it possesses the 'status of a negotiator' and 'a right to negotiate'. The question whether an organisation possesses the status of a negotiator is a question of fact which must be assessed by reference to that organisation's situation as it stands at the end of the negotiations. In the present case, the Council points out that the applicant did not at any time participate in the negotiations between management and labour which led to the conclusion of the framework agreement. Having failed to show that in some manner it participated in the negotiation process, the applicant cannot claim to have the status of a negotiator. Secondly, the right to negotiate relied on by the applicant cannot be inferred solely from the fact that it was consulted or took part in the consultation procedure.

34 The Council emphasises first that the succession of events which began with consultation and ended with the adoption of Directive 96/34 does not constitute a sequence of acts forming part of one and the same procedure. Articles 2 and 4 of the Agreement established two separate procedures.

35 The first procedure, referred to in Article 2 of the Agreement, opens with the Commission's consultation of management and labour with a view to drawing up the proposal referred to in Article 3(3) of the Agreement. It was at this stage of that procedure that the applicant was consulted. The second procedure, referred to in Article 4 of the Agreement, opens with negotiations between management and labour with a view to the Commission's drawing up a proposal. The Commission is not in charge of the negotiation stage of the second procedure and the document

which emerges is an agreement between private persons. The applicant did not take part in the negotiation stage that opened the second procedure.

36 The Council next observes that the only link between the two procedures is the starting point of the second procedure, which overlaps with the consultation stage of the first procedure. The Council also states that these two procedures do not both culminate in the adoption of the same type of act. The first procedure, being of a classically legislative nature, leads to the adoption of a Council measure on the basis of Article 2 of the Agreement, in accordance with the 'cooperation procedure' laid down in Article 189c of the Treaty, that is to say, in cooperation with the European Parliament and after consulting the Economic and Social Committee. The second procedure, which is essentially a contractual process conducted by and at the behest of parties representing economic and social interests, leads to the adoption of a Council measure on the basis of Article 4 of the Agreement, in accordance with a procedure which makes no provision for consultation of either the European Parliament or the Economic and Social Committee. Consequently, the Council maintains, the fact of having been consulted in the context of the first procedure does not give rise to any right to found on the fact of having been excluded from the second procedure.

37 Lastly, according to the Council, there is no provision giving a representative of management or labour the right to negotiate any piece of legislation whatsoever with other such representatives by reason of its right to be consulted by the Commission. The Agreement, and more specifically Article 3(4) thereof, merely offers management and labour the possibility of negotiating with one another, and does not confer a right on them. The only right on which the applicant can rely is the right to be consulted by the Commission by virtue of its inclusion in the list annexed to the Communication. In the present case, the applicant was properly consulted.

38 In response to the argument which the applicant, reasoning *a contrario*, bases on the orders of the Court of First Instance in Case T-117/94 *Associazione Agricoltori della Provincia di Rovigo and Others* v *Commission* [1995] ECR II-455 and in Case T-60/96 *Merck and Others* v *Commission* [1997] ECR II-849, the Council contends that the rule postulated by the applicant (which the Council challenges)

could not apply in the present case since the Council, which was responsible for the measure in question, was under no obligation to consult the applicant. The Commission alone was under such an obligation.

39 In any event, even if the applicant had to be recognised as having a right to negotiate, that would not be sufficient to distinguish it, since such a right could also be attributed to any other representative of management or labour who was consulted but did not negotiate the framework agreement.

40 Secondly, the Council maintains that the applicant erroneously relies on the right to an effective judicial remedy in order to establish its interest in bringing proceedings in this case. First, according to the Council, the applicant has failed to show that a reference for a preliminary ruling under Article 177 of the Treaty would not be an effective means of ensuring review of the validity of Directive 96/34. Also, since the applicant as such has no right to take part in the collective negotiation, it cannot rely on the case-law to which it refers (Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041). Lastly, a finding of inadmissibility would not mean that the Community judicature refused to recognise the applicant's representativity in relation to the general defence of the SMUs' interests.

41 The Commission, intervening in support of the form of order sought by the Council, also contends that the present action is inadmissible. It lays particular emphasis on two points. First, the applicant cannot be regarded as individually concerned by Directive 96/34. On that point, the Commission maintains that the applicant's position in the present case is similar in many respects to that of the associations of farmers and fishermen which were the applicants in *Associazione Agricoltori della Provincia di Rovigo and Others* v *Commission* and which, the Court of First Instance held, were not individually concerned by the contested measure. Notwithstanding their assertion that they had to be recognised as individually concerned because of their right to contribute to the drafting of a programme of action under the contested measure, to be submitted for assessment by the Commission, the Court of First Instance dismissed the argument that an association, by virtue of its capacity as representative of a category of operators, is

individually concerned by a measure affecting the general interests of that category, where the measure is of general application, applies to situations determined objectively, and has legal effects in relation to categories of persons viewed generally and in the abstract (*Associazione Agricoltori della Provincia di Rovigo and Others* v *Commission*, paragraphs 16 and 24).

42 Secondly, the Commission contends that the applicant has no direct interest, as defined by the Court of Justice, on which it may rely in order to establish that its action is admissible. The Commission states that, contrary to the applicant's assertions, for it to be possible for an applicant to be regarded as directly concerned, the legal effects produced by the contested measure in relation to that applicant must flow directly from the measure itself and must not be the result of a subsequent decision to which the contested measure inevitably or automatically gives rise (see, on that point, the Opinion of Advocate General Van Gerven in Case C-213/91 *Abertal and Others* v *Commission* [1993] ECR I-3177, point 20). In the present case the contested measure clearly leaves Member States with considerable discretion as to the means to be employed for attaining the objectives which it has set. Moreover, the Commission had specifically proposed that the Council adopt a directive in view of the nature and content of the framework agreement, which allows considerable discretion *vis-à-vis* its implementation at national level.

