

Guest Editorial

Fortune smiles on the Italian EU Presidency: talking half-seriously about the posted workers and parental leave directives

1. Be frank: have you ever thought that in the second half of the 1990s, in the era of flexibility and subsidiarity, two new EU directives in social affairs could be adopted in one day? Moreover, at a formal Council meeting chaired by Italy, represented by a caretaker Minister of Labour (our colleague Tiziano Treu), on the eve of domestic general elections? Seriously, would this scenario ever have been considered realistic, also in light of the fact the matters under discussion were highly controversial areas where EU Member States for the last ten or so years have failed to reach a compromise? Certainly not. Actually every expert in EU social affairs in Brussels would have told you that the mixture of factors involved would be incompatible with any positive outcome. And you would have agreed with them, for sure.
2. Sorry, but you would have been wrong. The most reasonable predictions have proved to be false. Miracles do happen from time to time, even inside the Council's headquarters in Brussels. On Friday, March 29th, 1996, in a formal meeting of the Council of Ministers of labour and social affairs a 'political agreement' was reached on two well-known issues: posting of workers abroad and parental leave. On the afternoon of March the 29th an agreement on the posting of workers Directive ended a six-year deadlock. While, in the morning, another agreement on parental leave marked the end of a 13-year battle by the Commission for better parental rights.
3. Do not expect any instant academic commentary. Because these editorial pages are being written when (May 1996) the two directives have not yet been formally adopted. In both cases the Council has requested Coreper to draft final texts of the directives' for their adoption under points 'A' of the agenda in the next formal meeting on the 3rd and 4th of June in Luxembourg. Discussions, at least in substantial terms, are finished. However, lawyers know very well how important the final draft of statutes is, including EU directives, which are better analysed in own's native language.
4. Speaking of translation and (official) languages, I will never forget what the Swedish Minister of Labour, Mrs. Ulrika Messing, said when taking the floor for the formal voting declaration at the end of the posted workers session in the Council. She supported the 'overall compromise suggestion' drafted by the Italian Presidency, although reminding the audience that the Swedish delegation had never had the pleasure of reading any draft of the proposed directive in their language. She concluded that she was confident that Coreper would produce, *inter alia*, also a version in Swedish, to be better understood (and implemented) in their home country.

Other Member States (France must be mentioned, inevitably) should learn that European integration will progress despite any linguistic patriotism and/or nationalism.

5. Hopefully, by this point the reader has already understood the very nature of these pages. They are based on a rare personal experience of a scholar. The author (domestically considered, correctly or incorrectly, to be familiar with international and comparative labour law) was appointed by Tiziano Treu, Italian Minister of Labour, as advising expert assigned to help him in dealing with EU affairs, especially during the Italian Presidency in the first half of 1996. Actually, as readers may know, Tiziano Treu (currently also President of IIRA) was not in any need of advice in Community social policy. Tiziano is well known to be capable of managing thousands of problems at once, while constantly being over-scheduled. This appointment as adviser came to me on November 24, 1995, precisely on my 45th birthday. A nice gift which now makes it possible to write a few pages on the birth of two long-awaited directives. I have to say that it was very interesting to step into the decision-making process from the point of view of the Member State holding the Presidency in the Council. I discovered things that I had not suspected at all. I will comment on some of them now.
6. Let me start with a question which is rather fundamental: who decides? In other words: what are the key-steps in the decision-making process leading up to the adoption of an EU directive? In answering this question I will simply offer, as I said earlier, a sort of diary, assuming that the reader is already familiar with the formal rules of the Community game. I discovered that in political terms much depends on the initiative and strategy of the Presidency. Needless to say that the Commission (the highly qualified officials at DGV, in our field, plus the Commissioner, a passionate personality, in the case of Flynn) play a key-role. On 26 January 1996, I had a long informal meeting at DGV on behalf of the Italian Presidency, talking with various people about matters (posted workers and parental leave, in particular) where Italy was planning to take action. This kind of 'technical' level procedure proved to be very useful. As a result of DGV's informal suggestions, we re-drafted some aspects of our posted workers proposal.
7. I have talked about the Presidency's initiative. Let me be more precise and say that the formula of 'flying diplomacy' could well describe the dynamism of Tiziano Treu and his team. Treu started informally in December 1995, visiting some capitals and informing colleagues to be determined to tackle once again the ill-fated issue of posted workers. Reactions were well disposed, sometimes kind, but certainly not enthusiastic. The UK Government in particular was very disappointed to learn that Italy had opted to tackle the posted workers issue again. Looking back on those weeks, I tend to believe that, particularly at an early stage, the role of a Minister of Labour who was also one of the world leading experts in labour law and industrial relations was crucial. For once, at least, having a 'technical' caretaker Government constituted 'added value' for the Italian Presidency.
8. Speaking of the Presidency's role, especially in the perspective of enlargement with EU membership of up to 27 states, I do not consider it acceptable that each Member State should hold the chair for six months every thirteen years. I saw in practice what I suspected: all Member States are equal, but some are more equal than others. At the moment the Presidency cannot be in touch at every (informal) stage with all members of the European family. Inevitably a choice is made taking into account the actual role played, in other words, the political and economic weight of each nation. Conclusion:

I believe that, in the Inter-Governmental Conference the idea of 'team Presidencies' should be seriously discussed, i.e., some (3 or 4) Member States taking the chair jointly for a year or even more. This would mean an institutionalisation of the 'troika system' already adopted for the EU foreign policy being extended to other areas of Community affairs. Otherwise there is a risk that the orchestra is formally under the direction of a conductor, but the first violin is in command.

9. Treu's determination to seriously explore all possibilities for an agreement on the posted workers issue became clear to other Ministers during the working lunch offered by the Italian Presidency on Saturday the 3rd of February in Venice, during a break of the informal Council meeting on training policies at the beginning of the year dedicated by the EU to life-long learning (footnote: some discussions in informal Council meetings are frequently not less inconclusive than many academic events). The food was simply superb: nevertheless the Ministers continued to work very hard. For the first time in my life I experienced a real working lunch: basically you are supposed to eat at an impressive speed, certainly not good for your health. Ministers were outstanding in taking the floor with order while eating. Waiters were admirable in terms of efficiency but they couldn't prevent the Ministers (and advisers) from leaving the table before the dessert was served (how shameful, being in Italy). The other thing I noted is that you share the table with many people but, because of the simultaneous translation system (with earphones), you can't talk to those sitting close to you.
10. After one hour of intense discussion (and highly stressed eating) my notebook was full of interesting comments by several Ministers. Despite Treu's final remarks expressing a substantial willingness to look for a compromise, I was personally sceptical. My reaction was based on the awareness that the 'blocking minority' group seemed solid. I remember the icy contribution of the UK representative (a couple of minutes at most), claiming that any initiative on this matter would simply result in lost jobs across Europe. The Portuguese Minister of Labour, Mrs. Maria Joao Rodrigues, also raised a good number of objections. Not surprisingly, both Portugal and the UK voted against the Italian 'overall compromise suggestion' on March 29th. The third very critical statement of the Venice lunch was made by the Irish Minister, Mrs. Eithne Fitzgerald. She was sitting close to me and we had just a few minutes to chat before the formal discussion started, enough time to learn how a Minister could reconcile work and family duties (including Italian-style cooking, her favourite cuisine). For months Ireland had joined the 'blocking minority' and resolved to support the final compromise only at the very last minute, precisely at 3:55 p.m. of that Friday the 29th March (on my watch the posted workers directive, the 'political agreement' I mean, was born at 4 o'clock sharp: after less than 60 minutes of formal discussion!). In this respect Ireland contributed significantly to the positive outcome. Perhaps, Mrs. Fitzgerald's tendency to appreciate Italian things played a not insignificant role in this story.
11. The Venice lunch offered an opportunity to identify the 'zero threshold' front (i.e., Member States refusing any 'grace period' in the application of host-country terms and conditions of employment to workers temporarily posted abroad). Germany was represented by a fiery Deputy-Minister, Horst Gunter, visibly under the pressure from the domestic union organising (German) construction workers. And the French delegation was led by a charming and convincing Mrs. Anne-Marie Counderc. She always started her contribution with 'France believes this...' and similar expressions. Evidently, other Ministers, using less rethorical expressions, were not so confident that

they fully represented their own country. Mrs. Couderec symbolised, in my eyes, the active role played by the female component (representing 7 Member States in the 29 March meeting) in the Council: Mrs. Miet Smet for Belgium, Mrs. Karen Jespersen (Social Affairs) and Mrs. Jytte Andersen (Labour) for Denmark, Mrs. Mady Delvaux-Stehres (Social Security) and Mrs. Marie-José Jacobs (Family and Women Condition Promotion) for Luxembourg, Mrs. Maj-Inger Klingvall (Social Affairs) and Mrs. Ulrika Messing (Labour) for Sweden, Mrs. Liisa Jaakonsaari for Finland, plus those already mentioned. At least in the Council for Labour and Social Affairs women have successfully offered an example of the effectiveness of affirmative action policy, more so in politics than in industrial relations.