43 The applicant disputes the arguments put forward by the Council and the Commission.

44 In response to the arguments put forward by the Council, the applicant contends first that the admissibility of the present action must be assessed in the light of the specific nature of Directive 96/34. In that regard, it emphasises that this is the first legislative measure to have been adopted on the basis of the Agreement and the Protocol. Its sole purpose is to place Member States under an obligation to implement a framework agreement concluded by three general cross-industry organisa-

tions. The content of Directive 96/34 was determined by those organisations themselves, while the Community institutions, which are generally called upon to take part in the legislative process, played a purely formal role (see the 13th and 14th recitals in the preamble to Directive 96/34 and the European Parliament's report on the Commission's proposal in relation to that directive). Significant, too, is the fact that the Commission expressed the view in its Communication that the Council has no residual competence to make any amendments to the agreement concluded by management and labour. Consequently, harmonisation of parental leave within all the Member States of the Union, with the exception of the United Kingdom of Great Britain and Northern Ireland, was exclusively entrusted to those three representatives of management and labour which, of their own initiative, opened the negotiation process provided for in Article 4(2) of the Agreement, independently of other such representatives recognised by the Commission. In those circumstances, Directive 96/34 cannot be equated with the directives hitherto examined in this context by the Court of Justice. It differs from classic directives in two respects.

45 First, the use in this case of the directive as legislative instrument was not dictated by any provision of the Treaty, but was a consequence of two choices. First, the cross-industry organisations which negotiated the framework agreement chose to make it effective *erga omnes*, although they could have confined themselves to negotiating a simple agreement producing effects *inter partes*. Second, the Commission chose to submit to the Council a proposal for a directive to make the framework agreement binding *erga omnes* whereas, under Article 4(2) of the Agreement, it could have opted for another of the legislative instruments provided for in Article 189 of the Treaty or — as the German Government maintains in its statement of position on the procedural issues raised by the Agreement — it could have proposed adoption merely of a decision *sui generis*. Because of those two choices, the arguments usually relied on to show that an action brought by an individual for annulment of a directive is inadmissible are not relevant in this case. It is paradoxical to argue that the legislative character of Directive 96/34 affects the admissibility of the present action — which implies that the fact that the applicant is a representative organisation which has been left out of the negotiations precludes it from securing review by the Community judicature of the framework agreement and the origins thereof because the cross-industry organisations which concluded that agreement decided to extend its effects to other representatives of management and labour — when the applicant is specifically challenging the legality of that extension. It would also mean that, by choosing the directive as legisla-

tive instrument, in preference to another form of instrument which it could — or even should — have proposed, the Commission has been able to deprive the applicant of all judicial protection.

46 Secondly, the applicant maintains that the specific nature of Directive 96/34 places the representative organisations which were left out of the negotiations in a special position which the Council cannot disregard. The argument that the applicant is not individually concerned by reason of the fact that it is not a signatory to the framework agreement is beside the point, since the question at the heart of this dispute is, precisely, whether the applicant should have participated in the negotiations and signed the framework agreement.

47 Furthermore, according to the applicant, the Council's arguments based on an analysis of the content of Directive 96/34 and leading to the conclusion that that directive is a legislative instrument fail to take into account its special nature. Thus, it criticises the argument based on the fact that it was not mentioned in the directive by pointing out that this would mean that its participation in the negotiations would have been enough to make the action admissible. Such an argument would provide the representatives of management and labour who took part in the negotiations with an additional reason for not including the applicant. Similarly, the argument that the content of the directive is rather vague, leaving the Member States a broad discretion, fails to take into account the fact that the content was determined by the representatives of management and labour, not by the Council, and that the applicant's first plea in law is based specifically on that lack of precision (see paragraph 23 above).

48 Secondly, the applicant points out that according to settled case-law, the legislative nature of a measure does not prevent it from being of individual concern to some of the economic operators concerned (Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005, paragraph 11; Case 53/83 *Allied Corporation* v *Council* [1985] ECR 1621, paragraph 4; Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 13; and Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 19). In the applicant's view, even if the cases cited concern only actions brought against regulations, there is no reason why that case-law should not apply where the contested measure is a

directive, since the difference between those two instruments does not lie in the fact that they are of general application but in the fact that a directive is binding on the Member States to which it is addressed as to the 'result to be achieved', while leaving to them the choice of form and methods (see point 10 of the Opinion of Advocate General Van Gerven in Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565).

49 Nor should the present action be found inadmissible on the basis of a literal interpretation of Article 173, fourth paragraph, of the Treaty, according to which decisions are the only measures in respect of which an individual may bring an action for annulment. The applicant argues that the provisions governing access to the Community judicature have always been interpreted with a view to ensuring effective judicial protection, in terms not only of the acts challengeable (see Joined Cases 316/82 and 40/83 *Kohler* v *Court of Auditors* [1984] ECR 641 and Case T-3/93 *Air France* v *Commission* [1994] ECR II-121), but also of the institutions concerned (see Case 110/75 *Mills* v *EIB* [1976] ECR 955; Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339; Case 34/86 *Council* v *Parliament* [1986] ECR 2155; and Case C-370/89 *SGEEM and Etroy* v *EIB* [1992] ECR I-6211).

50 The applicant notes that the order of 20 October 1994 in *Asocarne* v *Council* (paragraph 17), in which the Court of First Instance, justifying its barring of an action brought by an individual for annulment of a directive, pointed out that 'the judicial protection of individuals is duly and sufficiently assured by the national courts, which review the transposition of directives into the domestic law of the various Member States', met with a critical reception in academic legal writing, and that, although the Court of Justice, in its order of 23 November 1995, upheld the order of the Court of First Instance, it based its dismissal of the appeal not only on the ground that the judgments in *Van der Kooy and Others* v *Commission* and *CIRFS and Others* v *Commission*, which concerned decisions, could not be applied to the case before it, which concerned a directive, but also on the ground that the directive in question had been adopted following a procedure which made no provision for the appellant to participate in it, by contrast with the case which gave rise to the judgment in *CIRFS and Others* v *Commission*. The applicant emphasises, however, that Directive 96/34 was adopted under a procedure which provides not only for the participation of representatives of management and labour, such as the

applicant, but which existed only by reason of that participation and the choice made by those parties, who are the bodies truly responsible for it.