12. Lunch time played a pivotal role in the (unofficial) history of the posted workers directive. After Venice the second memorable lunch took place in Brussels on the 29th of March. The very last proposals made by the Italian Presidency (further amending the 'overall compromise suggestion' had been put forward some ten days in advance and had already been discussed by Coreper) were drafted in French, xeroxed and given out shortly after the Italian chair closed the morning session where the 'political agreement' on parental leave directive had been reached. Over lunch (more than just acceptable, offered in the Council building), Denmark objected to the term 'public policy provisions' as explained in Annex II of the 'overall compromise suggestion' (including the agreed statements for the Council minutes). Article 3.10, first indent, said (and says) that 'this directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of: - terms and conditions of employment on matters other those to in paragraph 1 in the case of public policy provisions'. Originally, the Council and Commission statement for the official minutes read that these 'public policy provisions' might 'include, in particular, the prohibition of forced labour, the legality of industrial action including strikes, or the involvement of public authorities in monitoring compliance with legislation on working conditions'. The Danish request was simply to drop any reference to industrial conflict/strike matters, with no open justification offered. Upon his leaving lunch, Treu made a commitment to give serious thought to the issue.
13. It was 2:15 p.m. or something like that. The afternoon session was scheduled to start at 3:00 o'clock: in less than an hour! We were really disappointed. After four months of contacts and negotiations, there was the risk of failure at the last minute. I was unable to take my coffee after lunch. A team of three Italians (Mr. Cacopardi, a top-level government official at the Ministry of Labour in Rome, Mr. Zanini, an equally high-ranking officer of the permanent Italian delegation at the EU in Brussels, and myself) started a final diplomatic effort. I felt like a long-distance runner in the final stretch of a marathon race, excited, exhausted, and astonished all at once. We visited first of all the Danish delegation which did not conceal that Germany was sharing their objection. Then we rushed to talk to the German delegation (how many people!: their office at the Council, probably the biggest, is always overcrowded): they were kind and direct at the same time. Drop the strike reference and the final 'green light' could be given. I was ready to ask the reason(s) for the objection but both Cacopardi and Zanini silenced me.
14. My academic question ('why') remained unanswered. In retrospect, I agree: it was not the proper time for discussions: it was time to run! All Member States delegations had to be either re-contacted or somehow informed about the change in the minutes. Treu was summarily briefed while he was trying to take a break in his office before the

afternoon session began. The advantage of a 'technical' Minister is that he understood immediately and agreed instantly. At that point I learned that diplomacy at Community level also implies physical exercise: corridors on the 7th floor of Council building are long and like a labyrinth, and...present EU membership is 15! In case of enlargement in the future, I strongly suggest that negotiators are given at least a bicycle in emergency situations to visit all delegations permanently based in the Council. But we did it on time. And Treu reminded me of Mr. Fogg (David Niven) in the last sequences of the movie *Around the World in 80 Days*.

15. I simply told you about one event in which I personally took part. Between mid-December and the end of March, I do not remember how many trips Treu and his closest collaborators made to the EU capitals, in addition to the intense contacts in Brussels, including the Coreper (Permanent Representatives Committee) meetings and those of the Working Party on Social Questions. I must admit that I was fully unaware of the very existence of this Working Party, consisting of Brussels-based officials appointed by National Permanent Delegations at the EU (supported by additional governmental people sent by each capital with special competences in matters under discussion), which in practice helps the Coreper's in its increasingly complex activity. In this context let me mention also the role of the General Secretariat of the Council: highly-qualified people crucial to the Presidency, not only in running Council meetings, but also in identifying in advance the most appropriate diplomatic strategy. In the late afternoon of the 28th of March we had a 2-hour meeting to review the main controversial points of the next day's discussion, for both parental leave and posted workers directives. The Council Secretariat suggested the potential importance and usefulness of the 'overall compromise suggestion by the Presidency'. This document, dated 28th of March, included our compromise solutions on some controversial issues. It proved to be essential for example to get the last-minute Irish support. Only a few days earlier, Ireland formally declared that its final decision was 'subject to an overall solution being arrived at'.
16. It was the Council Secretariat who advised Treu to organise the discussion in the plenary session around the 'overall compromise', to get the support of some dissenting Member States. The 'blocking minority' (26 votes, as opposed to a qualified majority of 62 out of 87) was composed of Spain (8 votes), Ireland (3), Portugal (5) and the UK (10). The Secretariat argued that Spain had some reservations, but was still in favour of a qualified majority solution, noting also that after the Venice lunch, the Irish position became increasingly flexible. However, there was no hope of overriding the 'general reservations' of both Portugal and the UK. The suggested detailed strategy on how to run the meeting was identified by the Secretariat in a document which, unfortunately, is confidential. The key-point, as said, was to seek consensus on the basis of the 'overall compromise', in other words the idea of discussing each section of the proposed directive separately has been rejected.
17. I focus so much on the Council because academics interested in EU affairs are already familiar with the Commission and the Parliament. The preliminary steps leading to a final decision in the Council are not as well known, apart from the role of Coreper. All that I have reported confirms the importance of the question of the democratic deficit as discussed in an article by Rod Hunter (a Brussel-based lawyer) published in the *Wall Street Journal Europe* of August 26/27, 1994, entitled *How Brussels Keeps You In the Dark*. The main point of the article is: 'calling rules 'technical' does not remove political choices, and labelling people 'experts' does not denude their decisions of political consequence'. In other words, the author claims that the EU 'is ceding

excessive power to well-meaning, but nonetheless unaccountable 'experts', and undermining representative democracy'. My conclusion is rather different. It is not so much the activity of experts that is questionable: they do play an important role, also domestically in the context of the legislative pipeline. Things are increasingly complex and cannot be handled only by politicians, frequently unfamiliar with technical aspects. Experts have the responsibility to advise, not to decide. They are able to influence decisions heavily, but the last word is not theirs. Obviously, it is a different thing to discuss the democratic deficit when one analyses relationships between the Commission, the Parliament and the Council. As for the Council, it does not keep you in the dark anymore than a Parliament does when it is legislating.

18. The very fact that I am unable to reveal a lot of the information concerning the actual decision-making process which led to the 'political agreement' on the two proposed directives is a legitimate source of concern in terms of openness and transparency. Some important steps have been made recently, to eradicate this problem in the Council: open meetings, the publication of votes and minutes when the Council is making legislation. Certainly, in this area these are positive steps. I personally think that Council meetings should be public. I did not find anything in my experience worth being kept secret. Strictly confidential trade-offs are made in the corridors, as always.
19. Since I talked about 'experts', let me devote a word or two to evaluating my experience and then I will move on to cover issues of relevance to the substance of the two directives. It was, to some extent, a surprise to discover how many things one could learn working for one's national delegation in the Council sphere, mainly when that country holds the chair. In the past, working for the EU meant to me having consultancy relations with the Commission, an experience which was generally very interesting. However, this time I had the opportunity to look at the EU social policy from a multi-angle political perspective. It is challenging to analyse 15 potentially different options for each issue. To fully understand the diverse options, your national delegation may need an academic. Obviously, you have more limited time than officials based in Brussels or in your home capital. However, you can offer more imagination, based on a wider comparative experience, which could prove helpful. In my case, it was probably the main reason why Treu's entourage in Rome kindly tolerated me over the last few months.
20. The international press has summarily informed its readers about the main points of the 'political agreement' of the posted workers directive. The most debatable element of the proposed directive was the question of how much leeway companies should be allowed before having to apply host-country minimum pay, paid holidays and other 'core' rights. Britain and Portugal, who argued for a longer threshold period, were outvoted. All other Member States agreed to a formula which lays down that local conditions must apply from day one, although certain exemptions will be allowed. These include the right of companies not to apply local wages and paid leave for 'small' work (which has been left to Member States to define) and, in the case of assembly work, the right not to apply local wage rates for the first eight days.
21. Shortly after the 'political agreement' was reached, Commissioner Flynn almost shouted that this was 'a great step forward for social Europe' and, crossing the Council room at an unbelievable speed (thinking of his size), rushed to shake hands with Treu, who was impressively calm, as always. Looking at the two of them, I came to the conclusion that the idea of 'sunset clauses' (i.e., automatic withdrawal of

Commission proposals if not adopted within a certain deadline) is not a good one. For the posted workers decision it took 6 years, which is undeniably a (too) long time. But eventually a decision was reached preventing single Member States from adopting diversified strategies in subject area, a result which is, by far, much more important than the time spent on reading it.