51 Thirdly, the applicant maintains that it is individually concerned by Directive 96/34 because that measure affects it by reason of certain attributes which are peculiar to it, and by reason of factual circumstances which differentiate it from all other persons. The applicant was recognised by the Commission in its Communication as an organisation which complies with the criteria for representativity set out in paragraph 24 of that document. Furthermore, it was consulted by the Commission during the two stages provided for in Article 3(2) and (3) of the Agreement. In addition, according to the applicant, the interests which it represents are the only ones to have been accorded special protection under Article 2(2) of the Agreement, in that the creation and development of the SMUs must not be held back by the implementation of the legislation under the Agreement. Lastly, the applicant claims that the very subject-matter of the framework agreement has such serious implications for the SMUs that they risk suffering serious damage in consequence of the applicant's non-participation in the negotiations, in manifest infringement of Article 2(2) of the Agreement. It follows that the applicant is individually concerned by Directive 96/34 by virtue of the role it should have played in the drafting of that measure.

52 In view of those factors, the applicant maintains that its action satisfies the requirements, laid down in *Van der Kooy* v *Commission* and *CIRFS and Others* v *Commission*, which an association must meet in order to establish that it is individually concerned. Moreover, it is clear from Case T-96/92 *CCE de la Société Générale des Grandes Sources and Others* v *Commission* [1995] ECR II-1213, paragraphs 35 and 36, that to be individually concerned by Directive 96/34, it is sufficient that it has the right to take part in the negotiations and it does not need actually to have done so. In any event, the Council cannot contend that the applicant is not individually concerned by reason of the fact that it did not take part in the negotiations, since what lies at the core of this case is precisely the fact that the applicant's position and status as negotiator were not recognised during the preparation of Directive 96/34.

53 Fourthly, the applicant maintains that the two sides to its application show that its interests are directly affected by the adoption of the directive.

54 The first concerns the way in which the directive came into being and impugns the fact that the applicant, as a recognised representative organisation, was arbitrarily left out of the negotiations. That legislative measure, which enshrines a framework agreement with which the applicant was not associated, directly affects the applicant's own interests in so far as it has an impact on one of the applicant's principal tasks under Article 4(2) of the Agreement, that is to say, to participate in the negotiation of agreements in the field of social affairs (see, to that effect, *CCE de la Société Générale des Grandes Sources and Others* v *Commission*, paragraph 38).

55 The second concerns the content of the framework agreement, which is criticised as too vague and general, in so far as it leaves the Member States free to 'authorise special arrangements' to meet the SMUs' operational and organisational requirements. However, the applicant claims a direct interest in ensuring that the SMUs' interests are taken into account in the framework agreement which must be transposed into the domestic law of the Member States.

56 In its reply, the applicant points to the fact that the Council itself recognises that the admissibility of the application cannot be divorced from the consideration of its merits, but its attitude, the applicant maintains, is open to criticism in that regard. On the one hand, it points out that the Council argues that an association which represents the SMUs can rely on compliance with Article 2(2) of the Agreement only in the case of a directive which applies to SMUs exclusively. This, according to the applicant, is a curious argument in that it envisages a directive which applies to SMUs alone and places administrative, financial and legal constraints on their creation and development. On the other hand, the applicant maintains that it is absurd to maintain that when a directive does not concern SMUs alone one of their representative associations cannot, before the Court of First Instance, invoke a failure to comply with a legislative provision which requires the interests of SMUs to be given special protection — Article 2(2) of the Agreement — precisely because that association represents those very undertakings.

57 The applicant submits that if its rights as a negotiator, in its capacity as a representative of one of the sides of industry, are infringed, it must be able to rely on the judicial protection conferred by Community law, irrespective of the content of the measure adopted. The applicant insists that its representativity has a bearing on the admissibility of its action, and compares its position with that of the CEEP, which defends solely the interests of undertakings in the public sector.

58 In response to the Commission's arguments, the applicant states that the real question is not whether it is directly or individually concerned by Directive 96/34, but rather how it can secure judicial condemnation of the infringement of its right to participate in the collective negotiation of framework agreements at European level. In any event, the applicant claims that the two arguments put forward by the Commission should be rejected.

59 First, the applicant submits that it is individually concerned by Directive 96/34. It maintains that the order in *Associazione degli Agricoltori della Provincia di Rovigo and Others* v *Commission* addressed quite different circumstances. In that case, the Court of First Instance held the action to be inadmissible, not because it regarded the Commission's obligation to consult the associations in question as insufficient to distinguish them, but because it held that such an obligation did not arise under the rules governing the adoption of the contested measure (paragraphs 30 and 31). The applicant reasons *a contrario* that economic operators have an individual interest in contesting a measure in cases where, before its adoption, they have been consulted by virtue of an obligation incumbent on the institution which consults them. It further claims that this interpretation was confirmed by the Court of First Instance in the order in *Merck and Others* v *Commission* (paragraphs 73 and 74) dismissing an action as inadmissible on the ground that the Commission had no obligation to hear the views of the applicants before adopting the contested measure. The applicant emphasises that, in *Merck and Others*, the Commission expressly stated that the existence of an individual interest must be acknowledged where there is a concomitant obligation to hear the views of the applicant during the preparatory stage of the measure in question (paragraph 34).

60 Secondly, the applicant maintains that it has a direct interest in seeking annulment of Directive 96/34. Emphasising that Directive 96/34 has no content specific to itself but merely embodies a framework agreement negotiated in breach of the applicant's right to take part in its collective negotiation, the applicant explains that its criticism concerns the manner in which the framework agreement was negotiated, which gives the applicant a direct interest in contesting Directive 96/34. On that point, the applicant refers to *CCE de la Société Générale des Grandes Sources and Others* v *Commission* (paragraph 38), in which the Court of First Instance refused to recognise that the applicant trade unions had a direct interest, because the rights of the employees' representatives themselves had not been impaired.