22. I do not think that I am disclosing any great secret when I say that both Portugal and the UK disagreed not only on the grounds of the 'grace period' length, as reported by the press. As I understood it, their main objection was that the draft directive was not a piece of legislation designed to promote freedom to provide services (or even to establish a harmonised common framework placing limits on the exercise of that freedom). In other words they considered the legal basis proposed (Arts. 57(2) and 66) as inappropriate, given that the directive was aimed primarily at workers' protection. I am personally convinced that the legal basis is correct since the directive covers undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, for a limited period, to the territory of another Member State. The directive does not apply to companies setting up subsidiaries in other Member States, individuals going abroad, and self-employed workers. However, at the same time it is true that this piece of EU legislation provides for a 'hard core' of protective rules to be observed by the provider of the services. Nevertheless, I do not think that the Portuguese and British objection is frivolous. Instead of waiting for a judgment of the Court of the European Communities (coming after years of uncertainty), I personally would welcome the proposal to enable the Council to seek an early opinion from the Court where one or more Member States dispute the legal basis recommended by the Commission for a proposed measure. Needless to say, this would be an important matter to be discussed during the Inter-Governmental Conference. Furthermore, my experience as adviser has vindicated my position as a strong supporter of the need for further extension of qualified majority voting. Unanimity is already (in a 15 Member States EU) incompatible with effective decision-making. In an enlarged Union it would be a nightmare.
23. On 29 March, as you may well remember, the IGC started officially in Turin, on the same day as the memorable meeting of the Council of Ministers for Labour and Social Affairs. This, unfortunately, convinced all journalists based at the Council in Brussels to fly to Turin. Furthermore, Italian journalists were on strike (no surprise). When Flynn and Treu opened the press-conference after the Council meeting, the sight of the conference-room was distressing. Almost everybody in attendance was either one of the Flynn's aides or members of the Italian delegation working for Treu. The consequence was easily predictable: the international press neglected the event, defined by Flynn as a 'fundamental milestone' in the history of social Europe. Treu was more cautious and underlined that the decisions (including the one on parental leave) demonstrated that social Europe was not dead. I asked myself how many 'milestones' Flynn found along his political career, on the one hand, and what kind of event (in politics) would be great enough to make Tiziano Treu (a bit) enthusiastic, on the other. Believe me: politicians, also at Euro-level, are unpredictable.
24. Despite the press blackout, I can offer you some information from the official report drafted on the 29th of March Council meeting by the General Secretariat. The basic principle of the 'political agreement' is that 'terms and conditions of employment' (including minimum rates of pay) applicable to nationals in one Member State also bind posted workers. This principle does not mean that the directive aims at harmonising working conditions across the EU: laws of Member States must be simply

coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of the Member State where the services are provided. The directive is applicable under three conditions: (1) the undertaking which posts workers is based in one Member State; (2) posting is made in the framework of transnational provision of services; (3) the existence of an employment relationship between the undertaking of origin and the worker during the period of posting. 'Terms and conditions of employment' in the directive context, include: (i) maximum work periods and minimum rest periods; (ii) minimum paid annual holidays; (iii) minimum rates of pay, including overtime rates; (iv) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment agencies; (v) health, safety and hygiene at work; (vi) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (vii) equality of treatment between men and women and other provisions on non-discrimination. More importantly, the directive will not preclude the application by Member States to national undertakings and to undertakings of other States, on a basis of equality of treatment, of terms and conditions of employment on matters other than those already listed, in the case of 'public policy provisions'. In other words, it is based on the principle of a non-exhaustive list. Every Member State has the discretion to extend (unlimitedly?) the concept of 'public policy provisions'.

25. So far, you would say that this is a victory for the 'zero threshold' supporters. To some extent this is true. Nonetheless, a relevant mandatory exception is made to this principle, at least in relation to minimum paid annual holidays and minimum rates of pay, including overtime. In the case of initial assembly and/or first installation of goods, where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, local regulations for holidays and minimum pay do not apply, if the period of posting does not exceed 8 days. This compromise was brilliantly suggested by the Commission. France and Luxembourg tried up to the last minute to reduce the grace period down to '24 hours'. Ireland was inflexible and identified the '8 days' element as an essential part of the 'overall compromise'. But this exception is not applicable to activities in the field of building work listed in an Annex. Possible abuses in the construction industry in terms of distortion of competition/social dumping are at the origin of the posted workers directive. It is not surprising at all that the above-mentioned exemption is not extended to most of the building sector. Rush Portuguesa docet
26. Voluntary exceptions to the 'zero threshold', i.e., which may be adopted by each Member State, are three. First: Member States may, after consulting social partners, decide not to apply local regulations in the area of minimum rates of pay, including overtime rates, when the length of the posting does not exceed one month. Second: Member States may provide that exemptions (a) from the application of local minimum wages to posted workers and (b) from the decision by a Member State concerning the non applicability of local minimum wages to posted workers, may be made by means of collective agreements. Third: Member States may provide for exemptions to be granted from local regulations on minimum paid annual holidays and minimum wages on the grounds that the amount of work to be done is not significant. It is not beneficial to make any extensive comment here: to discuss these kinds of complex provisions you actually need the final official text. Let me simply add a few words to

- the second exception, because this has to do directly with the role of the Italian Presidency.
27. Back in december 1995, when Treu and his team started to fly between EU capitals for the first contacts, I was requested to offer ideas and suggestions for the posted workers directive. In the past (early 1990s), I had the opportunity to advise DGV at the Commission on the same matter. I felt this was a rather impossible task after many years of frustrating negotiations. I realise now how brave Treu had been in deciding to tackle again an issue where many Presidencies had failed in the (also recent) past. Treu and myself jointly developed a suggestion which may be (over)summarised as follows. Mainly for minimum wages, we put forward the proposal of a threshold between zero and seven days which would automatically apply if the social partners (at Community and/or domestic level) did not reach sectoral agreements within two years from the date of adoption of the directive, these agreements being allowed to fix a threshold of up to one month. Was that idea ingenious or foolish?
28. I have to say that we were concerned about exposing ourselves to various criticisms. First of all: being out of the Maastricht Social Agreement, our idea was (unfairly?) over-emphasising social dialogue. Treu in any case presented the idea to other Governments, to ETUC and UNICE, and even to the Parliament. To make the story short, the Italian Presidency was unable to convince other Member States to follow this road, although, the social partners backed the idea hesitatingly. We advanced also a sub-proposal, less ambitious but equally unlucky: to give domestic collective bargaining a role in the context of Euro-framework agreements. The lesson I learnt is simple: everybody in EU circles talks of social dialogue. All (politicians and scholars) claim that the future of European social policy should be increasingly in the hands of employers and unions. When the opportunity comes, Governments and Community institutions find technical excuses to continue generating Euro-legislation that is frequently intrusive, over-regulatory and unclear. Very paradoxical!
29. Not much remains of this attempt to give the social partners a role in subject matter. Member States may provide that collective agreements (at a domestic level only!) may deviate from the 'zero threshold' rule for posted workers in the area of minimum wages, and (*vice-versa*) from the decision of one Member State concerning the non-applicability of local minimum wages to posted workers. This means that collective agreements may reverse the Government's decision, provided that the Government so agrees. Those Member States which do not want to take the full responsibility for the 'zero threshold' option in wage matters may leave social partners some room to manouvere. Definitely, this is not what we had in mind! At least for pay issues, labour and management are given a role in the posted workers story, if the Government agrees and provided they are interested. In any case, it is better than nothing.
30. All in all, the posted workers saga ended happily. But at what price? As always, when you read the final text, it is easy to discover that it was intensively watered down, for example, by giving collective bargaining a rather ambiguous role. Obviously I was more than delighted with the overall decision. Not by coincidence earlier I spoke of it as a miracle. Having said that, it was questionable above all to accept the 'zero threshold' even in its strongest form (i.e., with the possibility of widening - unlimitedly? - the notion of 'public policy provisions').

31. Parental leave: at first look you would say that the Italian Presidency job was much more simple in this respect. More simple, probably yes, but not by much. As a matter of fact, the greatest significance of the directive is not to be found in the content of the framework-agreement (well-known to the readership, I suppose): it lies actually in the procedure which led to the 'political agreement'. And in this respect the discussion was lively, not surprisingly at all, being in every sense the very first time.
32. Directive or decision: this was the Hamlet-style doubt. Here again I assume that the reader is already familiar with the formal terms of the discussion (in any case see for a clear summary 'Into the unknown: implementing the parental leave agreement', in EIRR 267, p. 19 *et seq.*). The term 'decision' (Art. 4.2, Agreement on Social Policy) leaves room for interpretation, since it does not clarify what form this instrument should take. The Legal Service of the Council in its opinion of 31 March 1994 did not take a clear position. More recently, on 19 February 1996, it came to the conclusion that 'decision' is a general term not to be identified with the instrument with the same name as provided in Article 189 of the Treaty. In other words, it shared the Commission's choice to draft a directive. The main reason for this was that the framework-agreement is made up of some clauses which must be transposed into the legal systems of Member States. In other words the Commission claimed that the framework-agreement was intended to be applied indirectly by means of provisions to be implemented into national law by the Member States and the social partners. As a matter of fact, the last clause (4.4) of the framework-agreement is identical to the final section of a directive.
33. The Commission presented its final proposal for a Council directive on parental leave on 31 January 1996 (COM(96) 26 final). At DGV they knew very well that the Italian Presidency had a slightly different view. Our point was very simple indeed. If we all agree - we claimed - that the Council decision must be limited to make binding the provisions of the agreement concluded between the social partners, why shouldn't we adopt a 'decision' in a technical sense? We met with UNICE and ETUC at least a couple of times. Formally they insisted on a 'decision', but certainly were not ready to pay the price. And the price was to delay the implementation of the agreement (inevitable in case of a strong request to the Commission to adopt a different instrument), which they considered to be excessive. This was also our conclusion. Treu was personally in favour of adopting a 'regulation', but reported to me that Flynn was absolutely determined on a directive. My informal contacts at DGV also led me to the same conclusion. The compromise, so to say, was that the text of the agreement would not form part of the decision but would be annexed thereto. The Commission said that the non-incorporation of the text of the agreement into its proposal had a clear meaning. If the Council had amended the agreement concluded between the social partners, the option would have been only one: to withdraw its proposal. I remain unconvinced of this procedure: proposing a directive on the assumption that the Council would not change it corresponds, in substantial terms, to the drafting of a 'decision' in the technical sense. At DGV they were very concerned about the transposition process. This is understandable, but not enough to justify their choice in my eyes. In any case, I learned that, when the Commission takes a firm position, the Presidency has not much if any leeway unless it prefers to delay a decision.
34. Paradoxically, the discussion in the Council meeting (morning session of the 29 March) was much more lively on parental leave than on posted workers. I felt that all Ministers felt that they had a political duty to find, as soon as possible, a 'political