61 Consequently, the applicant claims that it is not a person who has simply been affected by the content of a Community measure, but one who was required to be involved — by virtue of higher-ranking provisions of Community law — in the negotiation of that legislation. Since the Commission has failed to ensure compliance with the Agreement, the applicant maintains that it must have access to the Court of First Instance, which has the task, in the exercise of its jurisdiction in annulment proceedings, of requiring compliance with Community law. The applicant adds that there is no other effective remedy available to it — certainly not, as suggested, an action for failure to act or a reference for a preliminary ruling — by means of which it could secure judicial condemnation of a process in which its prerogatives as a representative of one of the sides of European industry have been disregarded (*Parliament* v *Council*, paragraph 20).

Findings of the Court

62 In the present case, it falls to the Court to assess the admissibility of an action brought by a legal person under Article 173, fourth paragraph, of the Treaty seeking annulment of a directive adopted by the Council on the basis of Article 4(2) of the Agreement.

63 Although Article 173, fourth paragraph, of the Treaty makes no express provision regarding the admissibility of actions brought by legal persons for annulment of a

directive, it is clear from the case-law of the Court of Justice that the mere fact that the contested measure is a directive is not sufficient to render such an action inadmissible (see, on that point, Case C-298/89 *Gibraltar* v *Council* [1993] ECR I-3605 and the order of the Court of Justice in *Asocarne* v *Council*). Thus, in its order in *Asocarne* v *Council*, after noting that the contested measure was a directive, the Court of Justice examined the question whether what was really concerned was a decision — albeit adopted in the form of a directive — of direct and individual concern to the applicant within the meaning of Article 173, fourth paragraph, of the Treaty. In that respect, it must be observed that the Community institutions cannot, merely through their choice of legal instrument, deprive individuals of the judicial protection offered by that provision of the Treaty (see the order of the Court of First Instance in Case T-122/96 *Federolio* v *Commission* [1997] ECR II-1559, paragraph 50). Furthermore, as regards the present case, Article 4(2), first subparagraph, of the Agreement provides that 'agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 2, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission'. That being so, the mere fact that the chosen form of instrument was that of a directive cannot in this case enable the Council to prevent individuals from availing themselves of the remedies accorded to them under the Treaty.

64 It is necessary therefore to determine, first, if Directive 96/34 is a legislative measure or whether it must be regarded as a decision adopted in the form of a directive. In order to determine whether or not a measure is of general application, it must be assessed in the light of its character and of the legal effects which it is intended to produce or actually produces (*Alusuisse* v *Council and Commission*, paragraph 8).

65 Article 1 of Directive 96/34 states that 'the purpose of this Directive is to put into effect the annexed framework agreement on parental leave concluded on 14 December 1995 between the general cross-industry organisations (Unice, CEEP and the ETUC)'. Paragraphs 1 and 2 of Clause 1 — headed 'Purpose and scope' — of the framework agreement specify, respectively, that 'this agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents' and that 'this agreement applies to all workers, men and women, who have an employment contract or employ-

ment relationship as defined by the law, collective agreements or practices in force in each Member State'.

66 Furthermore, although the applicant criticised the choice of the directive as the formal instrument for implementing the framework agreement on the basis of Article 4(2) of the Agreement, it did not claim that Directive 96/34 failed, as a directive, to satisfy the requirements laid down by Article 189 of the Treaty. It is sufficient to point out that Directive 96/34 is addressed to the Member States (Article 3), which are required to take all necessary measures which will enable them at any time to guarantee the results required by the Directive (Article 2(1)) and that the wording of the framework agreement to which Article 1 refers leaves to the national authorities the choice of form and methods which will enable those results to be achieved.

67 Consequently, Directive 96/34 is a legislative measure and does not constitute a decision within the meaning of Article 189 of the Treaty.

68 Secondly, it is necessary to determine whether, notwithstanding the legislative character of Directive 96/34, the applicant may be regarded as directly and individually concerned by it.

69 It should be borne in mind that, in certain circumstances, even a legislative measure which applies to the economic operators concerned in general may, according to the case-law cited above, be of individual concern to some of them (see, on that point, *Extramet Industrie* v *Council*, paragraph 13, *Codorniu* v *Council*, paragraph 19, and *Federolio* v *Commission*, paragraph 58). However, natural or legal persons can claim to be individually concerned by a measure only if it affects them by reason of certain attributes peculiar to them or by reason of circumstances which

differentiate them from all other persons (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107; Case T-12/93 *CCE de Vittel and Others* v *Commission* [1995] ECR II-1247, paragraph 36; and *Federolio* v *Commission*, paragraph 59).

70 On that point, the various arguments put forward by the applicant are all based on the premiss that it possesses special rights in the context of the procedural mechanisms established by the Agreement for the adoption of measures falling within its purview, and that those rights have been set at naught.

71 In the present case, in order to determine whether the applicant has in fact been affected by Directive 96/34 by reason of certain attributes peculiar to it or by reason of circumstances which differentiate it from all other persons, the particular features of the procedure culminating in the adoption of the directive must be examined, beginning with an analysis of the procedural mechanisms established by the Agreement. It is clear from the provisions of the Agreement that there are two procedures under which the measures necessary to attain its objectives may be adopted.

72 Those procedures have in common an initial stage consisting in the Commission's consultation of management and labour in accordance with Article 3(2) and (3) of the Agreement. However, Article 3(3) is silent as to which representatives of management and labour are covered. The Commission accordingly set out in its Communication a number of criteria, which make it possible to identify those representatives of management and labour whose representativity in its view entitles them to be consulted during that initial stage, which is mandatory for all Community initiatives based on the Agreement. On the basis of those criteria, the Commission drew up a list which is set out in Annex 2 to its Communication. At paragraph 24 thereof, the Commission states that this list will be reviewed in the light of experience acquired in that connection. The applicant appears on the list, in its capacity as a cross-industry organisation representing certain categories of workers or undertakings. It is common ground that it was consulted by the Commission in accordance with Article 3(2) and (3) of the Agreement.