agreement' for a directive that would implement, for the first time, an agreement in the context of the Maastricht Social Agreement. In short, there was not any real risk of failure. Taking advantage of this over-optimistic context, many Ministers took the floor to express reservations about the procedure. In my notebook, I listed in particular Belgium, The Netherlands, Sweden and Germany. Mr. Horst Gunther (Germany) made a particularly long and interesting contribution. He identified four main points which, in his (correct) opinion, had not yet been fully clarified: (1) representativeness of the social actors; (2) appropriate Community instrument for the decision; (3) voting procedure in the Council (majority vs. unanimity); (4) role of the Parliament. I found in my papers that the German delegation, a few days before the Council of the 29th of March, during a meeting of the Working Party on Social Questions jointly with the Coreper, had entered a general scrutiny reservation and stated that it would adopt a position on the institutional framework for implementing the Agreement on Social Policy.

35. Flynn reacted to Gunther's contribution by claiming that parental leave was a matter which, under the Agreement on Social Policy, had undoubtedly to be decided on a qualified majority basis. Flynn also reminded the Council that, although not required by the Maastricht Social Agreement, the Parliament had been consulted. As for the choice of the Community instrument, I understood from the Council discussion that, for this kind of framework-agreement, the directive was the most appropriate instrument for its implementation. This option did not have to be considered binding for future Community-scale deals, possibly of a different nature. This is expressed in the draft of 'Statements for the Council Minutes' where the Council and the Commission declared: 'It is for the institutions to choose from the binding acts referred to in Article 189 of the EC Treaty, on a case-by-case basis, the most appropriate legal instrument for implementing the agreements concluded at Community level within the meaning of Article 4(2) of the Agreement on Social Policy. The Council and the Commission consider that in this instance a directive is the most appropriate instrument for implementing the framework agreement concluded by UNICE, CEEP and the ETUC'. In another joint statement the Council and the Commission said: 'The provisions of the framework agreement allow the Member States a degree of discretion in the implementation at national level of parental leave and time off from work on grounds of *force majeure*'. I think that these statements are self-explanatory as is the compromise package suggested by the Italian Presidency, with the view (as we wrote) 'to reconciling respect for the framework agreement and the social partners' autonomy and the Commission's viewpoint with the delegations' need to know their obligations with regard to implementing the framework agreement'.
36. There was another issue which arose in behind-the-scenes in the last days (and hours) before the adoption of the 'political agreement' of March 29. In short: the Commission was against the idea of disclosing any official interpretative statements but was prepared to provide, on request, explanations of provisions in the framework agreement. In the context of its 'compromise suggestion', the Italian Presidency drafted the following statement: 'The Council takes note of the Commission's explanations in these minutes'. The compromise was not fully clear to me, until Treu revealed the trick in the Council meeting. Commission's explanations (see below para. 37) will not be public but will accessible to those who may be interested. Do you see any real difference?