73 As regards the first procedure, it follows from Article 2 of the Agreement that the Council may — after consulting the Economic and Social Committee, and adhering to the procedure referred to in Article 189c of the Treaty — adopt directives in the fields listed in Article 2(1) of the Agreement, or — acting unanimously on a proposal from the Commission, after consulting the European Parliament and the Economic and Social Committee — in the areas listed in Article 2(3) of the Agreement. As regards the second procedure, it follows from Article 4 of the Agreement that an agreement concluded at European level between management and labour may be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 2 of the Agreement, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The contested measure was adopted pursuant to the latter procedure.

74 The course of that procedure, which opens with the consultation stage governed by Article 3(2) and (3) of the Agreement, is as follows. Article 3(4) of the Agreement provides that management and labour may inform the Commission of their wish to initiate the process provided for in Article 4, and that the duration of the procedure must not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it. As mentioned above, Article 4 of the Agreement also provides that the dialogue between management and labour may lead to agreements which, in the matters covered by Article 2, may be implemented by the Council at the joint request of the signatory parties.

75 Thus, neither Article 3(4) nor Article 4 of the Agreement expressly identifies 'management and labour' for the purposes of the negotiations referred to. Nevertheless, the way in which the provisions are structured and the existence of the prior consultation stage suggest that the representatives of management and labour which participate in the negotiations must at the very least have been among those consulted by the Commission. That does not mean to say, however, that all those consulted by the Commission — the representatives of management and labour listed in Annex 2 to the Communication — have the right to take part in the negotiations. The negotiation stage, which may come into being during the consultation stage initiated by the Commission, depends exclusively on the initiative of those

representatives of management and labour who wish to launch such negotiations. The representatives of management and labour concerned in the negotiation stage are therefore those who have demonstrated their mutual willingness to initiate the process provided for in Article 4 of the Agreement and to follow it through to its conclusion.

76 Paragraph 31 of the Communication, in the section entitled 'From consultation to negotiation', states moreover that 'in their independent negotiations, the social partners are in no way required to restrict themselves to the content of the proposal in preparation within the Commission or merely to making amendments to it, bearing in mind, however, that Community action can clearly not go beyond the areas covered by the Commission's proposal; [t]he social partners concerned will be those who agree to negotiate with each other; [s]uch agreement is entirely in the hands of the different organisations; [h]owever, the Commission takes the view that the provisions regarding small and medium-sized undertakings referred to in Article 2(2) of the Agreement should be borne in mind by organisations which are signatory to an agreement'.

77 It is also clear from the wording of the Communication that the list set out in Annex 2 (management and labour organisations considered by the Commission to be representative) is drawn up to meet the organisational requirements only of the consultation stage provided for by Article 3(2) and (3) of the Agreement. The Commission mentions this solely in the section of the Communication dealing with 'Consultation of the social partners' (paragraphs 11 to 28), more specifically in paragraphs 22 to 28, under the heading 'The organisations to be consulted'; it does not refer to it anywhere in the section dealing with the negotiation stage (paragraphs 29 to 36 of the Communication, under the heading 'From consultation to negotiation').

78 Consequently, Article 3(2), (3) and (4) and Article 4 of the Agreement do not confer on any representative of management and labour, whatever the interests

purportedly represented, a general right to take part in any negotiations entered into in accordance with Article 3(4) of the Agreement, even though it is open to any representative of management and labour which has been consulted pursuant to Article 3(2) and (3) of the Agreement to initiate such negotiations.

79 The mere fact that the applicant contacted the Commission on several occasions asking to participate in the negotiations between other representatives of management and labour does not affect that position, since it is the representatives of management and labour concerned, and not the Commission, which have charge of the negotiation stage properly so called.

80 Similarly, Article 2(2), first subparagraph, of the Agreement does not confer on the applicant a right to participate in the negotiations referred to in Article 3(4). Although, admittedly, the second sentence of Article 2(2), first subparagraph, of the Agreement states that 'such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings', the subparagraph does not provide that representatives of the SMUs are automatically entitled to participate in any negotiations entered into by management and labour pursuant to Article 3(4) of the Agreement (see, on that point, *CCE de la Société Générale des Grandes Sources and Others* v *Commission*, paragraph 29). It lays down a substantive obligation, compliance with which is subject to review by the Community judicature at the instance of any interested party which brings the appropriate action, and not exclusively on application for annulment of a measure pursuant to Article 173, fourth paragraph, of the Treaty. Accordingly, no cross-industry organisation representing the SMUs, whatever its purported level of representativity, can infer from Article 2(2), first subparagraph, of the Agreement a right to participate in such negotiations.

81 The Court must also reject the argument put forward by the applicant, especially during the hearing, to the effect that, in accordance with the case-law, certain substantive provisions of Community law must, if they are to be effective, be recog-

nised as having certain procedural implications. The case-law cited by the applicant in that connection does not support the inference — from Article 2(2), first subparagraph, of the Agreement — that it has a right to participate in all negotiations entered into by management and labour on the basis of Article 3(4) of the Agreement. Thus, on the one hand, in its order in Case 792/79 R *Camera Care* v *Commission* [1980] ECR 119, the Court of Justice did not find that certain substantive provisions, in the event Articles 85 and 86 of the Treaty, had a procedural implication, but made a determination as to the scope of a provision which conferred there and then a special power on the Commission, namely Article 3(1) of Regulation No 17 of the Council of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87). Secondly, in Case C-127/92 *Enderby* [1993] ECR I-5535, the Court of Justice gave a preliminary ruling on the allocation of the burden of proof in relation to the question as to whether a certain practice in relations between employers and employees constituted discrimination contrary to Article 119 of the Treaty. In that case, the Court of Justice did not, therefore, attribute a procedural right to an individual in the context of a procedure for the adoption of an act by a Community institution, which is the context of the present case.

82 It follows from all the foregoing considerations that, having regard to the provisions of the Agreement, the applicant cannot claim to possess either a general right to participate in the negotiation stage of the second procedure provided for by the Agreement or, in the context of this case, an individual right to participate in negotiation of the framework agreement.

83 However, that is not sufficient in itself to render the present action inadmissible. In view of the particular features of the procedure which led to the adoption of Directive 96/34 on the basis of Article 4(2) of the Agreement, it is also necessary to determine whether any right of the applicant has been infringed as the result of any failure on the part of either the Council or the Commission to fulfil their obligations under that procedure, given that the applicant's right to judicial protection requires it to be regarded as directly and individually concerned if it is distinguished by reason of specific attributes which are peculiar to it or of factual circumstances which differentiate it from all other persons (see the case-law cited above, paragraph 69).

84 In that regard, the Court would point out that, while it is for the management and labour concerned, alone, to initiate and take charge of the negotiation stage, properly so called, of the procedure governed by Article 3(4) and Article 4 of the Agreement (see above, paragraphs 75 and 76), when they conclude an agreement whose implementation at Community level they jointly request by virtue of Article 4(2) thereof, the Council is to act on a proposal from the Commission. Accordingly, the management and labour concerned address their joint request to the Commission which thereupon resumes control of the procedure and determines whether it is appropriate to submit a proposal to that effect to the Council.

85 The Commission must act in conformity with the principles governing its action in the field of social policy, more particularly expressed in Article 3(1) of the Agreement, which states that 'the Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties'. As the applicant and the Commission have rightly pointed out, on regaining the right to take part in the conduct of the procedure, the Commission must, in particular, examine the representativity of the signatories to the agreement in question.

86 The Commission also undertook in its Communication to verify the representativity of parties representing management and labour which are signatories to an agreement, before proposing that the Council adopt a decision requiring its implementation at Community level. Accordingly, at paragraph 39 of its Communication, the Commission stated that it 'will prepare proposals for decisions to the Council following consideration of the representative status of the contracting parties, their mandate and the "legality" of each clause in the collective agreement in relation to Community law, and the provisions regarding small and medium-sized undertakings set out in Article 2(2)'.

87 The Council, for its part, is required to verify whether the Commission has fulfilled its obligations under the Agreement because, if that is not the case, the Council runs the risk of ratifying a procedural irregularity capable of vitiating the measure ultimately adopted by it.

88 It is proper to stress the importance of the obligation incumbent on the Commission and the Council to verify the representativity of the signatories to an agreement concluded pursuant to Articles 3(4) and 4 of the Agreement, which the Council has been asked to implement at Community level. The participation of the two institutions in question has the effect, at that particular point in the procedure governed by those provisions, of endowing an agreement concluded between management and labour with a Community foundation of a legislative character, without recourse to the classic procedures provided for under the Treaty for the preparation of legislation, which entail the participation of the European Parliament. As the case-law makes clear, the participation of that institution in the Community legislative process reflects at Community level the fundamental democratic principle that the people must share in the exercise of power through a representative assembly (Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraph 20; Case 138/79 *Roquettes Frères* v *Council* [1980] ECR 3333, paragraph 33; and Case 139/79 *Maizena* v *Council* [1980] ECR 3393, paragraph 34). In that regard, it should be noted that, in accordance with that case-law, the democratic legitimacy of measures adopted by the Council pursuant to Article 2 of the Agreement derives from the European Parliament's participation in that first procedure (see above, paragraph 73).

89 In contrast, the second procedure, referred to in Articles 3(4) and 4 of the Agreement, does not provide for the participation of the European Parliament. However, the principle of democracy on which the Union is founded requires — in the absence of the participation of the European Parliament in the legislative process — that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at Community level. In order to make sure that that requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative.

90 This obliges them to ascertain whether, having regard to the content of the agreement in question, the signatories, taken together, are sufficiently representative. Where that degree of representativity is lacking, the Commission and the Council

must refuse to implement the agreement at Community level. In such a case, the representatives of management and labour which were consulted by the Commission in accordance with Article 3(2) and (3) of the Agreement, but which were not parties to the agreement, and whose particular representation — again in relation to the content of the agreement — is necessary in order to raise the collective representativity of the signatories to the required level, have the right to prevent the Commission and the Council from implementing the agreement at Community level by means of a legislative instrument. The judicial protection to which the existence of such a right gives rise implies that, where non-signatory representatives with those characteristics bring an action for annulment of the Council measure giving effect to the agreement at Community level on the basis of Article 4(2) of the Agreement, they must be regarded as directly and individually concerned by that measure. It should be added that, on similar grounds, both the Court of Justice and the Court of First Instance have already held an action for annulment of a measure of a legislative nature to be admissible where an overriding provision of law required the body responsible for it to take into account the applicant's particular circumstances (see Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraphs 11 to 32; Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraphs 11 to 13; and Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraphs 67 to 78).

91 In the present case, it is first necessary to determine whether the Commission and the Council did indeed verify whether the collective representativity of the signatories to the framework agreement was sufficient. It is clear from the information submitted by the Council that such an examination was in fact carried out. The Council and the Commission have explained in the course of the present proceedings that they examined both the degree of representativity of the signatories and their representativity with respect to the substantive scope of the framework agreement. The 13th recital in the preamble to Directive 96/34 indicates, moreover, that in drawing up the proposal submitted to the Council in accordance with Article 4(2) of the Agreement, the Commission took into account the representative status of the signatories to the framework agreement. Also, in response to a request from the Court of First Instance made by way of a measure of organisation of procedure, the Council lodged extracts from documents of the Council's social issues group relating to its meetings of 22 February, 5 March and 12 March 1996, which make it clear that the question of the signatories' representativity was discussed within the Council.