37. Since I think that these explanations are of a general interest and because social partners should not care too much, let me report the 'Statement for Entry in the Council Minutes', at least in relation to the whole directive. The Commission stated: '1. The Commission proposed inserting in Article 1(1) and (2) of the directive the standard clauses which appear in directives establishing minimum requirements concerning the possibility of adopting more favourable provisions and ensuring there is no decrease in the general level of protection. Since the act in question is a directive addressed to the Member States, the Commission considers that it is not enough that the duty incumbent on them in this regard is stated expressly only in the agreement concluded between the social partners. 2. While it falls to the Member States to determine the system of penalties which shall apply to infringements of national provisions adopted pursuant to this directive, such penalties must, in accordance with the jurisprudence of the Court of Justice, be effective, proportionate and dissuasive. 3. The directive should be implemented without any discrimination on the basis of race, sex, sexual orientation, colour, religion or national origin'.
- I should simply like to add that Commissioner Flynn seemed sincerely unhappy about limiting the anti-discrimination statement only to an entry in the Council minutes.
38. Speaking of the Commission, relationships with the Italian Presidency have been very cordial, as well as intense. I already mentioned this collaboration a number of times. In addition we had two formal meetings, one in mid-December 1995 and the second at the beginning of January 1996, both in Rome. The former was interesting, the latter just a formality. On 14 December 1995 Mr. Larsson, the new Director of DGV and a group of close collaborators, visited the Italian Ministry of Labour for a first-time contact. I decided to travel from Bologna to Rome the night before, in order to be on time, fresh and (possibly) helpful in my first public performance as 'adviser'. I left Bologna at 9:00 p.m., scheduled to arrive in Rome at 11:30 p.m. To my surprise: my trip ended in the Eternal City at 4:00 in the morning. Yes, the travel was eternal indeed. Reason: it had snowed and the railway line between Bologna and Florence was blocked for hours. Like in the medieval ages! Too easy to be predicted: I overslept at the hotel and I was a bit late for the meeting. Not to worry because nobody is in time in Rome, especially if a meeting is convened for as early as 9:00 a.m. Treu did not show up, due to a last-minute Government meeting. Only Mr. Larsson, plus his aides (including Mr. Bianchi, the new Italian at DGV) were there at 9 a.m. sharp.
39. While taking a coffee at a bar downstairs, Larsson asked me what plans the Italian Presidency had for the next semester. What was I to do at that point? Obviously, I knew Treu's ideas, but in terms of priorities, strategies, etc., it was a question I couldn't answer exhaustively. I resolved to start with what I considered quite original in our projects, i.e., the role of collective bargaining in the posted workers directive (see above paras. 27, 28, 29). He seemed happy to talk to an academic, better to a colleague, having served as President of the Swedish Industrial Relations Association. He was sympathetically warm to me when I revealed to him all my anxiety about organising the World IIRA Congress in 1998 under the Treu's Presidency. When finally all the other Italians decided to join us (at nearly 10:00!), Larsson was already briefed on the details. Therefore, we could build on our long conversation a very interesting and concrete meeting. This was not the case with the second meeting on 8 January 1996. A number of Italian Ministers (Labour, Education, University, etc.), surrounded by their advisers, met Commissioners Creysson and Flynn, along with similar meetings of other Commissioners and Members of the Italian Government. What a mess! Each Minister/Commissioner spoke about her/his personal interests. We

were in a very small room, with no possibility of escaping! Treu came to the conclusion that it is practically impossible to prevent Flynn from speaking at length if he decides to do so. The funny thing was that there was no simultaneous translation in the room (only occasional whispering offered by advisers to their bosses) and just a few could understand Flynn's passionate appeals to fight unemployment.

40. The labours of Hercules: this is what I would entitle at least the first half of Italian Presidency chair of the EU, with Tiziano Treu in the role of Hercules (certainly not because of his body size). It was a tiring period, for sure. Not surprisingly for a top-level politician, Treu found the time to think quietly about our affairs over the weekend. Statistically, 9 out of 10 telephone calls I received from Tiziano were made either early on Saturday morning or late in the afternoon on Sunday. Follow me: it is Sunday, around 7:00 p.m. You are watching TV. Your favourite soccer team is playing. You have invited some friends for a pizza. The telephone rings. It's Tiziano..... Unfortunately, I was seldom able to meet the expectations of the boss. Frequently I sought the advice of friends, ringing them up and asking them to fax me their opinions in one hour or so. I want to thank my Sunday 'victims' for their freindly and patient support which contributed significantly to our work. Since this is not a scholarly work, I do not want to draw any conclusion. After all, I simply kept a sort of diary during the trip across EU events. Since I am still on duty (how long after these editorial pages?), I cannot tell you more. But the next time we meet, I promise to reveal all the gossip.

MARCO BIAGI