92 In those circumstances, the applicant's bare assertion that the Commission and the Council failed to examine the question whether the signatories to the framework agreement were representative is not enough to put in issue the reality of the verification carried out by both institutions, given the evidence submitted in that connection by the Council. In any event, the various tables which the Council annexed to its rejoinder and the Commission's study, which served as a basis for the classification of the representatives of management and labour listed in Annex 2 to the Communication — a classification, moreover, which the applicant did not challenge at the time — show at the very least that both institutions kept themselves informed as to the representativity of the management and labour concerned in the present case.

93 Secondly, it is necessary to determine whether those institutions' examination of the collective representativity of the signatories to the framework agreement satisfied the requirements in that respect, as described in paragraphs 83 to 90 above.

94 The first point to note is that the purpose of the framework agreement was to set out the minimum appropriate requirements for all employment relationships, whatever their form (see above, paragraph 65). If the various signatories to the framework agreement are to satisfy the requirement of sufficient collective representativity, they must therefore be qualified to represent all categories of undertakings and workers at Community level.

95 Secondly, the signatories to the framework agreement are the three bodies listed by the Commission in Annex 2 to the Communication as general cross-industry organisations, as distinct from cross-industry organisations representing certain categories of workers and undertakings, the sub-group in which the applicant was placed.

96 At first sight, the Council cannot be criticised for having taken the view, based on the Commission's appraisal, that the signatories to the framework agreement possessed sufficient collective representativity in relation to the content of that agreement, having regard to their cross-industry character and the general nature of their mandate.

97 Although the applicant does not deny the cross-industry character of the signatories to the framework agreement, it nevertheless claims that the mandate of those representing undertakings (UNICE and CEEP) is no more general than its own. In that respect, it stresses the fact that it represents many more SMUs, of all sizes, than UNICE and the fact that CEEP represents solely the interests of undertakings governed by public law, which are not so weighty in economic terms as the interests defended by the applicant.

98 As regards UNICE, it is common ground that, at the time when the framework agreement was concluded, that body represented undertakings of all sizes in the private sector, which qualified it to represent the SMUs, and that it counted among its members associations of SMUs, many of which were also affiliated to the applicant. The table set out in Annex 2 to the rejoinder (p. 36), to which the applicant made no reference at the hearing, also indicates that the national organisations affiliated to UNICE group together undertakings in the fields of industry, services, commerce, craft and SMUs.

99 Nor can the applicant plausibly argue that the fact that it represents a greater number of SMUs than UNICE shows that UNICE does not possess a general mandate. That fact is such as to support, rather than invalidate, the argument that UNICE does have a general mandate — to defend the interests of undertakings of whatever kind — by contrast with the more specific mandate of other cross-industry organisations, such as the applicant. Similarly, the distinction drawn by the applicant between the interests which it can defend on behalf of the SMUs and

those protected by UNICE further illustrates the special nature of the mandate of the applicant, which defends, specifically and exclusively, the interests of one category of undertakings (SMUs) and the generality of the mandate of UNICE, which defends the interests of all undertakings in the private sector, including the SMUs. It follows that, on the facts, it is established that UNICE possessed a general mandate at the time when the framework agreement was concluded.

100 So far as concerns CEEP, although undoubtedly denigrating its economic importance, the applicant does not deny that that cross-industry organisation represents at Community level all undertakings in the public sector, regardless of their size. In that respect, the general mandate that CEEP is recognised as possessing in Annex 2 to the Communication and Article 1 of Directive 96/34 cannot call in question the examination concerning sufficient collective representativity which the Council and Commission are required to carry out. Furthermore, by contrast with the applicant's situation, it is clear that if CEEP had not been one of the signatories to the framework agreement, this alone would have fundamentally affected the sufficiency of the collectively representational character of those signatories in view of the contents of that agreement, because then one particular category of undertakings, that of the public sector, would have been wholly without representation.

101 It remains to be determined whether, as the applicant suggests, notwithstanding the fact that the cross-industry organisations which concluded the framework agreement had a general mandate, their collective representativity in relation to its content was insufficient. On that point, the applicant maintains that, having regard to the number of SMUs which it represents and to the special consideration reserved for that category of undertakings by Article 2(2), first subparagraph, of the Agreement, the applicant's absence from the negotiations for the framework agreement automatically means that the collective representativity of the signatories responsible for defending the interests of undertakings was insufficient. This is borne out, according to the applicant, by the content of the framework agreement which, contrary to the requirements laid down in Article 2(2) of the Agreement, is particularly detrimental to the interests of the SMUs.

102 The applicant's criticisms cannot be accepted. In the first place, they are all based on a single criterion, namely the number of SMUs represented respectively by the applicant and UNICE. Even if that criterion may be taken into consideration when determining whether the collective representativity of the signatories to the framework agreement is sufficient, it cannot be regarded as decisive in relation to the content of that agreement. Since the framework agreement concerns all employment relationships (see above, paragraph 65), it is not so much the status of undertaking which is important, but that of employer. Even though the Council stated that the majority of the applicant's members — representing the craft industries — did not include any employees, the applicant failed to provide any tangible evidence to the contrary, notwithstanding the express requests made by the Court of First Instance at the hearing. On that occasion, the applicant confined itself to quoting various random statistics relating to one or other of the Member States concerned by the Agreement.

103 Furthermore, it is clear from the various tables annexed by the applicant to its reply and by the Council to its rejoinder that, among the SMUs represented by the applicant in the 14 Member States concerned by the Agreement (5 565 300 according to the table set out in Annex I to the reply; 4 835 658 according to the table set out in Annex I to the rejoinder, supplemented by the applicant's replies to the written questions put by the Court of First Instance; and 6 600 000 according to the applicant's oral statements at the hearing), a third (2 200 000 out of 6 600 000, according to the applicant at the hearing), perhaps as many as two-thirds (3 217 000 out of 4 835 658, according to the table set out in Annex I to the rejoinder) of those SMUs are also affiliated to one of the organisations represented by UNICE.

104 The applicant cannot argue that, by virtue of Article 2(2), first subparagraph, of the Agreement, its level of representativity is so great that its non-participation in the conclusion of an agreement between general cross-industry organisations automatically means that the requirement of sufficient collective representativity was not satisfied. Article 2(2), first subparagraph, of the Agreement is a provision of substantive law, compliance with which can be sought by any interested party availing itself of the appropriate legal remedy (see above, paragraph 80).

105 Lastly, as regards representation of the SMUs' interests, the very wording of the framework agreement makes it clear that the SMUs were not left out of the negotiations leading to its conclusion. Thus, point 12 of the general considerations of the framework agreement provides that 'this agreement takes into consideration the need to improve social policy requirements, to enhance the competitiveness of the Community economy and to avoid imposing administrative, financial and legal constraints in a way which would impede the creation and development of small and medium-sized undertakings'. Similarly, Clause 2.3(f) of the framework agreement states that the Member States and/or management and labour may, in particular, 'authorise special arrangements to meet the operational and organisational requirements of small undertakings'.

106 In any event, the criticisms which the applicant directs at the content of the framework agreement, pleading an infringement of Article 2(2) of the Agreement, do not in any way demonstrate that one or other of the provisions of the framework agreement imposes administrative, financial or legal constraints in a way which would hold back the creation and development of SMUs. The purpose of Article 2(2), first subparagraph, of the Agreement is not to prohibit the adoption of measures entailing administrative, financial and legal constraints for the SMUs, but rather to ensure that measures adopted in the social field do not disproportionately affect the creation and development of SMUs by imposing particular administrative, financial and legal constraints. It is also apparent that, in conformity with the nature of the Council measure implementing the framework agreement, the Member States and/or management and labour still enjoy a discretion *vis-à-vis* the transposition of the minimum requirements adopted in that agreement.

107 In the first place, the applicant cannot properly infer from Clause 2.3(e) and (f) of the framework agreement that medium-sized undertakings do not have the option of postponing the granting of parental leave. The wording of Clause 2.3(e) does not support such an inference. Furthermore, the list of reasons justifying the use of that option is not exhaustive, since, under the terms of the framework agreement, that list — which is placed in brackets — is merely illustrative. The applicant's interpretation of Clause 2.3(e) is therefore manifestly unfounded. Moreover, the wording of Clause 2.3(f) of the framework agreement must be read as authorising, in addition, in the case of small undertakings only, the rules concerning the exercise of the right to parental leave to be adjusted, so as to meet their operational and

organisational requirements. That additional option does not mean, however, that — as the applicant suggests — medium-sized undertakings are deprived of their right under Clause 2.3(e) to postpone the granting of parental leave for certain reasons.

108 Next, although it is common ground that the framework agreement does not allow for exceptional arrangements, by way of derogation from protection against dismissal, in cases where the employer's economic interests are adversely affected by having to maintain the employment contract during and after parental leave, it must be observed that, not only would the very notion of parental leave lose all substance if employers were able to interrupt the contract of employment on the occasion of parental leave, but the applicant has failed to establish — or even to explain to the Court — in what respect the fact that the SMUs are denied that option amounts to the imposition of an administrative, financial and legal constraint which would hold back their creation and development.

109 Nor, lastly, do the provisions of the framework agreement relating to the duration of parental leave infringe Article 2(2), first subparagraph, of the Agreement. Clause 2.1 of the framework agreement provides that parental leave is to have a minimum irreducible duration of three months, but it does not prescribe a general and unconditional maximum duration, it being possible to define this at the transposition stage. Thus, Clause 2.1 states that 'this agreement grants, subject to Clause 2.2, men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour'. That wording shows, therefore, that Clause 2.1 does not impose administrative, financial or legal constraints in a way which

would hold back the creation and development of SMUs, and that a substantial degree of discretion remains vested in those who will be responsible for implementing the framework agreement.

110 It follows that the Commission and the Council, acting in conformity with their obligations, in particular those derived from a fundamental democratic principle, properly took the view that the collective representativity of the signatories to the framework agreement was sufficient in relation to that agreement's content for its implementation at Community level by means of a Council legislative measure, pursuant to Article 4(2) of the Agreement. It should be emphasised that this finding, which is confined to the circumstances of the present case, is without prejudice to either the applicant's own representativity as a cross-industry organisation representing specifically and exclusively the interests of SMUs, or, in the case of any other agreement which the Council may be requested to implement on the basis of Article 4(2) of the Agreement, to the question as to whether those representing management and labour who are signatories thereto are sufficiently representative.

111 Thus, the applicant has not succeeded in showing that in the present case, having regard to its representativity, it is distinguished from all other organisations of management and labour consulted by the Commission which were not signatories to the framework agreement and that it was accordingly entitled to require the Council to prevent the implementation of the framework agreement at Community level (see above, paragraph 90).

112 It follows from all the foregoing considerations that, since the applicant was not affected by Directive 96/34 by reason of certain attributes which are peculiar to it or by reason of a factual situation which differentiates it from all other persons, it cannot in the present case be regarded as individually concerned by that Directive. The action must therefore be declared inadmissible.

Costs

113 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since both the applicant and the parties which have intervened in support of the form of order sought by it have been unsuccessful, and since the Council has applied for costs to be awarded against them, the applicant and those interveners must be ordered to pay the costs incurred by the Council.

114 Under Article 87(4), first subparagraph, of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs. The Commission, as an intervener, must therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicant and the parties which have intervened in support of the form of order sought by it to pay the costs incurred by the Council;

3. Orders the Commission to bear its own costs.

Lindh García-Valdecasas Lenaerts

Cooke Jaeger

Delivered in open court in Luxembourg on 17 June 1998.

H. Jung P. Lindh

Registrar President